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IRRIGATORS'  
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# IMPACTED PROPERTY RIGHTS POLICY

## 100226

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**Member Organisations:** Bega Cheese Limited, Border Rivers Food & Fibre, Coleambally Irrigation Co-Op Ltd, Cotton Australia, Gwydir Valley Irrigators' Association Inc., High Security Irrigators Inc, Hunter Valley Water Users' Association, Lachlan Valley Water, Macquarie River Food & Fibre, Mid Coast Dairy Advancement Group, Mungindi-Menindee Advisory Council, Murray Irrigation Limited, Murray Valley Water Diverters' Association, Murrumbidgee Groundwater Inc., Murrumbidgee Irrigation Ltd, Murrumbidgee Private Irrigators' Inc., Namoi Water, NSW Farmers' Dairy Committee, NSW Farmers' Association, Ricegrowers' Association of Australia, Richmond Wilson Combined Water Users Association, Riverina Citrus, Southern Riverina Irrigators, South Western Water Users', West Corrgan Private Irrigation District, Wine Grapes Marketing Board.

## **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**

NSWIC and its members have long been interested in programs and policies which impact on Water Access Licence holders' property rights in NSW. This interest has manifested at both State and Commonwealth level.

Significant work has been undertaken to establish processes by which an affected property right is compensated. Immense challenges have resulted from continued alteration of program design.

NSWIC believes that incremental changes to program design have been evolutionary in nature and have progressed closer to a satisfactory outcome. In light of that belief, Council now calls for a full and final step toward recognition of Water Access Licenses as an indefeasible property right which, when affected, must be met with full market value compensation.

## **Background**

## **Water Sharing Plans**

In NSW, Water Sharing Plans (WSP's) under the *Water Management Act* (NSW) 2000 commenced the process of reduction in entitlement reliability, primarily explained as a transition to sustainability.

A Water Sharing Plan (WSP) is a legal document creating rules by which water will be shared by all water users. This includes the environment, town supply, stock and domestic, industry and irrigation.

The plans, which last for ten years, determine how water is allocated between water users including a specific portion protected for the environment (planned environmental water) and another portion committed from recovery projects or the purchase of licences (adaptive environmental water).

Irrigators faced reductions in their reliability due to a change in the share distribution. That is not to say the irrigators do not agree that the environment needs to obtain a share, but it was at a great expense to their business.

There was no compensation provision written into the WSP to compensate for a change in reliability as a result of a reduction in reliability of shares within the WSP.

## **Risk Assignment Principles**

The introduction of the Risk Assignment Principles within the National Water Initiative (NWI) formalised concepts of liability and attached shares of that liability pool variously to license holders, State and Commonwealth Governments. Whilst variations to the quantum and attachment of that liability ensued, the principle of a compensable right was essentially formed.

The NWI of 2004 introduced the concept of Risk Assignment. This Inter-Governmental Agreement was part of outcome of a Council of Australian Governments (COAG) meeting and executed by all States<sup>1</sup>.

The stated objective of the NWI was:

*“Full implementation of this Agreement will result in a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes...”<sup>2</sup>*

Achieving this included:

*“statutory provision for environmental and other public benefit outcomes, and improved environmental management practices;”<sup>3</sup>*

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<sup>1</sup> Tasmania joined the agreement in '05 and Western Australia in '06.

<sup>2</sup> Point 23 of the NWI.

<sup>3</sup> Objectives sub-point (iii)

“complete the return of all currently overallocated or overused systems to *environmentally-sustainable levels of extraction*,”<sup>4</sup>

“clarity around the assignment of risk arising from future changes in the availability of water for the *consumptive pool*,”<sup>5</sup>

The introduction of Risk Assignment noted the premise that in 2014 (when all WSPs expire in NSW) there needed to be clarity around liability for future changes in availability to the consumptive pool. The NWI did not provide detail around the implementation of risk assignment, but stated that the *“risk assignment framework is intended to apply to any future reduction in the availability of water for consumptive use, that are additional to those identified for the purpose of addressing known overallocation and/or overuse”*<sup>6</sup> and also states *“a pathway for dealing with known overallocation and/or overuse has been agreed.”*<sup>7</sup>

For full details on our Risk Assignment policy, please see the *“NSWIC Policy for Application of Risk Assignment Principles.”*<sup>8</sup>

### ***Achieving Sustainable Groundwater Entitlements***

The Achieving Sustainable Groundwater Entitlement program (ASGE) across NSW further entrenched the concept of compensation, but at levels not associated (nor referenced to) market value.

The program (2005) was designed to assist groundwater users in the Upper and Lower Namoi, Lower Macquarie, Lower Lachlan, Lower Murray, Lower Gwydir and Lower Murrumbidgee groundwater sources to manage a reduction in their entitlements through the provision of an *ex gratia* payment.

The programs aim was to reduce the use of groundwater in each aquifer to a sustainable level. Funded by both the Commonwealth and NSW Governments, it was not originally designed to compensate groundwater users for their losses. However, with industry involvement, both the Commonwealth and NSW Governments invested \$60 million each to the program specifically for compensation.

The program implemented a reduction in the entitlement (licence) on a valley by valley basis. This permanently affected the actual property right, not the allocation against the property right.

Compensation was provided based on history of use and divided from a pool allocated to each aquifer. Acknowledging that these imposed changes required compensation to be paid was a big step forward. The value of the compensation paid however was well below market value.

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<sup>4</sup> Objectives sub-point (iv)

<sup>5</sup> Objectives sub-point (vi)

<sup>6</sup> Point 46 of the NWI.

<sup>7</sup> Point 47 of the NWI.

<sup>8</sup> Published in draft form presently and available by contacting NSWIC.

## ***Purchasing Programs***

Recent programs aimed at acquiring entitlement-based water for environmental use (including the NSW Governments “Riverbank” and the Commonwealth “Restoring the Balance”, for example) are both aimed at obtaining entitlement from water access licence holders through direct market interaction. The result is, essentially, compensation for entitlement reduction at market value.

The NSW RiverBank was a five year program announced by the NSW Government in 2005. The program set aside \$105 million to buy water entitlements from willing sellers for the most stressed and valued inland rivers and wetlands.

This was considered an innovative new way of obtaining water for the environment by becoming a licence holder and managing these entitlements for the benefit of the rivers and wetlands.

To date the program has obtained over 32,000 ML<sup>9</sup> at market value from the Macquarie, Gwydir, Lachlan and Murrumbidgee Valleys.

As part of the Commonwealth Governments Water for the Future program, *Restoring the Balance in the Murray-Darling Basin* is a \$3.1 billion investment to purchase water entitlements from willing sellers.

Purchases under *Restoring the Balance* program will be managed by the Commonwealth Environmental Water Holder (CEWH). The purpose of acquiring water access licences is to use this water to manage the environmental assets identified in the Basin Plan.

The CEWH has purchased 563,544 ML (as of January 2010<sup>10</sup>) of entitlement. These entitlements were purchased through market mechanisms at a market determined price.

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<sup>9</sup> Obtained from NOW website (16 Feb 10)

<sup>10</sup> MDBA website as of 16 Feb. 10

## **Conclusion**

There is a clear progress of how environmental water is being obtained, how compensation is being recognised and how that payment is being valued. NSWIC believes that this progress ought be heeded and continued to a final step which recognises the necessity to compensate when entitlements are affected, either in reliability or quantum, at a market determined value.

NSWIC believes that the market is the best place for those wanting to obtain water entitlements to act. This ensures that water is taken from those who are willing, allows for targeting of the asset required and provides a market-determined price as compensation.

In the absence of a market mechanism being used, the market price should still be the benchmark for compensation to be paid.

## Related motions which coincide with this **Impacted Property Rights Policy**

From a motion passed at our 05 November 2009 Council meeting –

**“That in all water entitlement licence categories any reduction in reliability of access or actual entitlement retrieved from water entitlement holders through the requirements of any Government water plan be compensated at full market value.”**

**“Any requirement by Governments to retrieve water or reduce reliability of access must include an acknowledgment and factoring in of the quantity and related social and economic impacts of Commonwealth water buybacks in any catchment.”**

**“That any water purchased as part of water buyback programs be considered fully compensated and become a benchmark for the value used to compensate any future non market reductions in entitlement or reliability of regulated, unregulated, supplementary and groundwater sources. These reductions may be due to the factoring in of speculative climate science or interconnectivity calculations into reduction targets. NSW has agreed to adopt these targets. NSWIC includes the targeting of non compensable water in the current NSW WSP such as supplementary river water or water not yet under a NSW WSP such as unregulated river water in a policy that demands compensation at market value.”**

## Related existing policy which coincides with this **Impacted Property Rights Policy**

*NSWIC Policy for Application of Risk Assignment Principles – February 2010*

Principles of Water Access Rights – June 2003

Responsibilities for Resource Rights – January 2003

Water Property Rights and Asset Security in NSW – Unravelling the Rhetoric – July 2002