NSWIC
NEW SOUTH WALES IRRIGATORS' COUNCIL

PO Box RI437
Royal Exchange NSW I225
Tel: 02 9251 8466
Fax: 02 9251 8477
info@nswic.org.au
www.nswic.org.au
ABN: 49 087 281 746

Response to ACCC

Water Trading Rules Position Paper

091023

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.

We assess this consultation as ***Direct***.

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

Partially completed and to be expanded in Draft Rules.

(iii) Summary of submissions, identification of preferred approach

Satisfactory

(iv) Explanation of interim determination and final feedback

Satisfactory

(v) 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.

Opening Statement

NSWIC is extremely disappointed that the ACCC has ignored the primary, opening submission that we made in response to the issues paper. A failure to address this issue will undoubtedly result in water market rules that are political in nature (in not encompassing all states) and hence ineffective.

NSWIC implores the ACCC to investigate and report on this matter in providing advice to the Commonwealth. Our submission in this respect from the issues paper is copied below:

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 instrument[1], 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"[2]. An explanatory note appears in Reprint 1 of the Act[3] 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)* 1989[4].

[1] *Commonwealth of Australia Constitution Act* (Cth) 1900, Section 109
[2] Section 241(1)(b)
[3] Reprinted 1 January 2009 with amendments up to Act 139, 2008.
[4] 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.

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).

Moreover, with the timeframe provided for the Water Trading Rules (March 2010[5]), 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.

[5] ACCC Water Trading Rules Issues Paper, Table 1.1, Page 2

Responses to Specific Positions

3.1 Ownership restrictions

NSWIC notes the ACCC's assurance that asset holdings in excess of $100m are subject to FIRB review, yet maintains its submission that water rights ought be treated identically to other property rights in respect of foreign investment. That is, the same FIRB criteria applying to real property purchase ought be applied to purchases (and holdings) of water entitlements.

The capacity for a foreign entity to exert control over commodity markets through control of water as a secondary market ought be seriously considered by the ACCC.

3.2 Co-held water access rights

Whilst NSWIC recognises that division of co-held water access rights is most certainly a difficult subject, it is our submission that the ACCC's position that it is "more appropriately dealt with by the appropriate basin state governments" is nothing short of an abandonment of the principle of a set of Basin-wide rules. The ACCC cannot abrogate this responsibility merely because it is a vexing question.

The issue extends beyond JWSS to incorporate partnerships, be they formal or informal, and, potentially, trusts. NSWIC has submitted to the ACCC (and others) for well over a year that the issue of small infrastructure operators must be addressed. This submission has fallen upon deaf ears. Had our submissions been heeded, the extent of this issue would be understood and could be addressed.

It is the submission of NSWIC that a failure to deal with this issue will result in a clearly and inappropriately segmented market.

The ACCC must create Basin-wide rules that allow co-holders to remove their individual right, without third party impacts and must require other holders to provide consent unless it can be reasonably withheld. In creating these rules, the ACCC must consult – particularly with Treasury – to ensure that Capital Gains Tax events are not triggered on the remaining members of a partnership or partnership-like organisation.

3.3 Unbundled water rights

NSWIC concurs with the position of the ACCC.

3.4 Restrictions based on the intended use of water

NSWIC reiterates its initial submission that neither critical human needs water nor stock and domestic entitlements ought be tradeable. To allow such trade clearly debases the concept of the entitlement in the first instance.

Critical human needs water ought be just that – critical. The suggestion that a "surplus", as noted by the ACCC[6], should be traded on the temporary market would show that too much water has been allocated and that the balance is not critical. Any "surplus" ought be returned to the consumptive pool from whence it came for distribution amongst entitlement holders.

This matter touches on the critical issue of water as a "human right". NSWIC concurs with the general philosophy that water for critical human needs is, indeed, a right – but does not believe that *all* water can fall into this category. Above and beyond critical human needs (which we define solely as drinking, sanitation and health), water is an *economic* good. Critical human needs water is not, as an asset, priced; and nor should it be. That portion of water above this which is an economic good is, as it should be, priced in the market. Transfer between the two is inappropriate at a definitional level.

Stock and domestic entitlements are logically similar. This entitlement is available to provide the needs of domestic consumption and stock consumption at a particular property. Australian society will always require – as it should – that stock have sufficient water to drink. It is foolhardy to suggest that a lack of license to access water will stop a cow from drinking. Trading in these rights suggests, however, that such a situation might occur.

NSWIC repeats its submission; stock and domestic entitlements and entitlements for critical human needs should not be tradeable.

Aside from these observations, NSWIC concurs with the positions of the ACCC. In particular, we express our strong support for the position in respect of entitlements held by the Commonwealth Water Holder; *viz*, that they must not be exempted from the water trading rules and that they should be treated no differently from privately held entitlements.

3.5 Stock and domestic water use

NSWIC reiterates its initial submission as well as those points made above.

Moreover, NSWIC refers to its Basic Landholders Rights policy, which is attached to this submission. This policy sets out a fashion to manage extraction levels for stock and domestic supply based on volume by area.

The ACCC suggests that stock and domestic rights "could"[7] be made tradeable. NSWIC concurs that, indeed, they could. This does not, however,

[6] At page 33.
[7] At page 39.

justify taking that action. In particular, the paper argues that farmers without access to an entitlement for stock and domestic purposes must enter the market to obtain it. Whilst this is clearly logical, it simply isn't practical. Australia is not ready to watch animals or people physically suffer or, more seriously, die, from lack of water. Moreover, enforcement officials are unlikely to be able to control the access of an animal to a critical requirement for its survival (although NSWIC does confess it would enjoy watching the ACCC attempting this) – and are most unlikely to stop humans from drinking or engaging in basic sanitary actions.

It is in this specific area more than any other that the ACCC needs to take practical account of reality. Yes, these rights could be made to conform with the rules and become tradeable – but that is insufficient reason to divorce the rules from reality.

3.6 Trade into and out of the MDB

NSWIC reiterates the crux of its original submission – an already stressed system should not be seen as a solution for extra-Basin water requirements.

That said, NSWIC believes that this is a political matter and not one for the water trading rules.

3.7 Environmental impacts resulting from trade

Pursuant to our initial submission, NSWIC concurs with the position of the ACCC.

3.8 Overallocation and overuse

NSWIC concurs with the position of the ACCC.

3.9 Conversion between priority classes

NSWIC reiterates its opposition to conversion noted in our initial submission and, as such, concurs with the position of the ACCC.

3.10 Carryover

NSWIC does not believe that the trading rules not to address carryover, which appears to be the conclusion of the ACCC.

With respect to "spillable water accounts", NSWIC has no objection to Victoria introducing such a program. We do not, however, see the necessity or benefit in such a system in NSW and, in particular, believe that such a system would intrinsically undermine the existing right.

3.11 Metering

NSWIC supports the installation of accurate and reliable meters on extraction points.

The ACCC specifically notes that it did not seek opinions on the question of meters in its issues paper[8] yet then manages to concludes that "stakeholders generally agreed that metering should be required before trade can occur"[9]. NSWIC expresses its **extreme concern** that the ACCC believes it can draw generalisations on stakeholders views without having specifically sought the views of stakeholders. Such a practice clearly calls into question the efficacy of the "consultation" process into which the ACCC have progressed.

In particular, NSWIC disagrees that metering must be required before trade can occur. Metering is relevant to extraction, not trade and, as such, does not necessarily have any bearing whatsoever on the trading rules. The ACCC has been supportive of the concept of external speculators in water markets – buyers, sellers and holders of water entitlements who do not physically use the water. What relevance to them, then, of meters?

Meters are a function of water *use* and hence have no place in *trading* rules.

The preliminary position of the ACCC is preposterous in that it attempts to delineate water access rights holders based on whether they intend to use water or not. NSWIC submits it is patently obvious that being a water trader or a water user are not mutually exclusive, as is evidenced by the volume of temporary trade from the southern NSW systems in the past 24 months.

[8] At page 61.
[9] At page 62.

4.1 The 4 per cent limit

NSWIC concurs that the 4% limit is a barrier to trade and must be immediately removed across the Basin, but notes that the Commonwealth have reached an agreement with Victoria that precludes this sensible course.

We reiterate our basic position – *competitive neutrality* means that barriers must be equivalent across states.

The transition path that the ACCC suggests[10] has been affected by the Commonwealth deal with Victoria, which releases that state from the path set by the NWI in the first instance.

As noted at the outset of this submission, NSWIC is appalled that the ACCC has not bothered to address the matter of interaction between water trading rules and water resource plans as noted in our initial submission. The process of allowing Victoria to draft a resource plan that includes any existing rules and to then have that plan protected until 2019 allows that state to maintain this barrier.

The ACCC must report to the Commonwealth on this unacceptable scenario and recommend action, lest the water market rules be nothing short of a parochial undertaking designed to penalise three states and allow one a free reign.

[10] At page 85.

Parts 5.1 to 5.4 of the Position Paper concentrate on processes by state government entities to enable trades. The water trading rules do not have the jurisdictional capacity to enforce timeframes or mechanisms against state governments. In light of this, NSWIC fails to see the relevance of this section.

Aspirational statements such as “jurisdictions should” and “Basin states should” are simply based in rhetoric. The ACCC ought concentrate on that which the rules are capable of being.

5.1 Approval times

NSWIC maintains its submission that mandated timeframes are worthless unless enforceable.

5.2 Consideration of applications by multiple approval authorities

Whilst NSWIC does not disagree with the aspiration aims of the ACCCs preliminary position, we do not believe that they are relevant to the water trading rules.

5.3 Information-sharing between approval authorities

These preliminary positions, whilst commendable, are not relevant to water trading rules.

5.4 Applications to Trade

These preliminary positions are unenforceable.

5.5 The role of water market intermediaries

The ACCC seems to conclude that the water market rules have no capacity to regulate intermediaries[11] whilst concurrently concluding that such regulation is unnecessary[12].

NSWIC does not disagree that the water market rules may have no capacity to regulate intermediaries, but thoroughly rejects the proposition that “nothing bad has happened yet, so nothing bad will happen.” We maintain our original submission – water market intermediaries ought be subjected to minimum operational standards which include trust accounting requirements and a requirement to hold professional indemnity insurance.

[11] At page 107.
[12] At page 108.

NSWIC submits that it is in the interests of the market – and therefore of the ACCC – to prevent, rather than cure, a potential major issue.

5.6 Approval authorities' other activities

NSWIC does not believe that noting an issue as "deserves closer attention by government" is sufficient when developing the rules that will govern the operation of a multi-billion dollar market.

NSWIC believes that the potential for a conflict of interest is real and present and that it must be dealt with via appropriate rules. We submit that rules in respect of disclosure together with significant penalties akin to those dealing with market information in equities markets ought be developed as part of the rules.

6.1 Trade in Regulated Systems

6.1.1 Hydrological connectivity and water supply considerations

NSWIC concurs with the ACCC in respect of trading zones, and specifically submits that any rules associated with such zones must be available to all market participants.

In our original submission, NSWIC sought equal application of trading zones across state boundaries. Trading zones must not become quasi-barriers to trade.

NSWIC concurs with the ACCC position derived from the MDBC manual.

NSWIC submits that any changes to trading zones or rules associated with them must be well publicised and, preferably, reviews must be undertaken on a regular (but not necessarily) frequent basis to ensure market information is as complete as possible.

Whilst agreeing that options to account for transmission losses should be explored, NSWIC reiterates its initial submission in respect of socialised delivery losses.

NSWIC concurs in respect of market information and trigger points on connectivity, although is unconvinced that this is a significant issue.

6.1.2 Managing water access right characteristics

NSWIC concurs that tagged trading is preferred over exchange rate trading.

6.1.3 Administrative processes

NSWIC is supportive of any moves to simplify administrative processes, but is wary of any increased costs visited upon the collective to develop and implement new systems.

6.2 Trade in Unregulated Systems

NSWIC makes no submission in respect of the positions adopted by the ACCC on issues identified in paper.

Our submission in respect of trade within unregulated systems, between unregulated systems and between unregulated and regulated systems is that the issue is far more complex that the ACCC has yet grasped.

Whilst NSWIC is not averse to the concept of trade of unregulated entitlements[13], far more significant consultation and discussion is required, an expert working group (including industry) must be formed and adequately resourced to identify how such a trading system might work and time needs to be taken to pilot an identified system.

NSWIC submits that statements of intent from the ACCC – that trade ought be investigated – are as far as this matter can currently progress and that inclusion of unregulated entitlement trade in the water market rules within the timeframe allowed cannot occur.

The Toorale Transfer

The ACCC points to the transfer of unregulated water from Toorale into the Murray system as an example of how this might be undertaken at a more widespread level. What the ACCC fails to convey in describing this transfer is the series of unique conditions that allowed this transfer to occur – no active licenses between Toorale and Menindee Lakes, low levels in the Lakes, the issue of new (temporary) license in the lower Darling and the capacity to control releases to ensure supplementary entitlements were not activated.

It is critical that the ACCC – and stakeholders – understand that these circumstances are unlikely to be regularly replicated to allow an individual transfer, let alone to allow an open market with multiple transfers.

6.4 Trade in groundwater

NSWIC concurs with the positions of the ACCC in respect of trade within groundwater systems.

NSWIC concurs with the positions of the ACCC in respect of trade between groundwater and surface water systems.

[13] Although refer to our submission to the Issues Paper (page 12) – NSWIC does not support trade between regulated and unregulated systems.

6.6 Farm dam trade

NSWIC notes that this issue was not raised in the Issues Paper. We further note that the ACCC consulted with state agencies directly on the matter[14], but did not speak with stakeholder groups.

NSWIC does not support the trade of water in farm dams via surface water systems and does not support the trade of farm dam water access rights.

[14] At page 172

7.1 Specific and separate water delivery rights

NSWIC supports the development of specific and separate water delivery rights for irrigators within an IIO area.

7.2 Trade of water delivery rights

NSWIC concurs with the approach of the ACCC and supports the "reasonableness" approach to restricting trade of water delivery rights. We again advise the ACCC of the very large number of small operators in NSW who may, in many instances, not recognise that they are operators. The ACCC should engage in a program immediately to identify and directly engage with those operators. As advised on many previous occasions, NSWIC is prepared to assist in this matter.

8.1 Specifying the volume/unit share of irrigation rights

Whilst NSWIC concedes that the ACCC position is a noble and worthy aim, we submit that consideration of the very large number of small operators will make this a difficult proposition. Should the ACCC proceed with this matter, consideration of the needs of small operators and financial and administrative assistance to comply must be provided.

8.2 Trade of irrigation rights

NSWIC concurs with the position of the ACCC.

9.1 Information regarding tradeable water right characteristics

NSWIC does not disagree with the provision of information in a standardised format via a template, but requires clarification of who will pay for the collation and publication of this information. At base level, irrigators – as sophisticated investors – know where to find this information and how to interpret it at present. As a result, they ought not be expected to pay (via water planning and management charges) for the provision of information to unsophisticated, new entrants to the water market. There is little benefit in this for irrigators and therefore they oughtn't be expected to fund the provision of information to others.

9.2 Information about trading rules and processes

NSWIC concurs with the position of the ACCC.

9.3 Trading volumes and prices

NSWIC concurs with the position of the ACCC, but submits that the requirement to accurately report must be supplemented by a requirement on the authority to whom reports are made to publish that information in a timely and accurate manner.

NSWIC has submitted to the Productivity Commission that a central exchange is highly desirable. A copy of that submission – which addresses a range of market issues and hence is highly relevant to the water trading rules process – is attached.

9.4 Allocation and policy announcements

NSWIC concurs with the position of the ACCC and, in particular, reiterates its support for replication of continuous disclosure and insider trading rules.

SUBMISSION CONCLUDES

NSW IRRIGATORS' COUNCIL
Level 6, 139 Macquarie Street
SYDNEY NSW 2000

ACN: 002 650 204 **ABN:** 49 087 281 746

Tel: 02 9251 8466
Fax: 02 9251 8477
info@nswic.org.au
www.nswic.org.au

Consultation

The Expectations of Industry

090303

Andrew Gregson
Chief Executive Officer

Introduction

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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 woeful[15]. 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.

[15] See case studies later in this document.

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

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)[16]; 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;

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

- Timeframes

  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 published[17] discussion paper as a minimum requirement.

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

[17] We accept that "published" may mean via internet download, but require that hard copies be made available free of charge on request.

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

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 publicised[18]. The method for doing so will vary depending on the method of consultation. As a threshold, at least 90% of affected stakeholders ought be targeted to be reached by publicity.

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

Subsequent to the closing date, a document ought 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 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.

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

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 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 for 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.

NSW IRRIGATORS' COUNCIL
Level 6, 139 Macquarie Street
SYDNEY NSW 2000

ACN: 002 650 204 **ABN:** 49 087 281 746

Tel: 02 9251 8466
Fax: 02 9251 8477
info@nswic.org.au
www.nswic.org.au

BASIC LANDHOLDER RIGHTS

090316

Mark Moore
Policy Analyst

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.

Executive Summary

Basic Landholder Rights (BLR) refers to the taking of water for stock and domestic use without the requirement for a license.

NSWIC recognises and supports this right, but calls for it to be adequately managed in order to:

(a) Properly manage the resource base from which it is drawn; and
(b) Ensure that the resource base is not abused.

Background

Replacing the *Water Act* 1912, the *Water Management Act* 2000 *(WMA)* introduced Basic Landholder Rights (BLR) as a replacement for Riparian Extraction. This change maintained the right of those adjacent to rivers, estuaries, lakes or aquifers underlying the land to extract water for domestic and stock use without a licence. It does not, however, specify how much water can be extracted.

Definition of "Basic Landholder Rights"[19]

Domestic and Stock Rights – An owner or occupier of a landholding is entitled, without the need for an access licence, water supply work approval or water use approval:

- To take water from any river, estuary or lake to which the land has frontage or from any aquifer underlying the land, and
- To construct and use a water supply work for that purpose, and
- To use the water so taken for domestic consumption and stock watering, but not for any other purpose.

This does not authorise a landholder to construct a dam or water bore without a water supply work approval.

Domestic Consumption, in relation to land, means consumption for normal household purposes in domestic premises situated on the land.

Stock Watering, in relation to land, means the watering of stock being raised on the land, but does not include the use of water in connection with intensive animal husbandry.

[19] *Water Management Act* 2000 – Section 52, Chapter 3, Part 1, Division 1

MEASURING OF BLR

NSWIC maintains a basic philosophy; *"if you can't measure it, you can't manage it."*

Presently a works approval is not required when accessing BLR[20]. The result is that there are no accurate records of how many BLR pumps exist, no restrictions in place for pump size or pipe size and no requirement for meters to measure the amount of water taken.

With no effective management of BLR, the water is accrued to losses rather than usage. Operational losses are increased not only by the water extracted for BLR but also by the water required to run the river and / or creeks to deliver BLR. This skews data on the river meaning less water being available for Available Water Determinations (AWD's).

NSWIC submits that an accurate understanding of capacity and extraction of BLR is required in order to manage our river systems for the benefit of all users.

Furthermore, NSWIC is cognoscente of the requirement to comply with National Water Initiative principles. We submit that adequately *managing* the water resource committed to BLR provides such compliance.

REASONABLE USE GUIDELINES

Contents

NSWIC submits that the establishment and enforcement of a set of Reasonable Use Guidelines (RUG) is a vital part of implementing a BLR policy. We note that, subsequent to amendments to the Act in 2008, this enforcement is now jurisdictionally possible.

A formula for assessing how much water is required for reasonable use must be developed in consultation with stakeholders. Guidelines for both what *is* and what *is not* reasonable use must then be published for a reasonable period prior to enforcement.

Basis of Determination

NSWIC recognises that the reasonable use amount can be set in a number of ways, primarily by megalitres per hectare or pump and/or pipe size.

Whilst we recognise that either of these would best be managed by a requirement for metering, NSWIC submits that the significant expense that would be incurred by such a measure would not justify the benefit accrued. For that reason, we do not support a requirement for metering of all stock and domestic water.

[20] Landholder not authorised to construct a dam or water bore without a works approval.

Where stock and domestic water is taken through works that are metered (such as an irrigation pump), the BLR should be measured through such means.

We submit that defining a BLR by pump and/or pipe size may not adequately address the range of issues that water resources will face in coming years, including effective management, subdivision of property and shortage of available resource. For that reason, we submit that a RUG be set on the basis of megalitres per hectare (land area and variables relating to rainfall and land use).

For the purposes of defining the entitlement, we note that they could be issued by *property* or by *works approval.* NSWIC submits that the former is the only logical determinant as it relates to the size of the property which, in our submission, ought be the basis of the BLR. Even in the event of pump or pipe size being the determinant of the BLR, multiple works approvals may exist on one property potentially significantly affecting the volume taken as a BLR.

Enforcement

NSWIC reiterates that it does not support metering of all stock and domestic use, but instead supports the effective monitoring of RUG.

To assist in enforcement, a register should be created where all landholders who have any works extracting BLR are required to register them with DWE. This is not a license, merely a means of tracking all points where BLR is extracted.

Where non-compliance with the RUG is reasonably suspected, NSWIC supports the requirement for a meter to be fitted *without expense to the water user.* In the event that subsequent monitoring of the meter shows a breach of the RUG, the costs of installation and monitoring should be levied against the offending user. Revenue from fines for misuse should be directed toward installation and monitoring to ensure no net increases in cost to water users.

Longer Term

The NSW Irrigators' Council appreciates that national water initiatives will mean that, over time, all water extractions will be the subject of metering.

NSW IRRIGATORS' COUNCIL
Level 6, 139 Macquarie Street
SYDNEY NSW 2000
ACN: 002 650 204 **ABN:** 49 087 281 746

Tel: 02 9251 8466
Fax: 02 9251 8477

info@nswirrigators.org.au www.nswirrigators.org.au

Submission to Productivity Commission

Market Mechanisms for Recovering Water in the Murray-Darling Basin

090902

Andrew Gregson
Chief Executive Officer

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.

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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.

(vi) Identification of problem and necessity for change

Satisfactory.

(vii) Identification of solutions and proposed method for implementation

This process must occur subsequent to the close of submissions.

(viii) Summary of submissions, identification of preferred approach

This process must occur subsequent to the close of submissions.

(ix) Explanation of interim determination and final feedback

This process must occur subsequent to the close of submissions.

(x) 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 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 and 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 possesses 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 notes[21] 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.

[21] At page 22, paragraph 1

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

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”[22]. NSWIC understands that the process is now complete, although reserves its right to makes 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)?

[22] At page 32

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 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 extend 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 gigalitres, this is to be achieved over 4 years, is pitiful when seen in the context of the 297 gigalitres 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."[23] This is demonstrably incorrect, as a brief glance at any 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.

[23] At page 25

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