

Submission to the Murray-Darling Basin Authority

Draft of the Proposed Murray-Darling Basin Plan

120412

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators access regulated, unregulated and groundwater systems. Our Members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

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

Executive Summary

This is a formal submission to the Murray-Darling Basin Authority in respect of the Draft of the Proposed Murray Darling Basin Plan.

It is also more than that. It is a final, exasperated plea for common sense to prevail over politics. It is a plea on behalf of our Members, our stakeholders and the communities which we are part of and which we support.

The Murray Darling Basin Plan, the *Water Act* and the National Water Initiative are all born of politics. Underneath them all lay good intent, which, unfortunately, has been so twisted and tainted by the hand of politics that the outcomes are nothing short of absurd. In both the Northern and Southern Basin in the past two years, communities have dealt with (and continue to deal with) the devastating impacts of severe flooding *at the very same time* that the Commonwealth is purchasing entitlements. Environmental assets are struggling to survive the onslaught of excess water and will be placed under further strain as weed species are spread by floodwaters.

Meanwhile, the screams of outrage that would take heed only of environmental “need” at the absolute expense of economies and communities have largely dissolved to the key performance indicator of a higher “number”. Lost to the process are the common sense outcomes which it aspired to. In its place are professional environmental activists and marginal seat politicians motivated by news grabs and a desperate desire for attention.

When the Murray-Darling Basin Authority concludes its work on the Plan, it will be handed back to the political realm. There it will become the subject of sound bites and chest beating. The interests of all sides will be played against one another not to provide sensible outcomes, but to achieve personal aims and ambitions.

Now is the time – and the opportunity – for common sense to prevail. The original aims of equal treatment for social, economic and environmental assets must be reinserted into this process. A clear understanding of the goals sought – *real* goals, not political aspirations – must be provided and a clear path to achieving them must be sought. The inclusion of all available data on water availability – including the last 2 years at least – must be undertaken. A full understanding of the social and economic implications of the plan in the absence of unsupportable assumptions must be had.

Both of these factors must necessarily result in a reduction to the quantum sought for recovery. It is quite clear that 2,750 gigalitres is too high and it **must** reduce.

We have no doubt that completing this task properly and approaching it with common sense will take time. Time is the one thing that we do have. The doomsayers who pushed unsustainable timeframes from the middle of a drought period were wrong. Sufficient water resources exist for all users – productive and environmental – to happily coexist for several years to come. Those years should be sensibly used to inject common sense to the Basin Plan.

The Murray-Darling Basin Authority has the opportunity to bring about sensible, supportable and sustainable reform. This submission, despite its detail, is a plea to do just that.

Background

We understand that submissions in respect of the Draft are to be accepted by the MDBA and that all formal submissions must be considered and published.

This is a formal “submission on the proposed Basin Plan” from the NSW Irrigators Council.

It remains the position of NSWIC that the National Water Initiative (NWI), as agreed by all Basin States in 2004, remains the driver for national level water reform. It is the NWI that was intended by all States as the platform for reform that provided the guiding principles.

The NWI clearly laid out that a triple bottom line outcome was to be sought as part of its Objectives, *viz*,

... optimises social, economic and environmental outcomes...¹

It contemplated that this would be achieved by weighing these competing objectives equally, *viz*,

Decisions about water management involve balancing sets of economic, environmental and other interests.²

The NWI went on to more explicitly note that balance must necessarily involve adjusting the demands of the competing interests, *viz*,

... settling the trade-offs between competing outcomes...³

In the submission of NSWIC, the chasm of difference between the Draft Basin Plan and the intentions of the NWI are best identified by this simple requirement. The NWI envisaged a trade-off approach to balance – neither the Draft nor the Commonwealth *Water Act* contemplates such a possibility.

The terms “balancing” and “trade-off” as used in the NWI to indicate the development of a *subjective* list of assets. The *Water Act*, however, artificially creates an *objective* list of environmental assets, by reference to international treaties and conventions in order to give it a head of power under the Constitution, which it then necessarily determines is unassailable.

NSWIC made submissions in respect of social and economic considerations in response to the Guide thus.

The social and economic considerations able to be undertaken by the MDBA have been the subject of what appears to be conflicting legal analysis, although provided on both occasions by the Australian Government Solicitor (AGS). NSWIC understands that the MDBA sought advice in the first instance upon which they acted to provide a Guide which focuses solely on environmental outcomes, with social and economic consequences limited in role to description only. We have

¹ Ibid, paragraph 23

² National Water Initiative, paragraph 2.

³ Ibid, paragraph 36.

been extremely critical of the outcomes of that descriptive work in any event and continue to advocate as such in this document.

Subsequent to the release of the Guide and the public statements by MDBA Chairman Mike Taylor and Chief Executive Rob Freeman⁴ that the Act required environmental precedence, Commonwealth Minister for Water Tony Burke obtained (and released) further legal advice from the AGS in respect of the consideration of social and economic matters. Whilst Minister Burke interpreted that advice such that the Authority is able to take social and economic matters into consideration in setting Sustainable Diversion Limits (SDLs), NSWIC has publicly questioned that interpretation of the advice⁵. In our submission, the advice says that social and economic consequences can be taken into account where decisions are available in servicing an environmental asset.

NSWIC submits that this process most certainly does not provide balance as it clearly does not treat environmental, social and economic outcomes as equivalents. It clearly treats the latter two as secondary considerations which can be taken into account only after the environmental outcome is given primacy.

Moreover, this approach does not even consider the NWI concept of “trade-offs”, demonstrably undermining the approach agreed in the NWI.

NSWIC has publicly questioned both MDBA Chairman Mike Taylor and National Water Commission (NWC) Chairman and CEO Ken Matthews as to the compliance of the Basin Plan with the triple bottom line outcome advocated by the NWI. Both responded that a Basin Plan focused on only one outcome was not compliant⁶.

In the submission of NSWIC, the Guide to the Basin Plan is not compliant with the National Water Initiative. It is our submission that the Act, for reasons of political expediency, has abandoned the principle of balance in order to achieve Constitutional relevance.

The capacity to “consider” social and economic impacts is insufficient to approach the balance that the NWI demanded.

It is therefore the submission of NSWIC that the MDBA must advise the Government that, in fulfilling its obligations pursuant to the Act, it will be in breach of the NWI.

As has been widely evident since the release of the Draft, the social and economic impact analysis has been less than adequate. Whilst a full analysis of the work undertaken to date is provided in the body of this submission, it is worth noting at this point that NSWIC believes that it is insufficient to the extent of being virtually worthless. The Draft is so vague in terms of water reduction at a valley or community level that economic and social impacts *cannot* be determined.

⁴ Comments at both Consultation sessions and Senate Estimates.

⁵ See <http://nswic.org.au/pdf/Briefings/101027%20-%20Water%20Act%20Legal%20Advice.pdf>

⁶ Ken Matthews at NSWIC meeting in Sydney, July 2010, Mike Taylor at Australian Cotton Conference, Gold Coast, August 2010.

For the avoidance of doubt, it is our submission that the catchment wide summary of potential economic impacts that has been presented with the Draft *do not* meet the requirements of the *Water Act*.

In the wake of the Guide, promises were made by both the MDBA and the Commonwealth Government that further, significant economic and social impact work would be undertaken and published. The publication of that work occurred quite some time after the self-imposed deadline. Then-new Chairman of the Authority, Craig Knowles, played down the implications of that report on the basis that it was a “retrospective” on what impacts would have occurred had the Guide been implemented. Whilst it is fair to say that some change has been made in the northern basin since the Guide, this does not appear to unequivocally be the case in the southern Basin. The impacts noted in that report were not acceptable and were clearly not balanced.

In respect of the current process, where identification of communities from which water will be removed is not made, it is clearly not possible to determine the community level impact. On that basis, it is virtually impossible to determine – let alone claim – that the Draft is a balance between economic, social and environmental outcomes. In light of that, the Draft itself cannot be supported by any entity that seeks true balance and a triple bottom line outcome.

Specific Comments on “Plain English” Version

NSWIC held legitimate concerns in respect of a legal instrument and a “plain English” interpretation being simultaneous concerns. Instances abound where differences between two such documents have rendered sections of affected stakeholders virtually disenfranchised. Acceptance of a position contained within a “plain English” document which is not reflected in what later becomes a regulatory requirement will have serious implications.

The Draft Basin Plan clearly falls in this category.

In the “Explanatory Note” at the commencement of the “plain English” document, the following appears:

Water for the environment will be secured through buyback of entitlement and water savings from infrastructure investment schemes.⁷

Whilst recognising that it is Australian Government *policy* to *obtain* water in such a fashion, such *policy* is not of regulatory strength and, more importantly, *this policy is not in the Draft Basin Plan*. NSWIC is concerned at what we believe is a blatant attempt to blur lines between policy and regulation in an attempt to garner support for the Draft Plan.

In a similar fashion, the Explanatory Note states that to 2019

water will gradually be recovered over the intervening period, in consultation with local communities.⁸

⁷ <http://mdba.gov.au/draft-basin-plan/draft-basin-plan-chapter-summary/explanatory-note> accessed 24 December 2011.

⁸ Ibid.

This one seemingly innocuous sentence carries two pledges – that water will be recovered gradually over the period noted and that it will be done in consultation with communities. Again, neither of these policy positions is reflected in the legal instrument that actually forms the Draft Plan.

Further, NSWIC notes the comments in the Plain English document that lists water quality targets as “aspirational”⁹. This is not reflected in the legislative instrument which lists them as targets. NSWIC submits that this is a significant difference.

It is our submission that the “plain English” document has been written by the MDBA as a public relations exercise to gather support for a Plan rather than by an external body tasked with providing an easy-to-understand yet accurate reflection of the legal instrument. It is our submission that the “plain English” document be withdrawn and replaced by a document drawn by an independent entity who can provide an accurate and unbiased interpretation of the legal document.

Submissions on Draft Basin Plan

The balance of our submissions are based on the proposed legal instrument only, although reference may be given to reports and the like which led to conclusions reached in the instrument.

As social and economic implications are not detailed (or considered) in the proposed legislative instrument, a separate chapter on these issues is provided.

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⁹ At page 39

Chapter One – General Submissions

Gross Quantum for Diversion from Productive to Environmental Use

NSWIC recognises that the gross quantum of proposed recovery has reduced from a figure “between three and four thousand gigalitres” as proposed by the Guide to a set figure of 2,750 gigalitres. The majority of the reduction has occurred in the northern Basin, including northern NSW.

The gross quantum sought in southern NSW is largely unchanged from the Guide.

Moreover, it may increase in some valleys given the indeterminate impacts of the “shared reduction” strategy.

In terms of moving toward balance and limiting social and economic impacts, NSWIC recognises this reduction – but does not believe it achieves balance. Moreover, stakeholders are still unaware of the nexus between this volume and the environmental outcomes sought. For the avoidance of doubt, NSWIC does not accept 2,750 and believes it remains too high for balanced social and economic outcomes.

Further, NSWIC understands that the figure of 2,750 was determined in large part based on system capacity constraints. We are pleased to see that these concerns have finally been taken into consideration, although are concerned that more detail in respect of timing at capacity constraints is not given (through an Environmental Watering Plan) particularly as we submit that temporal reliability is a key component of reliability overall. To that extent, the requirement in section 9 that nothing in the Plan will affect reliability hinges largely on the definition of reliability itself. If reliability is measured solely across a 12 month period, the regulatory requirement might be met whilst still having devastating implications for irrigated agriculture in the primary irrigating windows.

Capacity Constraints

We note the significant concern of informed locals in many river systems – including the Murray – that the currently ascribed volume cannot be delivered without significant damage to both economic *and environmental* assets. NSWIC notes the focus on “localism” in the rhetoric of the MDBA over the past 12 months, but believes that it has certainly not been evident in considering these constraints. We submit that the MDBA must urgently revisit the issue of constraints. In particular constraints on each and every system must be adequately determined and reported on. The “shared reduction” strategy may be materially impacted by capacity of systems to deliver and hence share. Further, the ability of the volume able to be delivered within constraints may not be able to achieve environmental outcomes sought. We submit that these must be reconciled as a matter of urgency. We submit that these are material failings of the current draft Plan.

Whilst acknowledging the debate over the specificity required in an environmental watering plan (submissions on which are made herein), NSWIC further submits that an environmental water *delivery* plan is necessary to fully address capacity constraints and channel sharing arrangements (where productive and environmental users may compete for access), to inform the gross quantum of water sought for diversion from productive use,

to give meaning to the “localism” rhetoric and to avoid significant damage to both public and private property that may occur with ill or uninformed environmental water volumes.

“Shared Reduction” Strategy

NSWIC recognises the “shared reduction strategy” that is present in the Draft Plan, essentially assigning an additional volume for downstream use across the two zones of the northern and southern Basin. Whilst acknowledging that there are some positives associated with such a strategy, including local involvement in acquisition program design, it is the submission of NSWIC that these benefits are greatly outweighed by the costs and the uncertainty created.

In the first instance, a “shared reduction” makes it virtually impossible to determine from which areas water will be removed and hence virtually impossible to determine social or economic costs to individual communities. The attempt of the MDBA economic consultants has fallen drastically short of acceptable, as is detailed in the economic analysis section of this submission.

Further, NSWIC is concerned at the possibility for trans-boundary manoeuvring between states which may see our constituency disadvantaged. Victoria has recently argued that Food Bowl Stage II (which the MDBA makes much of in its “we’re almost there” pronouncements) should be the limit of its current commitment. Should regulatory action by the Government in that State – such as trade caps – be continued, NSW clearly becomes the target for much recovery effort. When combined with SA Government rhetoric that their State should “lose” no more water due to “historical efficiency”, it is clearly incumbent on NSW to look to its own interests. In our submission, the “shared reduction” strategy is anathema to the “borderless” approach to which the *NWI* and, indeed, the *Water Act* were aimed.

Finally, NSWIC harbours concerns that the “shared reduction” strategy is primarily a public relations strategy to downplay the severity of potential reductions in individual communities. NSWIC submits that a *maximum* volume per valley ought be contemplated – with regulatory strength reflected in the legislative instrument – so that *maximum* impacts per valley can be assessed against the requirement of balance.

Mid-Point Review

NSWIC recognises – and concurs with – the wisdom of a review at 2015.

Unfortunately, the review does not carry the regulatory requirement for change. That is, it is essentially a desktop review that must be undertaken with no requirement that the Basin Plan be altered on the basis of any findings. NSWIC submits that this amounts to little more than a political promise.

We submit that a sunset date on the Basin Plan at 2016 puts in place a requirement to remake the regulation hence giving meaningful effect to the mid-point review.

NSWIC further submits that a positive approach be taken to the 2015 review rather than a negative approach. Rather than attempt to convince affected parties that the review might result in a reduction in volumes to be removed from communities through the ubiquitous “works and measures” or a “rules review”, NSWIC submits that the total volume for

recovery to be determined *now* must be reduced by the figure which MDBA experts expect can be obtained from such programs. In the event that their targets are not met, a 2015 review can consider an increase if required. NSWIC submits that this approach may lower the gross quantum to a more acceptable level. Further, it would be a show of good faith from the MDBA that the review itself is legitimate and genuine rather than a public relations exercise. Again, such approach must be regulatory in nature and must be written into the legislative instrument.

NSWIC notes that a “half before, half after” 2015 target on volumes to be recovered has been spruiked by the MDBA as a means of providing a glide path adjustment approach. Such a target is not reflected in the legislative instrument and, moreover, some systems have already exceeded this target. We note with approval that such a target was removed from the Plain English document subsequent to comments on a draft made by NSWIC. Nevertheless, the glide path approach should not be abandoned. NSWIC submits that it should instead be reintroduced into the legislative instrument itself to ensure that it is given significant effect and temporal guarantee.

Absence of Specified Environmental Watering Plan

NSWIC has been one of a number of peak bodies that have been critical of the absence of an environmental watering plan. Our criticism is not new, has been maintained over a significant period and goes to the heart of the Basin Plan. Without a detailed plan as to how, when and where water will be used, it is not feasible to state how much – and of what entitlement type – is required. For clarity, NSWIC submits that the absence of a detailed environmental watering plan is a critical and unrecoverable flaw of the Draft Plan. The absence of such a detailed plan may well see the withholding of support for the Draft Plan by NSWIC regardless of other matters.

The following is an extract of our submission in respect of the Guide on this matter which has been *comprehensively ignored* by the MDBA:

NSWIC submits that the lack of an environmental watering plan is a key weakness of the Guide. The fact that the Commonwealth has become the single largest owner of water in the Murray-Darling Basin without any published plan on how, when or where to use that water is anathema to sensible, practical and rational management of the resource.

A key component of the Basin Plan is the environmental watering plan. The fact that the Guide did not provide – nor even mention the watering plan – has contributed to a dramatic slump in already wavering stakeholder confidence. They ask a simple question – how can you know how much you need in the absence of any plan to apply it?

NSWIC submits that an environmental watering plan with clearly defined objectives and methodology must be an integral part of whatever the Authority publish next, be that an amendment to the Guide or a full Draft Plan.

NSWIC acknowledges the comments of MDBA Chairman Craig Knowles that it was a request of the States that they be given the capacity to write the environmental watering plan. To date, NSWIC has not been able to verify the veracity of that claim. We do not believe that NSW requested such capacity. In the event that State Governments have

requested such capacity, we need to understand their rationale, reasoning and business case for so doing prior to withdrawing our long-held objection to the current situation.

We note the publication by the MDBA of a piece by Chairman Knowles titled: *The Environmental Watering Plan: Flexible like the reed.*¹⁰ Whilst acknowledging the need for flexibility in certain circumstances, NSWIC does not believe that the Environmental Watering Plan is one of them. We have long contended that an Environmental Watering Plan is a key component in creating a nexus between what environmental “needs” are and the volume to be removed from productive use. In the absence of that nexus, the Basin Plan is clearly open to criticism that it is a political outcome, is not balanced and is unnecessary in the first instance. “Flexibility” in volumes of water to be diverted from productive to environmental use is not present and hence it is incongruous, at best, that “flexibility” in how, what and where that water is to be delivered is contemplated.

NSWIC submits that the failure of the Authority to provide a detailed EWP is in contravention of Section 28 of the *Act*. In particular, we point to subsection (4) which provides, *inter alia*, that;

In preparing the environmental watering plan, the Authority must have regard...

The *Act* clearly requires that the Authority must prepare the environmental watering plan and not abrogate that responsibility to the States as the Draft purports to do. We submit that a Basin Plan without an environmental watering plan is incomplete pursuant to the requirements of the *Act* and will therefore be open to either legal challenge or disallowance pursuant to Section 43 of the *Legislative Instruments Act*.

Whilst acknowledging that a day-by-day prescriptive approach is not feasible, we believe that the “flexible like the reed” approach is an abrogation of responsibility. In the absence of a defined approach to environmental water management, a defined volume of water required cannot be reliably calculated or defended.

Separation of Water Trade Rules

As a regulation, the Basin Plan must come before both Houses of Parliament as a Disallowable Instrument. The Australian Greens have already indicated their intention to move and/or support a disallowance motion in the Senate.

NSWIC has submitted on a number of occasions that the *Water Trade Rules* ought be separated from the Basin Plan as a regulatory instrument on its own accord. In this way, this vital accompaniment to the water market can operate free of the uncertainty associated with the Parliamentary process. We have been comprehensively ignored yet again on this submission yet, in the interests of a water market that functions adequately for all participants – including the Commonwealth – we again submit that the *Water Trade Rules* be extracted to a separate regulatory instrument.

Note that this submission does not constitute acceptance or agreement with the *Rules* as they are presented in the Draft. Further submissions are made in this document in respect of the *Rules*.

¹⁰ <http://freeflow.mdba.gov.au/2012/02/16/ewp-flexible-like-the-reed/#comment-260>

Cap Credit / Debit System and the “Reset” Approach

The Draft Plan proposes¹¹ that there will be a “reset” of cap credits currently in place. That is, there will be no rollover of cap credits.

NSWIC submits – in the strongest possible terms – that such a “reset” penalises users who have faithfully implemented cap management systems that were designed to provide environmental assistance in the first instance. To reset those cap credits at the commencement of the Plan is, in essence, taking future water allocations away from license holders. It would not be untoward for those users to seek compensation under such circumstances.

Moreover, a change to the cap credits systems through a reset clearly encourages States to ensure that their balance is at neutral, at very least, at the commencement of the Plan. Benefit would clearly exist to be significantly in debit, knowing that it will be wiped clean. In our submission, all cap credits and debits must be honoured – and maintained – at the implementation date of the Plan.

The Draft Plan proposes a further fundamental change to the cap process that has been in place for some time in limiting credits to 20% of annual diversion limits¹². Such a limit – particularly when only applied to upside – is an unacceptable change to cap management in the long term. In the short term, it is a structural anathema to the concept of long term management.

As an example, in the first year of the Basin Plan, accounts will have been reset to neutral subsequent to the proposed reset of cap debits and credits. In that year, extractions will be limited to 120% of the long term Sustainable Diversion Limit. In essence, then, the “long term” SDL was, in fact, measured over a single year. The problem is ameliorated to a certain extent in year two – and further so in consecutive years – but the very concept of long term average management is subverted by the 20% cap, particularly in early years. NSWIC submits that the cap be either removed, increased or implemented over a period of years.

Further, NSWIC harbours concerns that the 20% cumulative limit potentially seriously affects valleys that operate on a continuous accounting basis, such as the Gwydir in northern NSW. We submit that further consideration of this matter by the MDBA must be undertaken urgently.

Conversion Factors

Only days prior to the official release of the Draft, it was revealed¹³ that the relevant Commonwealth Department was proceeding to undermine the Plan’s integrity through a proposed significant alteration of the conversion factors it used in acquiring water entitlements. NSWIC expressed extreme public displeasure at the time¹⁴, noting that such a change rendered meaningless all that the Authority was doing.

¹¹ Section 6.13

¹² Ibid

¹³ Weekly Times, November 2011

¹⁴ http://nswic.org.au/pdf/press_release/2011/111102.pdf

NSWIC submits that it is vital that such whim cannot impact so dramatically upon regional communities and entitlement holders. The concept of certainty, touted to a large degree by the MDBA, demands that such a scenario cannot occur again. NSWIC therefore submits that the Draft Plan must include defined long term reliability factors that can be used by all market participants. The Commonwealth must accept these as their conversion factors. Change to those factors must therefore only occur via the process set out in the *Act* for a change to the Plan itself.

Third Party Entities

NSWIC has long advocated for regulation of third party entities in the water market, particularly brokers. We have recognised that contemporaneous state legislation is a difficult process that is unlikely to bring about a solution in the medium term. We have consistently argued to the Commonwealth Government that a “voluntary guidelines” system is impractical and unlikely to solve any of the problems that face the market, yet they appear poised to proceed down that route.

We have previously submitted to the MDBA that the Water Trading Rules offer the ideal opportunity for a regulatory regime for market intermediaries. Unfortunately, we have been comprehensively ignored in both the Guide and the Draft Plan. On neither of those occasions has the MDBA taken the opportunity to explain why they have not pursued this opportunity.

To summarise and reiterate our previous submissions, NSWIC believes that the common law of agency allows for an extension of the auspices of the *Water Act* to intermediaries acting on behalf of water access entitlement holders. With that capacity achieved, a regulatory regime that mandates the use of trust accounts and the holding of professional indemnity insurance should be introduced immediately.

Tangibility of Water Entitlements

NSWIC is aware of opinion within the Australian Securities and Investments Commission that water access entitlements should be treated as intangible assets. The result of such a formal move would be the classification of water entitlements as derivatives. In this event, all dealers in such securities would be required to hold a Financial Services Licenses. To the best of our knowledge, information and belief, no water market intermediary is currently in such a position and, as a result, the market could essentially be shut down overnight.

NSWIC has made submissions to the MDBA to have this matter resolved through a simple classification listing in the Basin Plan which would clearly have regulatory strength to obviate the issue. We are extremely disappointed that such submissions have been comprehensively ignored and call on the MDBA to reconsider the matter urgently.

Use of Best Available Science

The *Water Act*¹⁵ requires the Authority to “act on the basis of the best available scientific knowledge...”¹⁶

NSWIC has publicly noted¹⁷ that the MDBA has used 114 years of data to assist in calculating average annual inflows at 31,599 gegalitres. The time period for the data used concluded at 2009. We have noted that a further two years of data, 2010 and 2011, are now available. In our submission, “best available scientific knowledge” requires the application of the best available data. A failure to include recent data is clearly a failure to meet this obligation.

We note that the MDBA has publicly refused to recalculate average annual inflows on the basis of the most up to date data¹⁸. Unfortunately, that refusal was published on the MDBA “myth busting” page rather than on the “questions answered” page. NSWIC wondered why the MDBA refused to recalculate the average¹⁹.

Our concern is particularly heightened by the fact that the MDBA itself has previously claimed that a “different modelling period” can result in significant differences²⁰. In that instance, the modelled difference in the Gwydir River alone was some 17 gegalitres per annum between IQQM²¹ and the MDBA estimates.

Further, we note comments from the MDBA that inclusion of the past two years would result in “only” .13% variance, or 32 gegalitres. NSWIC submits that 32 gegalitres is a far from insignificant amount and requests that data in calculating this figure be publicly released.

On the basis of “best available scientific knowledge” and on the clear precedent set by the comparison example in the Gwydir, NSWIC submits that the average annual inflow data *must* be recalculated on the basis of the last two years of data.

We note that Section 9.12 requires use of *historical climate conditions* in calculating long term annual diversion limits. We are extremely disappointed to note that this term, when defined in Section 1.07, requires consideration only of the period July 1895 to June 2009. We have made a case for this period to be extended in the first striking of the Basin Plan, but further submit that it is entirely inappropriate to nominate an end date for a historical record in a legislative instrument with no end date. The Draft, as it stands, locks in the use of “old” data with the only determinative factor being exactly *how old* that data is. At present, it is two years out of date. At the proposed 2015 review, it will be six years out of date. At the implementation of the Plan in 2019, it will be ten years out of date. NSWIC submits that the definition of “historical climate conditions” must be altered to allow regular revisions to include new data to give the Draft Plan legitimacy.

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¹⁵ *Water Act* (Cth) 2007

¹⁶ Section 21(4)(b)

¹⁷ http://nswic.org.au/pdf/press_release/2012/120214.pdf

¹⁸ <http://mdba.gov.au/draft-basin-plan/mythbusting#inflow-data>

¹⁹ http://nswic.org.au/pdf/press_release/2012/120216.pdf

²⁰ “Comparison of watercourse diversion estimates in the proposed Basin Plan with other published estimates” (MDBA 2011)

²¹ Integrated Qualitative and Quantitative Model as used by NSW Office of Water in setting State Water Sharing Plans.

Chapter Two – Specific Submissions

The following submissions are made in respect of individual provisions of the Draft Basin Plan and should be read in conjunction with the Draft Basin Plan.

Plain English Summary

NSWIC acknowledges the intent of providing a “plain English” summary of the Draft Plan. The Draft Plan is, by nature, a complex legal document. The provision of an interpretive document, as a concept, is useful.

NSWIC submits, however, that the document provided has crossed the line from providing an interpretation of legal provisions to becoming part of the communications and “spin” strategy of the Authority.

As an example, NSWIC points to the “Explanatory Note” at the outset of the plain English summary where the Authority states:

...and water will gradually be recovered over the intervening period (to 2019).

The “recovery” of water is not the role of the Murray-Darling Basin Authority. It is solely guided by Government and implemented by the relevant Department. In the submission of NSWIC, it is misleading of the Authority to purport such claim in a document designed to interpret the Draft Basin Plan.

Further, the same part of the document states:

Water for the environment will be secured through buyback of entitlements and water savings from infrastructure investment schemes.

No such commitment is contained within the Draft Basin Plan. In our submission it is therefore completely inappropriate that such a commitment be contained within a plain English interpretation of it.

It is the submission of NSWIC that the plain English interpretation should be written by an entity independent of the MDBA.

1.07

NSWIC makes submissions in respect of defined term “historical climate conditions” elsewhere in this document.

5.02

Subsection (2) notes that a “management outcome” will be improved “water security for all uses of Basin water resources.”

This objective clearly cannot be sustained as a logical argument. The purpose of the Basin Plan is to reallocate water from one class of user to another with the obvious result that yield for one class will be lower. Whilst recognising that this is a particularly small point, NSWIC submits that such statements are unhelpful in designing a supportable document.

5.05

Noting the management objective in 5.02 to “improve water security”, NSWIC is disappointed to see 5.05(2)(d) sets out to ensure entitlement holders are “better adapted to reduced quantities of available water.” We submit that this is clearly contradictory. One of the two must be deleted.

6.04

NSWIC has been frustrated by an inability of authorities to define “long term average sustainable diversion limit” and how it is to be calculated for several years. An opportunity to provide a clear definition arises in this section but has unfortunately again been overlooked. The definitions section of the Draft provides no guidance and the relevant section of the *Act* (Section 4) points only to Item 7 of the Table in Section 22 which again provides no guidance.

Section 9.12(1) of the Draft refers to Section 4 of the *Act* thereby continuing the cycle of documents relying on one another to provide a definition whilst none does.

NSWIC submits that a clear and defined interpretation of “long term average sustainable diversion limit” is vital for stakeholders to understand how they must respond and engage. In the first instance, “long term” must be defined. In the second instance, “average” must be defined – particularly in light of recent debate between NSWIC and the MDBA in respect of data sets to be used (see section 1 of this submission). Finally, an understanding of these two in the context of “sustainable diversion limit” must be clearly set out in the legislation. An “understanding” or process within the MDBA cannot – and will not – suffice in the context of a Regulation without a sunset clause.

Further, NSWIC submits that the separation of Chapter 6 and Chapter 9 when attempting to determine sustainable diversion limits is an error in legislative construction. At very least, the two Chapters should be linked via the definition provisions.

6.06

NSWIC recognises the attempt to back rhetoric that is established by this section. Industry participants, including NSWIC, have welcomed recent moves of the MDBA to consider methods of acquiring and delivering water more efficiently as part of the Basin Plan. Moreover, those same participants have universally sought further focus on equality between social, economic and environmental requirements.

It is disappointing, then, that the rhetorical effort has been backed by a section in the Draft that provides the opportunity for the MDBA merely to “express its view”²² on these critical matters. In the absence of defined activity in these areas and a pathway to meaningful change in outcomes, NSWIC submits that the expression of a view is largely meaningless.

In particular, NSWIC submits that the term “works or measures” must be clearly defined with an explanation as to how any efficiencies will be accounted in the context of SDL offsets. We are concerned that multiple interpretations currently exists which will, unchecked, result in significant misunderstandings in the course of the Plan.

²² 6.06(1)

6.07

NSWIC is supportive of the proposal to conduct a review from 2015.

The nature of the review proposed in the Draft is not, however, supported by NSWIC.

In our submission, a review must have definitive outcomes for it to be of use. As the Draft is written, the review is largely a desktop and public relations exercise with no requirement to change or reconsider any particular matter. In our submission, the review must be brought about – and concluded – by a sunset clause in the Regulation in the first instance. That is, the conclusion of the review must be a remaking of the Basin Plan due to its expiry. Anything short of such measure leaves the review open to being effectively meaningless.

NSWIC notes the capacity of the MDBA to prepare “an amendment” to the Basin Plan pursuant to the *Act*²³. We note that commencement of such process would properly trigger the consultation provisions further contained in the *Act*²⁴. In our submission, the review must trigger this process. We submit that 6.07 of the Draft be amended to state that the review likely precedes an amendment pursuant to Section 45 and hence triggers the consultation requirements. We note that 6.07(2) in parentheses subsequent to subsections (a) and (b) contemplates “amendment to the Basin Plan”, which, in our submission, is insufficient to comply with our requirement. Further, we note the inefficiency of having a review by the MDBA which must then be essentially completed again in the process pursuant to the *Act*.

6.07(2) currently sets a date of 30 June 2017 but the occurrence on that date is indefinite and hence subject to confusion. The date can be read as either the conclusion of the review or the date by which changes to the Plan must be effected. NSWIC submits that this must be clarified in accordance with submissions above.

Moreover, NSWIC is concerned that 30 June 2017 may not provide sufficient time for outcomes to be determined and promulgated. We note that 1 July 2019 is the date set²⁵ for compliance by Water Resource Plans. It is our understanding from the *Act*, however, that a Water Resource Plan must be compliant with the Basin Plan as it was *two years prior* to the WRP being provided to the Authority²⁶. A Water Resource Plan to commence on 1 July 2019 pursuant to the Draft that is presented for accreditation on, say, 1 January 2019 (a not unreasonable timeframe for the preparation of such a document by a State) would therefore need to be compliant with the Basin Plan as it were on 1 January 2017. This would clearly be *before* any changes pursuant to the review were implemented and hence the Water Resource Plan would not benefit from any changes brought about by the review (essentially rendering it meaningless). Note also that the timing in this example would provide only 6 months for the MDBA to accredit the WRP, which may be insufficient. A requirement by the MDBA to have a State present the WRP earlier than this will exacerbate the problem described. NSWIC therefore submits that the timing of the conclusion of the review must be altered.

²³ Section 45.

²⁴ Sections 46 – 48 inclusive.

²⁵ 9.13(2)

²⁶ *Water Act* Section 56(2)(b)

6.09

NSWIC notes that subsection (6) requires a cumulative balance of zero at the commencement of a register. This has the effect of resetting current cap credits and debits to zero.

NSWIC submits that carry over of cap credits and debits must be included within the Plan. Cancelling of credits and debits at 30 June 2019 will provide a perverse outcome for Basin Planning by encouraging states not only to utilise existing credits prior to that date but potentially to delve into significant debit. We note that NSW currently has a cap credit in the vicinity of 3,582 gigalitres.

For the purposes of clarity, resetting the cap credits and debits system will encourage the use of significant extra volumes prior to 2019. This is clearly an absurd outcome.

6.13

We submit that limiting a cumulative balance to 20% debit at the outset of the Plan is incongruous with the concept of long term management. In the absence of a glide path approach to Plan implementation, NSWIC cannot support this proposal. We submit that the inclusion of a period of implementation in which to balance long run availability of water against the defined 20% limit is clearly necessary. We do not believe that the “reasonable excuse” provisions of subsection (1)(b) are sufficient to cover this legitimate concern.

Further, we are concerned that insufficient provision has been made in subsection (1) for those valleys that utilise continuous account methods, such as the NSW Gwydir. We note the advice of Authority staff that this concern is offset by the provisions of 9.17(1)(a), but we do not concur with this view. Continuous accounting is a fundamentally different concept to carry over (which, in any event, we submit should be a defined term) and should be treated and defined separately. We therefore submit that *either* 6.13(1) *or* 9.17(1) must be redrafted to specifically account for continuous accounting.

We note that subsection (2) provides for aggregation of systems in Victoria in respect of determining SDL compliance. We are concerned at what appears to be different treatment across state borders. We submit that the opportunity for aggregation must be offered to all States and hence that this subsection must be rewritten to allow for aggregation at the discretion of a State.

6.14

NSWIC applauds the adoption by the MDBA of risk assignment principles as contained within our March 2010 policy paper on this matter²⁷. We therefore support this provision.

At the same time, we note assurances of the Government that any “gap” between current environmental holdings and those identified in the Plan will be acquired either via infrastructure or purchase. In the period subsequent to the release of the Guide, the MDBA and its senior officers have publicly endorsed – and even made – such commitment. In light of this, NSWIC submits that it is incumbent on the MDBA to include this commitment in the Plan. It is our submission that it rightly belongs in this section (or, at very least, Division) and therefore must be written into it.

²⁷ http://nswic.org.au/pdf/policy_documents/100311%20-%20Implementation%20of%20Risk%20Assignment%20Principles.pdf

Chapter 7

We have made submissions earlier in this document in respect of the environmental watering plan. We do not believe that Chapter 7 constitutes an environmental watering plan sufficient to meet the requirements of the *Act*. Moreover, we do not believe that the generalised attempt contained within Chapter 7 provides sufficient nexus between environmental requirements and the SDL proposed by the Draft. Until – and unless – a detailed environmental watering plan is provided by the Authority, such nexus cannot exist and the Basin Plan will continue to meet heated opposition.

In short, if the Authority is unable to explain what, when and where water is specifically required for through a detailed environmental watering plan, we do not believe that a volume can be reliably calculated. A “high level” statement of principles is, in our submission, what has been provided in Chapter 7. Such a statement is insufficient basis for determining a detailed volume.

7.10

NSWIC notes the onus placed by this section on States to prepare long term environmental watering plans. We further note that no indication of this requirement was contemplated in the Guide or during the period of preparation of the Draft. The claim of the MDBA that it was subsequent to a request by the States is not, to date, supported by any evidence or agreement by the States.

Subsection (2) binds the States to writing a document that complies with “relevant international agreements” despite the fact that they are not signatories to said agreements. In the submission of NSWIC, the very fact that “relevant international agreements” are contemplated by the Draft in accordance with the *Act* points to a clear intention of Parliament that the environmental watering plan be written by a Commonwealth entity – namely the MDBA.

Sections 7.10 through to 7.23 places numerous obligations on to States when developing the environmental watering plan that should have been developed by the MDBA. No mention is made of the costs that will be incurred or who will be responsible for paying them. NSWIC submits that the absence of this information is a clear warning to water access license holders that they will be expected to pay. NSWIC flatly rejects such an approach and will not accept it.

7.16

NSWIC is most concerned that “operational constraints” in respect of environmental watering have merited a grand total of two lines in the Draft Plan. NSWIC together with a number of its Members and a range of stakeholder groups have engaged – in good faith – in consultation processes where they have raised this issue. We – and they – are rightly disappointed that the issue has been essentially ignored.

In the submission of NSWIC, delivery constraints for environmental outcomes must be a key part of the Basin Plan. In their absence, the Plan is potentially undeliverable and hence rendered meaningless. Further, the requirement to simply “identify” such constraints without them having any overall impact is absurd.

In our submission, the Draft Plan must fully identify the capacity of each system in the Basin to deliver environmental water and must match this against use plans for use. This must be the crux of the environmental watering plan which, pursuant to previous submissions, must be contained within the Plan itself.

7.19

The construction of this section and particularly the use of “may” is incompatible with the note that “transparency” is to be ensured. In the event that the Authority wish to ensure transparency, we submit that “may” should be replaced by “must”. Pursuant to previous submissions, “or Basin State” should be deleted.

7.52

NSWIC notes the efforts of the MDBA to become engaged in how water is acquired for environmental use through this section of the Draft, but submits that it falls short of the rhetoric. If the MDBA wish to back rhetoric in respect of preference to infrastructure acquisition and the like, this is the section in which it must be placed. As the section currently stands, the Authority “may” prepare “recommendations” which “may” include “priority areas” or types of entitlement. NSWIC submits that this section ought be either considerably strengthened to back rhetoric or deleted in admission of such.

At the same time, NSWIC is perplexed that the Authority foresees a time where it will be able to establish “priority areas” for recovery when it currently cannot as evidenced by the “shared reduction” components in the northern and southern Basin. If the Authority can foresee that, it should, in our submission, be prepared to state priority areas at the outset.

Chapter 8

The proposed Basin Plan identifies targets in mg/L. While this may be an accurate scientific measurement, it is inconsistent with current reporting practices for salinity that use EC.

This chapter sets out objectives and targets for water quality. While the MDBA asserts the targets are “aspirational”, the legislative document states they are to be used to “inform operational decisions relating to the management of water flows”.

We submit that salinity targets should not be a factor in making operational decisions relating to the management of water flows.

8.12

NSWIC does not purport to hold expertise in respect of water quality targets, but is concerned that a fundamental requirement of the Basin Plan can be changed by “publication on the Department’s website...”²⁸ NSWIC submits that a change that could materially affect the Basin Plan, the SDL or an environmental watering plan should be subject to the same provisions as any other alteration of the Plan.

²⁸ 8.12(2)(a)

8.17

NSWIC is concerned that, in addition to salinity targets, the MDBA propose a salt load target for export from the Murray Mouth. In our submission, this potentially results in a perverse outcome where salt is induced into the system merely to meet export targets at the end of the system. It can, in fact, act as a disincentive to the excellent results achieved across more than a decade in salinity management across the Basin²⁹.

Given the varying nature of fresh water availability and the climatic variability of salt volumes and concentration, NSWIC submits that salinity targets alone (in the absence of a separate salt load target) are not only sufficient to achieve the objective sought, but have less likelihood of a perverse outcome. Moreover, focus on salinity issues in the system as a whole rather than solely out the mouth will aid in dispelling perception that the Plan which was meant to be Basin-wide has become concentrated solely on that region.

8.18

NSWIC is concerned that an identical salt load target of 500mg/L at Burtundy, Morgan and Murray Bridge implies that no salt will enter the river system between these points. This is clearly inappropriate. NSWIC submits that it must vary.

9.09

NSWIC recognises and appreciates the desire of the MDBA to avoid reliability impacts in respect of the Basin Plan. We strongly support this section whilst noting that a clear definition of “reliability” is necessary.

9.11

NSWIC is concerned that the obligation on a State to establish and maintain a register of environmental water that is largely held by the Commonwealth Environmental Water Holder is essentially a cost-shifting exercise. We submit that the reporting requirements in this section would be far more efficiently and effectively dealt with by the CEWH in any event.

Further, the publication of entitlement details for one class of entitlement holder over another may contravene the Water Market Rules as published by the ACCC.

9.12

Subsection (3) locks the States in to using increasingly out of date data through the construction of historical climate conditions. Submissions in this respect are contained elsewhere in this document.

²⁹ <http://nswic.org.au/pdf/Briefings/120203.pdf>

9.13

NSWIC understand that the provisions in this section – and particularly subsection (3) – are in respect of methodology to ensure *long term* compliance. Other than the section heading, we submit that insufficient guidance is given to those interpreting the section that it is to apply *long term* and not annually. Interpretation of these provisions to an annual level would result in an effective ceiling at what is designed to be an average, thereby lowering the average. We submit that the section be redrafted to provide clarity in this respect.

9.14 and 9.15

NSWIC understand that the near-replication of these sections is to provide, in the latter, capacity for a State (such as NSW under current conditions) to have a Plan Limit that is *lower* than the SDL. We submit that replication of the section is confusing and that the addition of a subsection under 9.14 will remove said confusion whilst achieving the same end.

9.17

NSWIC is concerned at the construction of subsection (b) in reference to return flows. We note that any change to current return flow arrangements or treatment will be seen as an impost on current reliability which would put this section at odds with 9.09.

9.18

This section purports to set limits on quantities that can be taken by commercial plantations³⁰. NSWIC is of the opinion that this provision will conflict with Regulations pursuant to the Carbon Farming Initiative which will require plantations for CFI purposes to purchase and hold entitlement.

NSWIC submits that the CFI Regulations are superior to those contained here for the purpose of water entitlements for commercial forestry plantations and should be replicated.

9.22

NSWIC submits that requiring identification of priority assets and ecosystems functions in a water resource plan is a redundancy as it must logically appear in an environmental watering plan. We note that the costs of preparing Water Sharing Plans in NSW are charged to water access license holders as this state pursues full cost recovery. NSWIC submits that this section must be placed into the requirements for an environmental watering plan.

9.23

Our submission above is equally relevant to this section

³⁰ 9.18(1)(c)

10.04

NSWIC submits that the calculation of water required for conveyance of Critical Human Needs has been substantially overstated. The figure of 1,596 gigalitres includes the 696 gigalitres provided under the Agreement³¹ and hence allows a further 900 gigalitres. It is our understanding that a maximum of 750 gigalitres is required upstream under normal conditions for conveyance. In light of that, the figure listed is at least 150 gigalitres too high.

Further, NSWIC points to the recent changes made by NSW to the Snowy Hydro Operating License which has created a drought reserve contingency to be held in Lake Eucumbene. That drought account will carry over within the Snowy Scheme until called out (or spilled). Some 200 gigalitres is set aside for the purpose. This more than offsets any additional figure required for conveyance in drought above and beyond the normalised figure of 750 gigalitres. NSWIC therefore submits that the conveyance requirement should be reduced by at least 150 gigalitres.

Chapter 11

NSWIC has made several submissions previously in respect of the Water Trading Rules, all of which have apparently been studiously ignored.

We note that the task of consultation in respect of the Water Trading Rules was essentially outsourced to the ACCC. NSWIC participated in that process³², but has been publicly critical of the ACCC “consultation” process on many occasions. Indeed, our Consultation Expectations Policy³³ features the ACCC as an example of how *not* to consult with stakeholders.

We wrote to then-Chairman of the MDBA, Mike Taylor, on 15 January 2010³⁴ to advise as such, to reject the recommendations of the ACCC and to call on the MDBA to undertake stakeholder consultation itself.

Given our belief that our significant submissions to the ACCC on the Water Trading Rules were ignored, we now make those submissions directly to the MDBA as three appendices to this paper.

We point to two specific requests of the Water Trade Rules that we have made on multiple occasions – that they be separated from the Basin Plan instrument and that they be used to regulate third party intermediaries in the water market. We have previously made significant submissions supporting those requests and reiterate those requests in this submission.

We understand that the proposed commencement date for the Rules is July 2013. On current likely timeframes, this sees a period of at best 6 months from adoption to

³¹ The Murray Darling Basin Agreement Clause 88(b)

³² For Water Trading Rules Issues Paper, see <http://nswic.org.au/pdf/Submissions%20Archive/091022.pdf>

³³ http://nswic.org.au/pdf/policy_documents/090303%20-%20Consultation%20Expectations%20Policy.pdf

³⁴ See final two pages of Appendix 3 hereto.

implementation. We submit that this timeframe is insufficient for the MDBA (or another entity) to provide sufficient information to those that will be regulated ahead of what may be significant penalties. We understand that it is the position of the MDBA that the commencement of the Rules must align with the commencement of a water year, a position with which we concur. In light of that, it is our submission that the Rules ought commence on 1 July 2014.

11.05

The term Basin State is not defined in the Draft, although is defined in the *Act* to exclude the Commonwealth. NSWIC has some concern that interpretation of “agency of a Basin State” may be made such that the CEWH is excluded from the recovery of loss or damage provisions contained within this section. For clarity, NSWIC submits that a definition of Basin State in this section in accordance with the *Act* would be useful.

11.17

Subsection (1)(c) potentially gives trade precedence to one class of user (CEWH) of identical entitlements to other user classes contrary to 11.07. NSWIC submits that this subsection must be redrafted for clarity and purpose. We suggest that consideration of the addition of “using planned environmental water” be undertaken.

Part 2, Division 2; 11.27 – 11.30 and Part 3; 11.31 – 11.35

NSWIC submits that these rules are a significantly shortened version of the Rules already in force and monitored by the ACCC. We submit that an effective doubling of the rules through adding them here will lead to redundancy, at best, confusion as a minimum and, more likely, conflict. We submit that this Division ought be removed.

Notwithstanding the above, if the MDBA are able to provide legal advice that these sections will apply to *all* operators of infrastructure, including State agencies, and that the provisions of 11.05 will not apply to these sections, we may provide further submissions to significantly strengthen this Division.

We have sought an understanding from relevant agencies (including the MDBA) of how many entities they believe that these Rules will affect. We are extremely concerned that no understanding exists within those agencies. We submit that serious consideration is given to this issue. Further, we submit that an analysis of the size and/or scope of delivery right trade must be undertaken prior to implementing Rules governing it as we do not believe it is significant.

11.23

We submit that trade of groundwater within the boundaries of a single jurisdiction is already well managed under state rules. The role of the MDBA – and the Basin Plan – is to regulate and manage interstate water. We submit that Rules in respect of groundwater trade ought properly be limited to only those resource units that cross jurisdictional boundaries.

11.46

NSWIC submits that a requirement to provide data that is not backed by further rules or requirements to publish that data in a reasonable time and format is virtually worthless. It will result in significant expense for no apparent benefit. Until – and unless – these Rules are augmented such that an obligation to report this data is included, NSWIC submits that this Rule ought be struck.

11.48 and 11.49

NSWIC concurs that continuous disclosure obligations in respect of the water market are warranted and, as such, is bitterly disappointed that it merits but two virtually indiscernible Rules in subordinate legislation. We have sought an understanding from representative of the MDBA, the ACCC and the Commonwealth Water Department as to how these Rules will integrate with the *Trade Practices Act*, the *Corporations Act* and the relevant activities of the ACCC and ASIC. We were unable to determine if legal advice has been taken on this. In the event that it has, such legal advice has not been released.

NSWIC submits that significantly more thought, analysis and consultation must be undertaken in respect of these two Rules and the outcomes sought by the MDBA and the ACCC in this respect.

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Chapter 3 – Submissions in Respect of Social and Economic Impact Analysis

Executive Summary

The economic studies commissioned by the MDBA for the proposed Basin Plan have provided inaccurate and unreliable results and have misguided policy actions.

The main economic tool used for the evaluation of the proposed Basin Plan was a cost benefit analysis (CBA) that was meant to compare all current and future economic costs with any potential future benefits.

Inaccuracies in the economic cost analysis;

- The economic cost studies have used static and long term economic modelling that underestimated the economic costs to industries and communities in the Murray Darling Basin. Key limitations include;
 - Unrealistic assumptions on perfect flexible labour and capital markets;
 - Insufficient understanding of realistic factor substitutability;
 - Disregard for prevalent financial constraints and changing Basin conditions;
 - Inadequate analysis of individual and cumulative regional effects;
 - Inaccurate hypothesis on water buybacks and proceeds; and
 - Utilisation of outdated economic data.

Inaccuracies in the economic benefit analysis;

- The economic benefit studies have used simplified economic modelling and inappropriate data that overestimated the economic benefits of the proposed Basin Plan. Key limitations include;
 - Use of proxy data to evaluate environmental benefits;
 - Reliance on scenario analysis and survey data which are prone to misspecification and response bias; and
 - Utilisation of benefit transfer functions to obtain estimates in regions where no data is available.

Recommendations:

- Inclusion of a new, updated and realistic data set that accurately reflects current Murray Darling Basin conditions;
- Use of precise and realistic assumptions in the economic modelling; and
- Application of a non-linear framework that determines the optimal quantity of environmental water.

Submissions

After continuous criticism by NSWIC about the socio economic impact analysis of the Guide to the Proposed Basin Plan, it comes at a great disappointment that there has been only an increase in the quantity of commissioned reports but not an improvement in the quality of the analysis.

The inadequate socio economic analysis in the Guide to the proposed Basin Plan claimed that the Basin Plan would cause job losses in the magnitude of 800 and a productivity decline valued at around \$800 million. These highly doubtful results were a direct consequence of the data sets and techniques used in the economic modelling commissioned by the MDBA (see Economic Considerations to the Guide to the Proposed Basin Plan). Given the extended time frame since the release of the Guide of the Proposed Basin Plan it is unacceptable that the results presented in the proposed Basin Plan differ insignificantly from the previous economic impact analysis.

The new overall findings by the commissioned report suggest that the proposed Basin Plan will have minimal impact on Basin communities with only an upper limit reduction in Gross Value of Irrigated Agricultural Production (GVIAP) of -4.3% (ABARES 2011).

Changes in employment were estimated to range between -1600 and +300 depending on modelling assumptions on water buyback proceeds and no explicit quantitative results for productivity declines were provided in the new economic impact analysis.

It was the hope and expectation of NSWIC that the additional time frame and the funds provided to the MDBA would be used for more accurate and verifiable economic modelling and precise community consultation and would therefore show more sensible and precise results. Unfortunately, this has not been the case.

After careful examination of the data and the modelling techniques used in the socio economic impact analysis, the following key limitations were observed;

- *Uncertainty*

There remain substantial uncertainties over key areas of policy implementations which prevent a detailed and accurate evaluation of the economic impact of the proposed Basin Plan. These uncertainties include the limited information on shared reductions, the timeframe over which water will be recovered for the environment and the magnitude of the Water for the Future programs. Additional uncertainties include insufficient details on the Environmental Watering Plan and the trading behaviour of the Commonwealth Environmental Water Holder (CEWH) in the water trading market.

In the absence of this vital information there is only limited capacity for the economic modelling to provide accurate and precise results on the likely economic costs of the proposed Basin Plan. Should these critical details remain uncertain, then any estimation on size and distribution of the economic costs will be approximations at best. To be more specific, in case these uncertainties are not resolved in the near future then the estimated economic cost will likely to be much greater and the current estimated cost figures will be unsuitable for the use in the MDBA's cost benefit analysis. Support for this claim can be found in the report provided by Monash University:

only slow and clearly outlined permanent water entitlement buyback process will help alleviate losses in farm output over time as farmers are able to forward plan their decision making. (Monash, 2010)

Given the degree of uncertainty, the ability of farmers to plan for the future is limited by the information currently available which may lead to reduced farm management efficiencies.

- *Data*

The data set used in the economic modelling remains limited and outdated. The limitations are evident in the estimation of key baseline parameters which are modelled against ABS 2005/06 data. Given the dynamic changes to land and water use in the Basin area, a data set from 2005/06 will have limited predictive power for the analysis and reflects the one sided and skewed analysis that was undertaken by the MDBA.

Given previously raised criticism about the 2005/06 data set, it remains the viewpoint of NSWIC that the data set should be withdrawn and replaced by a new, updated and accurate data set. Using a one year data set from 2005/06 is not only too simplistic but also highly biased towards the condition prevalent within that year. In 2005/06, Australia experienced a prolonged drought which greatly distorted commodity and water prices. It should be remembered that irrigators who continued to produce in 2005/06 did so in full knowledge that substantive losses had to be incurred to maintain operations. These losses were necessary to keep permanent plantings alive but meant that irrigators faced a substantial erosion of their equity capital.

Besides from the inappropriate nature of the data set to represent the Basin wide conditions in 2012, the data also does not capture the dynamic changes in land water use that have occurred since 2005/06. The often quoted impact mitigation process through land and water substitution become irrelevant in case these factors of production have already been adjusted over the past five to six years. As can be observed in the NSW Office of Water Irrigator's survey 2010, the percentage area for various irrigated crops has drastically change since 2006. In the Murrumbidgee for example, the percentage area dedicated to rice production has decreased from 16.8% (2006) to 7.1% (2010), whilst wheat production has increased from 27.7% (2006) to 47.5% (2010). Associated with the changes in the area dedicated to specific crop production, the application rate (ML/ha) has also changed for several crop types. Grapes for example show a substantial decrease in ML/ha in the Murrumbidgee with 3.1 ML/ha in 2010 compared to 7.6 ML/ha in 2006. Additional to the relevant information gathered through the irrigator's survey released by the NSW Office of Water, the 2011 census would provide additional data that could help assessing the impact of the proposed Basin Plan on Basin communities.

- *Static and long term economic modelling*

In line with the submission to the Guide to the proposed Basin Plan, it remains the opinion of NSWIC that the economic modelling is mostly long term and static in nature and hence not able to capture the dynamic changes in water and land-use in the Basin Area. The large static characteristic of the economic modelling can only provide a snapshot of the economy at a given point in time and cannot illustrate

adjustment processes in the intermediate phase. As an example, should the often assumed substitution effect between irrigated and dry land use have already taken place, then the results on GRP and GVIAP are not reflective of the actual impacts in the Basin area as no further substitution might be possible. Reduction in GRP and GVIAP might therefore be substantially larger than estimated.

Furthermore, the basis of the economic modelling is a Computable General Equilibrium model (CGE) which creates a stylised version of the Australian economy and uses a neo classical framework with linear functions.

It is well known that a neo-classical framework creates a utopic image of the economy in which households are assumed to be utility maximiser based on rational decision making and producers are cost minimiser based on profit outcomes without any consideration of wider social issues. Such constraints on rationality and perfect clearing markets are unlikely to be met in a real economic environment such as the Basin area.

If the equations are modelled linearly, it is not surprising that the results obtained are also linear. In the context of the proposed Basin plain, this is evident in the equal proportional reductions in GVIAP as a result of decreased water availability. This direct relationship between GVIAP and water available is a clear design fault of the original model and shows how crucial an initial model specification is for the overall economic results. Instead of modelling the relationship between environmental water and economic costs in a linear framework, it is desirable to consider non-linear relationships with potential threshold effects. Since the Guide to the Proposed Basin Plan, threshold effects have continuously been ignored in all of the economic modelling commissioned by the MDBA. Ignoring threshold effects however ignores the fact that there might be maximum points beyond which further water reduction will have detrimental effects on regional activities whereby certain producers might be forced out of the market. The effect will magnify if the water reductions set a chain reaction in motion whereby distribution and other service sectors reliant on agricultural production will also collapse. Given the great interdependence between these industries, these threshold effects will be of significant importance for the analysis.

- *Ceteris Paribus Analysis*

Contrary to standard economic convention, the MDBA has continuously ignored ceteris paribus assumptions which would isolate and highlight the economic impact of the proposed Basin Plan from other exogenous events. As an example, the job losses attributable to the proposed Basin Plan are often claimed to be offset by future job gains as a result of projected future economic growth. Future projected growth should be seen as an independent event and not as an offsetting feature of the proposed Basin Plan.

However if such practice is acceptable, then attempts should be made to also incorporate other external factors that are likely to have a large impact on the Basin communities. One factor that requires a more detailed analysis is the effect of possible climate changes on agricultural production. A privately commissioned report by Deloitte's Access Economics has tried to estimate the interaction effects between SDL implementation and future climate changes in the context of the proposed Basin Plan and showed that the economic effects are disproportionately

larger should future climate condition be drier. It is therefore apparent that other exogenous factors (climate change and changes in other input costs) need to be incorporated to obtain a comprehensive picture of the economic impact of the proposed Basin Plan.

- *Financial constraints*

The prolonged drought and the repercussion of the global financial crisis have caused severe financial capacity constraints for businesses and communities in the Basin area. Since 2005/06, rural indebtedness to all banks has risen from \$43 546 million to \$60 362 million in 2010/11, and associated interest payments have increased from \$3 249 million (2005/06) to \$ 4 911 million (2010/11). These high debt servicing costs and interest related expenses have caused numerous problems for Basin communities and severely limited the financial adaptability of individuals in the area. Evidence of this limited adaptability can be found in the recent Irrigators Survey published by the NSW Office of Water, in which it is indicated that one of the common reasons for selling permanent water entitlements is the desire to reduce individual's debt levels. 53.5% of the respondent in the 2010 survey have stated that they sold water on the permanent market for debt related reasons compared to 33.8% in 2006.

Related to rising rural indebtedness, the proposed Basin Plan will have also a strong negative impact on land values in the Basin area and future credit worthiness of individual irrigators. The proposed lower water availability will depress the asset value of irrigated agricultural land as output and yield will be substantially reduced. The reduced availability to a key input like water will cause irrigated agricultural production to scale down or force a substitution to dry-land production. Whilst a small proportion of irrigated land can be substituted to dry-land production, the yields sustained will be substantially lower and highly dependent on prevalent climate conditions. In general, it can be assumed that the substitution to dry-land production will not lead to a sufficient compensation for the loss in irrigated land value. Hence lower irrigated land value will cause a reduction in equity capital which will have a detrimental effect on the creditworthiness of individual irrigators in the Basin area. One direct effect would be the reduction in regional lending due to increased credit risk as less collateral can be provided as a guarantee.

- *Substitutability of agricultural land*

The economic modelling assumes that the sale of water entitlements by individuals with a water access licence will cause a substitution from irrigated agricultural production to dry-land production. The yields sustained through this switch are supposed to partially offset the losses of irrigated agricultural production.

Such a simplified substitution effect might not be possible as some land is specifically designed for irrigated agriculture production and hence unsuitable for dry-land production unless large costs are incurred to make the land equally efficient. The inefficiency of ex-irrigated farms occurs as a result of land wastage where channels, drains and roads for previous irrigated activities existed but are now redundant. Fields of previously irrigated farms are also generally smaller and existing irrigated equipment sometimes obstructs the operations of dry-land

production. Examples exist where irrigated infrastructure had to be removed to make the farmland more efficient.

Where a substitution to dry-land production is possible, obtained yields are generally substantially lower. As the Guide to the proposed Basin Plan suggests, the average gross value of irrigated agricultural production at the Basin scale is 3,295 \$/ha compared to \$184/ha for dry-land farming. On an industry specific scale, data gathered by Cotton Australia between 2000/01 - 2009/10 suggests that the ten year average yield on irrigated cotton in NSW lies between 7.3 b/ha and 9.4 b/ha whilst dry-land cotton produces yield less than half (2 b/ha - 4.3b/ha) in the same region. These vastly different outcomes show that the substitution to dry-land production is often infeasible or only attainable at large costs to irrigators. As a result; lower obtained yields will have greater flow on effects on agricultural related supply chain industries where employment in the retail and wholesale sector, transport, finance and machine repair industries will be at risk.

Should an irrigated farm be converted into a dry-land operation, then the crops available for production will be generally limited to wheat, barley, chickpeas, cotton and sorghum. The often quoted substitution to high valued horticulture products is often not possible, as high security water entitlements groundwater access is needed to execute this step.

Furthermore, some of the economic modelling assumes that there will be a further substitution between factors of production where water use will be replaced by higher capital and labour utilisation. This degree of factor substitutability is highly questionable as labour and capital cannot replace a vital input like water in the production process. Hence the assumption that there will be minimal changes in output due to a high degree of land and water substitutability is unlikely.

- *Labour & Capital mobility*

In line with the previous submission to the Guide to the Proposed Basin Plan, NSWIC strongly criticises – and entirely rejects – the assumption of perfect labour and capital mobility.

It is clear that near to perfect factor mobility is an unrealistic assumption in the context of the proposed Basin Plan. Not only does a natural rigidity exist in the labour market but individuals will have to incur several adjustment costs related to switching occupation. In light of the imposed stylised assumptions it is not surprising that the employment effects are minimal with estimates ranging from -1600 to +300. If workers and capital can freely move within or between regions, then individual 'A' who loses his job as a result of lower water availability in one region is assumed to be able to reallocate to another region for work; without any additional costs. In reality, adjustment costs for redeploying labour and capital are not negligible as individuals will have to incur reallocation costs and learning costs if they change employment. These labour adjustment costs will mean that the economic costs of the proposed Basin plan are much larger than estimated in the economic modelling. All employment figures are also quoted as net figures, hence the reduction in employment in one region is assumed to be offset by the gain in employment in another region. It is obvious that this convention fails to capture the actual employment effects as those individuals who lost employment in one region might not easily find another occupation in the area.

Under the assumption that labour is perfectly mobile, then it needs to be realised that wages have to adjust downwards to keep the labour market in balance. The reason for this arises because a decrease in water available for consumptive use will affect output adversely. Lower output and associated lower labour demand will only lead to reasonable stable employment if workers accept lower nominal wages. If wages are taken as a proxy for welfare, then the employment figures quoted by the MDBA only show a partial picture of the economic impact of the proposed Basin Plan. Additional to the net employment changes quoted by the MDBA, the economic modelling also does not capture the inter-temporal transition phase between long and short run labour adjustment. It is likely that the inter-temporal adjustment costs will again play an important part in the overall labour adjustment and will magnify the economic costs in the short run.

- *Agricultural commodity prices*

It is the great concern to NSWIC that lower water availability and hence lower agricultural production might lead to an increase in domestic commodity prices. NSWIC is aware that Australia is in most cases a price taker in world agricultural commodity markets, but would like to stress that a substantial amount of high quality agricultural products are also supplied to the domestic market, particularly fresh produce. Medium grain rice would be an example of a high quality Australian product that is supplied to both the domestic and international market. Under good climate conditions, Australian rice growers are able to produce up to 1 million tonnes of rice in any given year of which around 80% is exported to the Middle East, North America and Asia.

Should less water be available for agricultural production, then there will be a scale down in domestic output which will not only lead to a decrease exports but also an increase in the prices of domestically supplied agricultural products where restrictions prevent the importation of substitute goods.

Additional to water reductions, climate change could also have a further adverse effect on future commodity prices. As could be observed in recent years, high variable climate conditions in Europe and Asia has lead to a global shortage in main agricultural products like wheat and rice, which have varied in price substantially. Wheat prices have fluctuated more than 100 AUD/MT between January 2010 and January 2011. Other agricultural commodities like canola and soybeans have also seen large price fluctuations since 2006. Given an average price of around 350 CAD/t for soybeans and 400 CAD/t for canola, recent observations show more severe prices fluctuations which cause greater risk and uncertainty for individual irrigators. The greater risk is a consequence of a scale down in output that leads to an increase in per unit cost. As the equal high fixed costs have to be incurred for smaller quantity of output, irrigators will be less likely to take advantages of economies of scale and hence will see a decrease in profitability.

- *Buyback Proceeds & Timeframe*

NSWIC raises concerns about the modelling assumption that proceeds from water buybacks will remain within regional communities with stimulating effects on regional communities. Furthermore, it is assumed that water buybacks occur over a

long time horizon and hence allow communities to adapt to new water allocations through redeploying labour and capital to other productive use.

Given the large financial constraints that individuals and communities currently face due to the prolonged drought and the GFC, the assumption that additional capital remains within the communities is not realistic. Lower consumer confidence as a result of remaining uncertainty about future water allocations and recent spikes in energy prices, will likely lead to lower propensity to consume. Should proceeds from water buybacks be used to reduce individual's debt levels, and hence leave local communities, then the impact of reduced water availability will be even more severe than the economic modelling suggests. So far, the water buyback proceeds are modelled to insulate regional service sectors from the impact of the proposed Basin Plan but should those funds leave the area, then these sectors will be most severely exposed to the water reductions. As it is yet unclear whether those funds remain within local communities it will be difficult to estimate the impacts on regional communities and those industries that heavily rely on irrigated agricultural production.

Additional to the assumption that water buyback proceeds remain within the Basin area, the economic modelling has also included previous buybacks into the baseline scenario without accounting for any previously inflicted economic costs. This assumption is flawed as previously purchased environmental water has already constrained regional economies and changed the amount of water that is currently tradable in the water market. These impacts should be quantified and added to the economic cost of the proposed Basin Plan.

The previous submission by NSWIC has pointed out that the economic modelling assumes at least a 20 year time horizon for the water buybacks so that individuals are able to adapt and use all information for perfect foresight decision making. The problem remains that the legislative document has not specified where and when water will be recovered from individual communities, hence the speed and magnitude of the water recovery remains uncertain. The uncertainty of how the shared reductions are divided between Basin areas gives individuals and communities less than perfect information and creates additional constraints for Basin communities.

- *Water recovery process*

NSWIC is of the opinion that substantially more attention should be given to water saving infrastructure projects as their long term benefits far outweigh those of buyback approaches. Extending infrastructure projects could help reduce economic costs without reducing environmental benefits. The benefits from increased infrastructure investment are evident and include;

- Short term employment within the Basin region and associated increase in labour productivity as more water efficient infrastructure will free up labour and capital to be used in other productive activities that can potentially increase output per land unit. This factor might be of significant importance for smaller business that will be able to adapt to lower water availability through heavy utilisation of labour in other productive processes. A retention or

growth of small to medium businesses could therefore be the result of such water saving infrastructure investments.

- Substantially lower quantities of water will be lost in the transitional process as less water is exposed to seepage and evaporation especially during future dry climate conditions. This would leave a greater total quantity of water available for both the environment and irrigation.
- The establishment of a form of drought insurance. Should Australia again experience an extensive drought period, then water will become more valuable and the price of water in the market is likely to rise. Given the lower quantity of water that is traded in the water market due to the involvement of the CEWH, prices of water will increase even more severely. Should water delivery in such a scenario be secured through infrastructure investment projects then they could be regarded as highly reliable water supplies and hence make these infrastructure investment projects substantially more valuable over the long term than water buybacks.

Infrastructure projects should be seen as a real alternative to water purchase as it will leave Basin communities more resilient in the future.

NSWIC acknowledges the commentary of the MDBA that focus ought be placed on infrastructure programs, but notes that it is contained in supporting material only and not in the proposed legal instrument. Until – and unless – this focus is incorporated into the instrument, the commentary is merely agreeable rhetoric.

- *Climate change*

Greater variability in climate conditions and the possibility of more frequent drought periods will exacerbate the impact of water reduction on irrigated agricultural production. Many of the economic modelling claims that environmental water demands peak at different times to irrigation water demands however this might not be the case for perennial crops whose water demand will synchronise with environmental demands in dry periods and hence leave insufficient water resources for irrigated activities. High water prices and insufficient water available in a drought could potentially render certain agricultural activities unviable and hence lead to collapse of whole industries and communities.

Deloitte Access Economics has estimated that the impact of the prolonged drought in the early 2000s had a substantial impact on agricultural production and employment in the Basin area with employment losses close to 6000. The low water availability together with high environmental water requirement could fundamentally change the productive capacity of the Basin area and lead to large scale collapse of regional production and the associated service sector which makes up around 75% of the Basin workforce.

A need to include climate changes in a more sophisticated way than 'dry', 'normal' and 'wet' years would help to project more accurately the economic costs for Basin communities in a drier future climate. Not including these external factors will certainly underestimate the economic impact of the proposed Basin Plan.

- *Flow through effects*

The magnitude and distributional effects of the proposed Basin Plan on agricultural related industries is not well captured in the economic modelling as the links between primary producers and related supply chain industries are still not well researched. Community consultation has revealed that the flow through effects on supply chain industries and agriculture related service sectors are likely to be widespread but the economic analysis is limited to a qualitative evaluation and does not feature in any of the economic modelling done by either ABARES or Monash University. It will be of substantial importance that the information gathered through the community consultation is incorporated into the economic modelling to provide a detailed picture of the economic linkages in the Basin area.

As the irrigator's survey released by the NSW Office of Water has revealed, there is a very high percentage of farm expenditure in those towns that are in close proximity to the farms. In the 2010 survey, the mean percent farm expenditure occurring in the nearest town ranged between 49.9% in the Lower Murray Darling/Murray to 79% in the Central West. This high expenditure shows that agricultural activities have a substantial link to other businesses and service sectors in the area.

- *Regional effects*

After continuous criticism by NSWIC on the insufficient valley by valley analysis, it appears that the economic modelling still only considers large scale economic impacts in the whole Basin area. Trying to decompose the Basin wide results into small scale regional effects unfortunately show several inconsistencies. Fringe areas within a particular modelled region are shown to be more heavily affected by the reduction in water available than central towns within a region. This clearly does not show the interconnections between the agricultural sector and other industries located within a Basin community and therefore highly question the validity of the obtained results. A statement by ABARES reports shows these limitations clearly;

While large scale economic models are suitable for analysis at broad regional (i.e. catchment) levels, they are limited in their ability to provide accurate estimates at smaller geographical scales. (ABARES 2010).

Furthermore, regions in the economic modelling are not consistent between each commissioned report and do not match with the MDBA regional classifications. The economic modelling undertaken by ABARES has used only 7 regions whilst the MDBA has selected 19 regions in total. Canberra has also been incorporated into several commissioned reports even if stakeholders, including NSWIC have continuously argued that the inclusion of Australia's capital city with its comparatively large population and diverse employment base will substantially distort the economic impact analysis.

- *Water Trade (Permanent)*

It is a major concern of NSWIC, that the structure of the water market has been substantially altered with the involvement of the Commonwealth Environmental Water Holder (CEWH). Given that the Commonwealth environmental water portfolio comprised of approximately 1,050 GL across 21 water sources / catchments at the end of September 2011, the CEWH can be regarded as a major participant in the water market with substantial market power and potentially significant trading constraints. Whilst a discussion paper on the *Commonwealth Environmental Water - Trading Arrangements* has been released, there remains substantial uncertainty whether the CEWH is able to trade. Should trade of water entitlements or allocations not been allowed due to legislative constraints, then this could impose significant inefficiencies in the water market and potentially lead to large scale economic losses for irrigators.

If water trading by the CEWH is prohibited, this would mean that a substantial amount of water entitlements are taken out of the market in times when water might be needed for irrigation and the water demand for iconic environmental sites is low. This reduction in water available to irrigation might cause substantial losses for individual irrigators and might mean that potential gains from trade will not be utilised.

Furthermore, the water demand for environmental iconic sites will not likely remain static over time and it will be necessary for the CEWH to adjust its portfolio to optimise the environmental outcomes in order to comply with the Water Act 2007. Should trade of the CEWH not be allowed then this could potential increase the inefficiencies in the market.

The discussion paper on *Commonwealth Environmental Water - Trading Arrangement* suggests that water trading might be used as a risk mitigation technique that is able to assist irrigators in case where water demands differ between environmental water use and consumptive use. The difficulty will arise if the CEWH has to comply with the objectives of the Water Act and the environmental demands synchronise with the irrigator's water demand, as there might not be sufficient water available for consumptive use.

Additional to the economic modelling undertaken on the cost side, the economic evaluation of the environmental benefits also shows major limitations;

- *Benefits to individual environmental sites*

All economic benefit studies admit that only estimates for total marginal changes in environmental quality can be obtained whilst economic values of specific iconic sites cannot be calculated. This makes the assessment of the direct link between additional environmental water and the improvement of individual environmental sites difficult and questions the necessity of the water reduction in the scale of 2750 GL. Since the benefits of a specific SDL figure cannot be separately valued there is no way to determine the direct effect on a particular environmental site. As one of the economic benefit studies argues,

..ecological response depends on the flow characteristics and not the change in long term average flow volumes. (ICE 2011)

The proposed Basin plan is also not specific on the time frame for the delivery of the environmental benefits. A specific timeline should be set for when specific environmental targets have to be met so that an accurate and verifiable auditing process can be put in place that evaluates the effectiveness of the Proposed Basin Plan.

Furthermore, NSWIC has doubts that environmental benefits can be modelled as a linear increasing function to an increase in water availability for the environment. This is a highly simplistic assumption and does not illustrate the functioning of an ecosystem in the Basin area. Non-linearity and threshold effects should be considered to provide a more accurate representation of the environmental benefits.

NSWIC would like to further highlight that certain environmental assets within the Basin area have been treated as special cases whilst Basin communities have been largely modelled as homogenous. An example of a special environmental asset is the Coorong which has been treated as an exceptional case for the environmental benefit evaluation in the CIE 2011 study. It is the opinion of NSWIC that such favouritism should be avoided under all circumstances as it skews possible policy responses towards certain areas.

- *Direct and indirect use value of environmental assets*

NSWIC acknowledges that environmental benefits are inherently difficult to measure as markets for ecosystem services rarely exist. It is therefore a concern that the Proposed Basin Plan suggests that the environmental benefits will likely to outweigh the economic cost. Evaluation of environmental benefits with the currently available techniques and existing data are inherently imprecise and biased towards conservationist policies.

While the valuation of current environmental benefits with existing market data is acceptable in certain circumstances, it is unsuitable for forecasting future benefits as the environmental conditions within the basin area are constantly changing. The available data represents only a snapshot in time, and future environmental benefits are unlikely to be assessed accurately.

It is a further concern that the environmental benefit evaluation assumes that higher levels of environmental water will result in greater environmental benefits and hence an increase in market prices for environmental assets. This implicitly suggests that individuals will utilise all newly available resources even if predictions on how individual behaviour change is not straightforward. It is highly doubtful that there is a one for one relationship between additional water and higher direct use value since not all identified iconic sites are directly accessible for the general public. As the results from the CIE study show, the highest environmental benefit values were obtained from the projected recreational use values of environmental sites. Should this change in use value (i.e. recreation) not occur, then the estimated benefits obtained from the studies would likely be considerably smaller.

Furthermore, the reliance on travel costs and housing price data as a substitute measurement to evaluate environmental benefits is often imprecise. Questions remain as to how these values can be used to make predictions on the actual achieved environmental benefits of the proposed Basin Plan given that many other factors (i.e. current economic environment or increased uncertainty about future developments) will influence the prices of real estate for example. It is often difficult to isolate these effects and arrive at a reliable estimate for environmental benefits.

- *Non-use values of environmental benefits*

Non-use value estimations are even less reliable than use value techniques as they depend on survey data and scenario analysis. The techniques are imprecise, both in terms of their ability to deliver reliable data and to provide correct survey results. Survey data has an inherent response bias since only those individuals who feel strongly about a topic will answer the questionnaires and hence respondent's willingness to pay will be overstated.

There are further problems with the design of individual surveys as they might be biased towards a particular response. The phrasing of a question can direct individuals to particular responses and hence overstate the willingness to pay for a particular environmental asset. Small changes in the wording or the order of a question can also lead to significant changes in survey responses. It is important to keep in mind that respondents must interpret the meaning of the question, search their memory for relevant information, integrate this into a judgement and communicate the judgement to the interviewer. Although some individuals are motivated to make the effort, others may become impatient, disinterested or tired. Instead of providing an accurate and comprehensive answer, individuals often give a response they believe is acceptable. Hence the value that people attribute to a particular environmental asset does not necessarily show their actual valuation for the environmental site.

Furthermore, surveys are affected by framing effects. It was admitted in some of the environmental benefit studies commissioned for the Proposed Basin Plan that the responses of individuals were not always comparable as each interviewer asked about slightly varying attributes of different rivers or wetlands. An additional limitation of survey arises from the inherent problem that individuals often recall past events which does not allow them to evaluate the question objectively. This can skew the results to a more conservationist viewpoint.

Scenario analysis has similar problems to survey evaluation as carefully designed and realistic choices must be presented to respondents in order to obtain reliable results. The phrasing of the scenarios is again of crucial importance as it can cause bias in the results. One of the key problems is that individuals are often inconsistent in scenario responses as they find it difficult to distinguish between marginally different outcomes. Slight variations in the health of a particular wetland might not be distinguishable for an individual and hence lead to indifference.

Given the imprecision of the evaluation tools, it is no surprise that some of the estimates for environmental benefits have such large variations in outcomes. As an example, it was claimed that the

avoided costs from the lower Murray dairy swamp in South Australia have a filtration value of \$1,180 to \$12,700 (Morrison 2010).

- *Benefit transfer functions*

Even with the application of *use* and *non-use* valuation techniques, data on environmental benefits is scarce in certain regions and hence benefit transfer functions have often been used to extrapolate existing data for the estimation of environmental benefits in regions where no data is available. It is the opinion of NSWIC that such methodology rarely gives precise estimates for aggregate benefits, especially given the size and the diversity of the basin area. It is certainly questionable if such an approach should be used to weigh up the environmental benefits against the significant economic costs that will be imposed if the Basin Plan is implemented in its current form. Transferring benefit values implies that the unique characteristics of a particular wetland can be transferred to another to estimate individual's willingness to pay for other environmental sites. As there are hardly any measures that allow for the decomposition of environmental sites, it is difficult to identify which characteristic should be used to transform the willingness to pay between particular sites.

As has been shown above, there exist several problems with the evaluation techniques and data sets used for the economic impact analysis of the proposed Basin Plan.

Recommendations

In line with the objectives of the National Water Initiative (NWI), the proposed Basin Plan has to achieve a triple bottom line result that balances economic, environmental and social outcomes. In the submission of NSWIC, the Draft Plan does not achieve this.

To achieve such a balance, the MDBA needs to gather sufficiently suitable data on all benefits and costs associated and apply an appropriate evaluation technique to assess the viability of an environmental policy like the proposed Basin Plan.

The main economic tool used to evaluate the feasibility of a policy like the proposed Basin Plan is a cost benefit analysis (CBA) that compares all current and future economic costs with any potential future benefits of the policy. The prerequisite for a reliable and consistent CBA is that all costs and benefits can be quantified and converted into today's dollar value. A policy should only then be chosen if the value of the benefit side is greater than the value for the cost side.

In the submission of NSWIC, an optimal policy would be one that achieves a balance between environmental, economic and social outcomes and takes into consideration the following three uncertainties;

- Uncertainty relating to the scale and timing of environmental benefits. The extent to how an ecosystem improves over time has not yet been researched sufficiently as data and estimation techniques are scarce and imprecise. Substantial scope for improvement is available in this aspect.

- Uncertainty relating to the current and future economic costs associated with the proposed Basin Plan. Given the limitations of the long run economic modelling conducted by ABARES and Monash University, a comprehensive evaluation of the direct and indirect costs associated with the proposed Basin Plan remain limited, especially in light of the regional ambiguity over key policy aspects (i.e. “shared reductions” in northern and southern zones). An updated data set and a wider variety of estimation techniques need to be explored to accurately capture the cost to Basin communities.
- Uncertainty relating to the appropriate *discount rate* used in the CBA. Whilst approximations are often used (i.e. marginal return on capital), doubt remains as to whether one single figure can be found for the calculations; especially given the long term associated costs and benefits of the proposed Basin Plan.

These uncertainties are not exclusive to policies aimed at environmental aspects but the magnitude and the duration of the impact from the proposed Basin Plan will be much larger than with most other policies. An optimal policy is therefore of crucial importance in order to achieve a balanced result.

The CBA that was used by the MDBA has applied linear functions (i.e. straight lines) in order to explain the benefits and costs associated with the proposed Basin Plan. Since this runs contrary to most environmental policy analysis NSWIC proposes that the cost and benefit functions should be modelled in a non-linear way. The rationale is as follows:

It is generally understood that greater reduction in water available for consumptive use will increase environmental benefits and economic costs. However the magnitude of the benefits and costs are usually not identical for a specific quantity of water reduction imposed. If it is assumed that all possible changes to the current status quo can be measured in a range between zero and one hundred percent, we can explain how costs and benefits change with low and high levels of water reduction.

Focusing on the benefit side, we could describe the benefit curve associated with the environmental benefits as *concave*. A concave curve means that for an increase in additional water for the environment from, say, zero to ten percent will have a relatively large incremental benefit whilst increases in additional water from, ninety to one hundred percent will have smaller incremental benefits as the ecological system has already been restored to a reasonable good health.

To be more specific, an example from the Murray Darling Basin is able to illustrate the non-linear relationship between environmental benefits and additional water availability. By general convention, the benefits associated with environmental improvement will be measured by society's willingness to pay for the change in ecosystem health.

Listed as a Ramsar site in 1982, the Barmah-Millewa Forest is classified as an important environmental site that requires preservation under the proposed Basin Plan. Being home to Australia's largest river red gum forest, this particular wetland provides a habitat for a range of flora and fauna that requires varying degrees of water supply. In years of low annual rainfall, this wetland is dependent on river flows from upper catchment of the Murray River. The constructions of the Hume and Dartmouth Dam have regulated water flows to the wetland and have changed the composition, growth and regeneration of the vegetation in the downstream area.

In the Sustainable River Audit commissioned by the MDBA, the ecosystem health of the upper Murray region where the Barmah-Millewa Forest is located is classified as 'poor'. Assuming different levels of environmental water is provided to this particular wetland, the different levels of society's willingness to pay could be measured.

Not all vegetation in the Barmah-Millewa Forest relies on constant water supply as many plants have over time adapted to varying water levels. This suggests that even small additional environmental water will likely have a large ecological and visual impact on the wetland. The rationale is as follows; adaptability of native vegetation to changes in water supply has meant that during prolonged drought periods, plants will slowly deplete their water reservoirs and delay further growth until new water supply is available. Hence small additional supply of environmental water could cause reservoirs to be maintained and new plants to grow. An example of a commonly found perennial grass that does not require large quantities of water is *Phragmites Australis*.³⁵ This particular grass is able to grow in both lower and high water supply conditions and hence even a small amount of environmental water is likely to cause an expansion of this grass variety. Other vegetation like the river red gums³⁶ and other eucalyptus types are also able to grow in case of low levels of additional water and will be severely damaged if too much water is supplied as prolonged flooding depletes soil oxygen.

In line with the maintained and extended flora in the wetland, population of fish, water birds, snakes and leeches would also find sufficient feeding and hiding grounds. The numbers of these inhabitants from the Barmah-Millewa Forest might therefore also increase. The changes in the variety of flora and fauna in the wetland due to low levels of additional environmental water would be clearly visible and lead to large additional benefits to society. The extensive visual improvement of the wetland is likely to be correlated with a large willingness to pay by society measured by higher tourist revenue. Such an effect could be represented through a very steep initial benefit curve.

Once those changes have taken place, additional supply of environmental water to the wetland might further increase the biodiversity and fully restore previously depleted water storages. The visible changes to this additional water supply might however be substantially smaller. Relating to the previous example of *phragmites australis*, the higher level of water supply will not alter the growing behaviour of this particular plant substantially. River Red gums and other plant varieties will also not show a substantial change in the short run as recovery of these plants take a long time. Since the optic of the wetland is not significantly altered, tourist numbers are unlikely to increase proportional to the increases in additional environmental water. Hence the additional willingness to pay by society for this further improvement in ecosystem health might be substantially smaller as individuals will not see the added benefits to the wetland. This will cause the benefit curve to still increase but at a lower rate (i.e. flattening out of the benefit curve).

Taking this argument one step further, after a particular threshold level of additional water is reached, the wetland might be saturated and hence not require further water. Should such a threshold be reached then there will be no added benefits to society through higher quantities of environmental water. Translating this effect to the benefit curve, there will be a flattening out of the curve after a particular threshold point is reached.

³⁵ http://www2.mdbc.gov.au/livingmurray/mfat/wetland/za_phragmites.htm

³⁶ http://www2.mdbc.gov.au/livingmurray/mfat/floodplain/zd_rrgf.htm

In summary, small increases in environmental water will be associated with increasing benefits but at a decreasing rate until a maximum point is reached.

Having discussed the non-linear characteristics of the benefit side, a relationship between economic costs and varying levels of environmental water need to be analysed.

The cost curve related to the proposed Basin Plan can be described as *convex*. A convex curve means that an increase in environmental water from zero to ten percent is likely to have a smaller economic cost to agricultural production but an increase from ninety to one hundred percent will have a significant impact as the flow on effects to industries dependent on irrigated agriculture become more severe.

To be more specific, the economic costs associated with higher levels of environmental water can be illustrated in the context of a particular Basin agricultural commodity like rice. Towns like Leeton, Griffith, Coleambally and Deniliquin in the Riverina region of NSW are highly dependent on the rice industry to support local businesses and social services. Rice growing provides both direct employment through farms, mills and rice storage infrastructure and also indirect employment through supply chain services like truck driving, fertiliser and chemical provision.

Similar to the approach used for the environmental benefit side, the economic costs associated with reduced water availability are measured by society's welfare costs in the form of reduced production, employment and related services in the area.

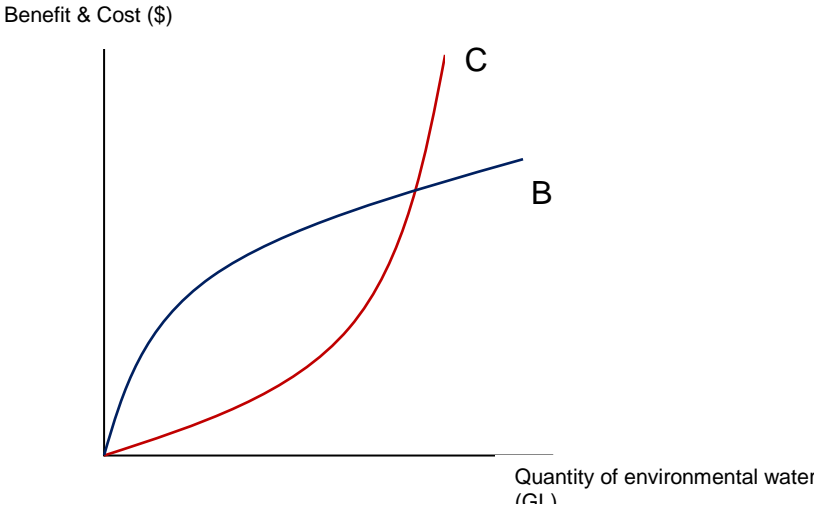
The importance of water for the rice growing industry is evident through the sustained job losses in the Riverina area during the period of 2001 – 2009 when the area faced a prolonged drought and had to adjust to changes in permanent water license availability through the involvement of the CEWH. Over this time period, SunRice employment dropped from 1048 to 368 and more than 50 back office positions were lost. These figures represent a significant number of direct rice related employment reductions as a result of lower water availability.

In general, the reduction in water available for productive use will likely lead to a scale down in rice growing activities as water is a key input into the production process. If only a small quantity of environmental water is used for the environment, then the economic costs will likely to be small as rice is able to adjust to slight variability in water supply. Irrigated rice requires varying water supply dependent on location, temperate, seepage and drainage. The average total water use in 2010/11 was around 13.52 ML/Ha rice given estimates by primary Industries. As a result of water efficiency, small changes in water supply will therefore have small economic costs. This can be represented by a reasonably flat economic cost curve for low levels of environmental water.

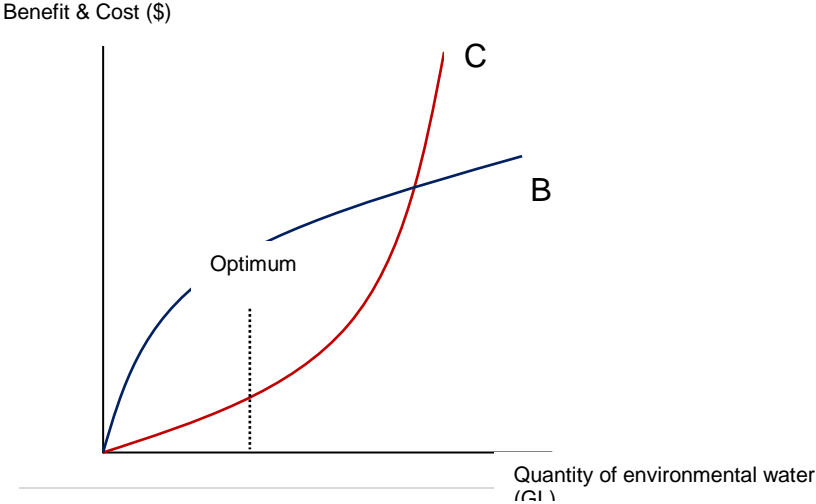
Should the quantity of environmental water increase further, then the associated costs will become more severe as rice production will decrease significantly and revenue gains for farmers will likely be diminished. To cover operational costs, certain farms are likely to lay off on-farm workers and shut down certain production lines. The greater the increase in environmental water, the more severe the effects will become until a certain threshold point is reached where rice growers are not able to cover their production cost in the long run and choose to exit the industry. If more and more farmers choose to exit the industry, then transportation and operating costs for other businesses that remain in the area will increase substantially. The resulting economic costs will quickly reach a threshold point whereby not only individual farms will be closed but mills and another associated service will shut down. The closure of these vital supply chains could then lead to the collapse of entire regional towns that highly depend on the revenue of the rice growing industry.

Hence, the economic costs will quickly become unsustainable and will spill over to other industries. We will therefore see a domino effect that might lead to substantive reductions in available employment and population in regional communities. This domino effect can be represented by a sharp increase in the cost curve after a particular threshold point.

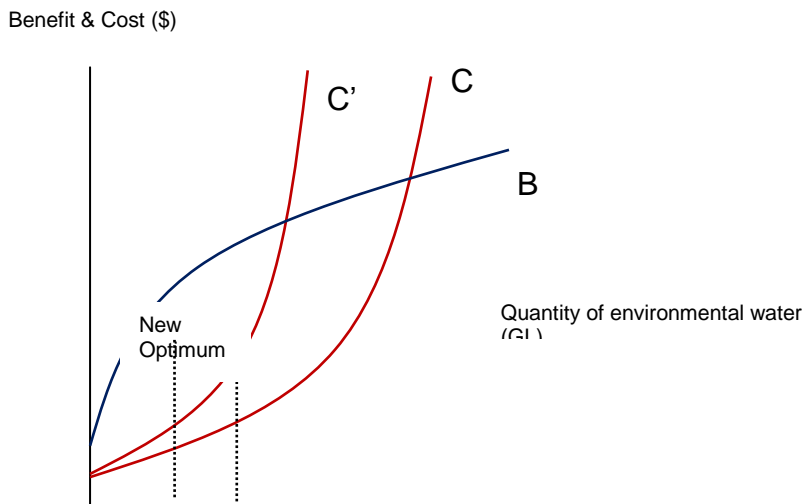
In summary, small increases in environmental water will be associated with low economic costs but these costs are likely to increase rapidly after a certain threshold point is reached. A graphical representation of the cost and benefit curve associated with the proposed Basin Plan is outlined below:



Having constructed a more realistic image of the costs and benefits associated with the proposed Basin Plan, the quantity of optimal environmental water can be determined by comparing the distance between the cost and benefit curve. An optimal level would be reached where the net benefit is maximised.



To locate this optimal point, uncertainties related to the proposed Basin Plan have to be taken into account. Uncertainties over valley specified water reductions, the speed and magnitude of the recovery process and the proportion of water acquired through buybacks or infrastructure projects will create additional costs for irrigated industries and irrigation dependent communities. These added uncertainties are likely to cause the cost curve to fluctuate within a particular band and hence makes finding the optimal level of environmental water more difficult. Fluctuations here can be represented through different slopes of the cost curves.



The variability in the cost curve creates additional restriction for an optimal policy design as too high levels of water reduction can magnify the costs and will not result in a balanced outcome for the Basin Plan. Certainty over these policy aspects should be established in order to narrow the margin of error.

The role of uncertainty in an optimal environmental policy is especially important given that environmental changes occur over a very long time horizon. It is difficult to predict all possible costs and benefits but additional uncertainties create more opportunities to miss a balanced outcome between social, economic and environmental policy goals.

Furthermore, environmental policies usually impose sunk costs on society through permanent changes in the current status quo. These sunk costs can take the form of discrete investments (e.g. installing more water efficient equipment) or expenditure flows (e.g. future price premium paid for additional energy resources that are used in conjunctions with the newly installed equipment). These long term changes are often irreversible and should be carefully taken into consideration when evaluating a particular environmental policy. A valuable example of large additional cost of newly installed water saving equipment is the building works in Rockdale feedlot at Yanco where poorly engineered construction has caused permanent fixed cost for irrigators.

The economic analysis above has shown that a correctly specified cost benefit analysis is a powerful tool to assess the viability of the proposed Basin Plan. It is the opinion of NSWIC that one cannot simply use straight lines when determining the optimal level of environmental water much less rely on legal convenience to determine a volume.

It is unfortunately that inaccurate information gathered on the benefit and cost side together with simplified assumptions on the curvature of the functions have led to vastly different policy recommendation and have misguided policy actions.

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APPENDIX ONE

**Response to ACCC
Water Trading Rules
Issues Paper**

090406

Andrew Gregson
Chief Executive Officer

Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

This document represents the views of the members of NSWIC. However each member reserves the right to 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.³⁷

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*

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

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

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

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

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

(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.

³⁷ We note that our policy was not available at the commencement of this consultation process.

Opening Statement

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

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

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

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

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

General Comments

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

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

NSWIC is comforted to see “the existence and magnitude of any barriers or impediments”³⁸ noted as a point for discussion at the outset of this paper. Our organisation will, during the course of this submission and throughout the process, continue to raise the existence of such barriers in other states. We note upfront in our submission and at the beginning of the process that the existence of such barriers and the lack of willingness on behalf of governments to deal with them threatens the entire move to Commonwealth oversight of the Basin, let alone the development of effective and efficient markets in water.

³⁸ Issues Paper, page 1.

Specific Comments

3.4.1 Interaction with water trading rules in water resource plans.

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

Whilst it is a general principle of law that a proper Commonwealth statutory instrument will prevail over a conflicting State statutory instrument³⁹, 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 Victoria) or later to be “prescribed by the regulations”⁴⁰. An explanatory note appears in Reprint 1 of the Act⁴¹ 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)* 1989⁴².

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 2010⁴³), it is entirely possible – and, in our submission, probable – that Victoria will refrain

³⁹ *Commonwealth of Australia Constitution Act* (Cth) 1900, Section 109

⁴⁰ Section 241(1)(b)

⁴¹ Reprinted 1 January 2009 with amendments up to Act 139, 2008.

⁴² 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.

⁴³ ACCC Water Trading Rules Issues Paper, Table 1.1, Page 2

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.

Answers to Questions

Chapter 5 Water Access Rights – Rules Relating to Ownership

Question 5-A Are there situations where a requirement for co-holder approval for a subdivision of a water access right should not apply?

NSWIC supports the concept of co-holder approval but submits that rules regarding such approval be instated such that approval cannot be unreasonably withheld.

Question 5-B Should the ownership of water access rights be restricted for any particular individuals? If so, on what basis?

Private Infrastructure Operators have been barred from withholding consent for trade on the basis to whom the asset is sold⁴⁴. Should any bar be permissible for a state owned entity or, as in the example given of Victoria's 10% rule, for a state itself, then an immediate and inherent inequity exists in the market.

The only consideration in terms of barring trade to certain persons should be on the basis of the Foreign Investment Review Board (FIRB). NSWIC notes that ownership of water assets is not currently within the jurisdiction of the FIRB and submits that it should be.

⁴⁴ ACCC Water Market Rules

Chapter 6

Water Access Rights – Rules Relating to Location

Question 6-A *What improvements (if any) could be made to the way in which (a) physical constraints; and (b) environmental limits are incorporated into water trading rules?*

With respect to physical constraints, NSWIC submits that information on capacity, usage and remaining allowance is vital to an effective and efficient market. As such, well defined “trigger points” need to be established, published and reported against on a frequent basis.

With respect to environmental constraints, NSWIC notes that current limitations are set on the basis of current environmental volumes. The determination to increase environmental volumes made by the Commonwealth and implements through both a “buyback” scheme and a proposed reduction in extraction volumes (the “cap”) have the potential to impose further constraints. NSWIC has long advocated – and maintains its position that – entitlement obtained for environmental purposes *must not be altered* from its original state. That is, environmental water contained within a consumptive license must be subject to the same constraints as remaining consumptive water *including environmental constraints*

Question 6-B *On what basis are water trading zones defined? Are there examples of where trading zones have been set too narrowly? Too broadly?*

Water trading zones have been defined within state jurisdictions. This has led to an inequity, particularly with respect to the narrow zones for application of 4% annual trade barriers within Victoria as opposed to the wide zones for the same barrier in NSW.⁴⁵

The width or otherwise of trading zones is not an issue – the equivalence across state jurisdictions is the key to achieving equity. They must be set consistently in each jurisdiction.

Question 6-C *What scope is there to introduce trading zones where there are none already in place?*

NSWIC makes no submission on this point.

Question 6-D *What restrictions (if any) relating to carryover should apply to the trade/transfer of water access rights?*

NSWIC submits that there is no justification for restrictions within the Water Trading Rules in respect of carryover. To put in place such restrictions potentially restricts the development of innovative water

⁴⁵ Note that the implementation of the Water Market Rules (Transformation) within NSW as of September 2009 will result in the effective removal of the 4% barrier in this state.

products. Further, such restriction is effectively a barrier to what ought rightly be private negotiations between a buyer and a seller.

Northern NSW Basin

The concept of carryover is not cohesive across the Basin. Several systems – notably those in the northern NSW sector of the Basin⁴⁶ – operate on a continuous accounting system. Continuous accounting in these systems provides for up to a set percentage, on a valley by valley basis, of storage space against entitlement. For example, in the Gwydir Valley a maximum of 150% of entitlement may be held at any one time. To some extent, the 50% could be considered carryover.

Consideration of storage capacity is clearly important in these systems. The Copeton dam in the Gwydir system, as an example, can hold 150% of issued entitlement. Once an entitlement holder reaches 150%, no further allocations are made to their account. That water then flows to other entitlement holders within that system.

Southern NSW Basin

The concept of carryover as advanced by the ACCC Issues Paper is essentially that of the Murray and Murrumbidgee systems of the Southern Basin, where allocations are made based on a water year (that is, not continuous) with the capacity to “carry over” a portion of allocation for use in following years.

Unlike continuous accounting, there is a limit on the amount that can be carried over, together with a limit (100%) on the total amount that can be stored against any one license.

Moreover, the storage capacity of these systems is significantly less than the total entitlement. That is, it is not possible to store 100% of total entitlement should carryover provisions be exercised to that extent. For that reason, a general provision is in place that carryover water is the first to spill in the event that the dams reach capacity.

Question 6-E

What are the advantages and disadvantages of imposing an adjustment for conveyance losses on the trade/transfer of a water access right? How should the adjustment be calculated?

NSWIC remains in favour of socialised delivery losses across connected systems. Adjustments for conveyance losses are justified within irrigation infrastructure operator areas on the basis of eliminating third party impact from trade.

⁴⁶ Including the Gwydir, Namoi and Border Rivers.

Question 6-F Are there any concerns with the arrangements for the trade/transfer of water allocations ('temporary' trade) between Basin states?

In NSW, water charges levied by both State Water Corporation (SWC) and the Department of Water and Energy (DWE) are in two parts; a fixed and a variable component. We understand that this is not the case in other Southern MDB states.⁴⁷

When a temporary trade occurs out of NSW to another Southern state, the fixed charge remains the responsibility of the owner of the source entitlement. The variable component, however, is not collected as the destination state has no mechanism for levying it.

This system offers a potential significant negative impact for irrigators in NSW, where adherence to the principle of full cost recovery pursuant to the National Water Initiative has been far more greatly advanced than in other states. NSWIC has calculated that this has the potential to see in excess of \$1m per annum removed from the revenue pool of SWC. In a full cost recovery environment, this will be recovered from all irrigators through an IPART determination – and outcome that is clearly inequitable.

NSWIC submits that these variable charges must be recovered, either via levying at the point of sale or by creating a virtual extraction point at the interstate border at which the variable charge accrues to the government of the relevant jurisdiction.

Question 6-G How could tagging arrangements for 'permanent' trade be improved?

The timeframes involved in permanent trade – in excess of 6 months in some examples – are a significant barrier.

Maximum timeframes for approval *by state administrative bodies* must be mandated in the Rules with penalties for non-compliance. Revenue from such penalties must be directed to the pool of cost-recovery funds to ensure the “benefit” is felt by all consumptive users in the aggrieved state.

Question 6-H Are there areas where the opportunity to trade/transfer water access rights between Basin states could be expanded? What measures would be necessary for this to occur?

NSWIC makes no submission on this matter.

Question 6-I Are there any concerns with the arrangements for the trade/transfer of water allocations ('temporary' trade) between regulated water systems within Basin states?

⁴⁷ We understand that Victorian charges are 100% fixed. We understand that South Australia does not levy a charge.

NSWIC refers to our answer to Question 6-F.

Question 6-J Should trades/transfers between unregulated systems be permitted? If so, what measures could be taken to ensure that water reaches its intended recipient.

Where hydrologically possible⁴⁸, trade should be permitted.

Trade between unconnected unregulated systems, and between regulated and unregulated systems should not be allowed.

The water resource plan needs to be flexible to allow trade, particularly with respect to flow levels on commence to pump rules.

Question 6-K What are the advantages and disadvantages of permitting the trade/transfer of a water allocation:

- (a) From a regulated system to a (connected) unregulated system?*
- (b) From an unregulated system to a (connected) regulated system?*

Do these factors differ depending on which system is upstream? What arrangements would be necessary to facilitate these trades/transfers?

NSWIC does not support trade between regulated and unregulated systems.

Question 6-L Under what circumstances should a trade/transfer between a ground water system and a surface water system be permitted?

The relationship between groundwater and surface water – connectivity – is not understood to the point where trade should even be contemplated.

The footnotes to this section suggest that the realisation of a groundwater entitlement and the reapplication of realised funds to the purchase of a surface water entitlement is a form of trade. Such rationalisation is absurd, suggesting that the sale of takeaway food, for instance, and the use of resulting funds to purchase real estate could, in fact, be considered trade between noodles and home units.

Question 6-M Are there any issues of concern about changes in the location of water access rights within a regulated system?

In any trade where the point of delivery changes, consideration must be given to physical supply constraints.

⁴⁸ Within the same system.

Question 6-N Are current arrangements sufficient to limit potential third party impacts from trades/transfers that change the location of a water access right within an unregulated system?

Water resource plans – Water Sharing Plans in NSW – must be sufficiently flexible to allow trade but, at the same time, must ensure that extraction conditions can be varied to ensure no third party impact.

Where the mitigation of third party impact is an issue, the burden of proof in determining otherwise must fall to those engaged in the trade.

Question 6-O Are third party impacts adequately addressed in relation to changes in location within ground water systems?

Ground water systems are not well understood, particularly in respect to movement of water within an aquifer. Until – and unless – the impacts to third parties can be understood and quantified, trade has the potential to cause such impacts.

The burden of proof where impacts are questioned must lie with the parties to a transfer but, at the same time, hydrological information that is currently sadly lacking ought be considered a priority by governments.

Question 6-P How could the trade/transfer of ground water access rights be made more efficient?

Three dimensional modelling of groundwater systems, undertaken by government, will provide information to understand and contemplate the implications of trade in any given scenario.

Question 6-Q Should there be any specific rules imposed relating to the trade/transfer of water access rights to locations outside of the MDB? On what basis should these be imposed?

The assumption that water is not “deliverable outside the MDB through natural water courses, but would instead rely on pumping”⁴⁹ is false. A significant portion of the flow into the southern MDB comes from the Snowy Scheme. It is possible for a portion of water to *not* be diverted, hence having it flow into the Snowy River without the requirement for pumping.

In strict legislative terms, there is no reason to create Rules preventing the trade or transfer of water access rights outside the Basin. This does not mean that NSWIC supports the notion that such a trade or transfer is acceptable politically. It is our submission that an already stressed system should not be seen as a solution for extra-Basin water requirements.

⁴⁹ Water Trading Rules Issues Paper page 39

Chapter 7

Water Access Rights – Rules Relating to Other Matters

Question 7-A *What are the advantages and disadvantages of allowing a change in the priority class of a water access right?*

The change in priority class – or *conversion* – is an aberration to the concept of a two priority system in the first instance.

NSWIC supports the current moratorium in place in NSW with respect to conversion. We do not support the reimplementation of the conversion system, particularly in light of recent experience in terms of impacts during years of low water availability.

As the Issues Paper noted earlier, an asset holder who wishes to alter the nature of their asset is able to realise its value in the market and apply the proceeds to a new asset. That is, a general security irrigator is able to sell their general security license and use the proceeds to purchase a high security license. It is in this fashion that the *market* is the best approach to determining yield on assets rather than a regulator regime such as conversion.

Question 7-B *Does defining a specific purpose for a water access right create a barrier to trade?*

Yes, although there are clearly circumstances in which such barriers are justifiable. For example, critical human needs water ought not be tradeable. To allow such trade would clearly show that the water is not critical. In the same fashion, water able to be extracted under a basic landholders or riparian right should not be tradeable.

Question 7-C *Should there be any restriction on the trade/transfer of water to urban areas within the MDB?*

NSWIC submits that there is no need for a restriction on trade. Urban areas rightly receive first priority on water to meet critical human needs. Water that urban areas *would like* over and above those critical human needs ought be able to be purchased on the market and delivered to them. For example, a local council may determine that limited watering of household gardens is warranted. Such water is not critical human needs but, if the council wished to spend ratepayers funds on obtaining such water on the market then they ought not be prevented from so doing.

Question 7-D *Should it be possible to trade/transfer stock and domestic rights? If so, what conditions should apply?*

Stock and domestic rights should not be tradeable. The capacity to trade this entitlement undermines the reason for its existence. It is attached to land and must stay that way.

Question 7-E To what extent, and how, should water trading rules provide for the needs of environmental water-holders?

Water entitlements purchasing programs have been undertaken on the basis that the source entitlement will retain the characteristics of the entitlement purchased.

Under **no circumstances** must the entitlement be able to be changed based solely on the identity of its owner.

The ACCC must understand – and must clearly report – that a rule that allows the alterations of characteristics based solely on the identity of its owner will result in the complete loss of faith in the ACCC and all environmental water holders, state or Commonwealth, as a result.

Question 7-F What are the advantages and disadvantages of requiring the possession of a relevant water use approval as a condition of approving a trade/transfer?

Contrary to the tacit position put by the ACCC in the Issues Paper, that “the continued development of a robust water use approval framework ... is critical”⁵⁰, a water use approval is utterly irrelevant to the trade of a water access entitlement.

A purchaser of water does not necessarily have to *use it* in any fashion. Use approvals, therefore, should relate to extraction permits and not the source entitlement.

For example, NSW allows “zero Water Access Licenses” which effectively allow entitlement to be purchased and accrued for later trade/transfer to an extraction point.

Question 7-G To what extent, and in what way, should water trading rules attempt to address:

- (a) Salinity*
- (b) Other environmental issues*

arising from changes in the timing and level of river flows (in contrast to the impacts on water use on land)?

Resource sharing plans and state legislation are in place to deal with issues of salinity and environmental management.

This is not a role for Water Trading Rules.

⁵⁰ Ibid, page 43

Question 7-H *Are there other examples (besides the 4 per cent rule) of volumetric limits on the amount of water that can be traded/transferred out of particular areas?*

It must be noted – and reported by the ACCC – that the 4% rule in NSW will be effectively removed on 1 September 2009 when the Water Trading Rules commence, enabling transformation in the areas where the rule currently exists. Once an entitlement is transformed, it can be traded clear of any accounting system for implementation of the rule.

The other clear example of a trade limit is the 10% rule in Victoria.

NSWIC refers to comments made at the commencement of this submission in that respect.

Question 7-I *What are the arguments for and against volumetric limits on the permanent trade of water access rights out of an area?*

The existence or otherwise of barriers – and the justification or otherwise – is a moot point.

The key point for consideration – and that which must be addressed by the ACCC – is the equivalent imposition and interpretation of trade barriers in all jurisdictions.

If, on the basis of the legislation under which these Rules will be made, the ACCC cannot deliver equivalent imposition and interpretation, then the ACCC must report to the Commonwealth the inability to create rules that are fair, equitable and capable of achieving a market reflecting those characteristics.

Question 7-J *Where water access rights are not currently tradeable, what are the advantages and disadvantages of requiring them to be made tradeable?*

Subject to submissions elsewhere in this paper, NSWIC submits that water access rights ought be tradeable.

Chapter 8

Water Delivery Rights

Question 8-A To what extent does the bundling of water delivery rights with either an irrigation right or a water access right present a barrier to, or restriction on, the trade/transfer of these rights?

The bundling of the rights is clearly a barrier to trade, although such barrier may be justifiable in certain instances. In particular, NSWIC refers to the large number of small infrastructure operators in this state and submits that the Rules must be drafted to take into account their specific circumstances.

NSWIC has, during the course of the preparation of previous ACCC paper, offered to facilitate discussions with these affected small infrastructure operators. Whilst this offer has been rejected by the ACCC, NSWIC advises that the offer remains open.

Question 8-B What are the advantages and disadvantages of requiring more explicit separation of a water delivery right from an irrigation right or water access right where these are currently bundled?

Where practicable, the rights ought be unbundled to enable separate trade.

Delivery rights are often used by infrastructure operators to effectively manage physical supply constraints. The tradability of these entitlements allows for trade of water supply to individual properties without the need for external consideration of the water right trade in terms of capacity to supply.

Question 8-C What conditions and restrictions on the trade/transfer of water delivery rights are reasonable?

As water delivery rights are effectively a means of controlling the physical constraints faced by an infrastructure operator, any conditions or restrictions must be based on those physical constraints. Given that the breadth, depth and overall size of an infrastructure operator varies from two irrigators on a shared delivery channel right up to State Water Corporation, the rules must be the subject of *extensive* consultation⁵¹ and be sufficiently flexible to allow effective and efficient implementation.

Questions D and E

Refer to the above.

⁵¹ NSWIC refers to its previously stated offer to facilitate this process.

Chapter 9

Irrigation Rights

Question 9-A *What requirements, if any, should be placed on IIO's so as to enhance the trade/transfer of irrigation rights.*

Subsequent to the adoption of the Water Market Rules, this is a moot point in relation to NSW.

The point of any such requirement should be to ensure a level playing field across states. As such, the Water Trading Rules must be written to *entirely reflect* the Water Market Rules into those jurisdictions not affected by them.

Question 9-B *What are the advantages and disadvantages of requiring more explicit separation of an irrigation right from a water delivery right, where these are currently bundled.*

The ACCC entirely ignored a submission from the NSWIC on the matter of transformation previously. That submission – solely on the matter of Transformation – dealt with this issue at length.

That submission is appended to this submission for the further consideration of the ACCC.

Question 9-C *Are the policies and procedures of IIO's in relation to the trade/transfer of irrigation rights transparent and accessible to their customers?*

This question again highlights the lack of comprehension of the large number of entities that fall into the definition of Irrigation Infrastructure Operator, their relative sizes and scales of their operations.

The question is akin to asking “does the retail industry offer the same opening hours”.

NSWIC estimates that there are some 500 infrastructure operators in this state alone. It is impossible for any entity to generalise to the extent of answering this question. Any entity that does attempt to answer the question does not understand it.

Many small IIO's do not understand their obligations pursuant to the Water Market Rules. Many are likely not even aware that they are governed by the Water Market Rules. The effort to consult with them during this process was limited, at best, and the effort to inform them after the fact has been similarly limited.

Question 9-D *To what extent, and in what circumstances, is it appropriate for an IIO to impose restrictions on the “permanent” trade of an irrigation right to another person located **within** the IIO's area? What are the specific forms of any current restrictions, and their implications?*

Subsequent to the imposition of the Water Trading Rules (Transformation) within NSW, this question is a moot point.

Again, it is imperative that the Water Trading Rules reflect absolutely the requirements of the Water Market Rules onto those jurisdictions that are not affected by the latter. Failure to do so creates further inequities across jurisdictions.

Question 9-E *To what extent, and in what circumstances, is it appropriate for an IIO to impose restrictions on the ‘temporary’ trade of water allocated under an irrigation right to another person located **within** the IIO’s area? What are the specific forms or any current restrictions, and their implications?*

Restrictions based on reasonable operations requirements are appropriate.

With respect to specific forms of restrictions, NSWIC invites the ACCC to consult with and receive advice from the estimated 500 IIO’s in this state.

Question 9-F *What are the arguments for and against linking the ability to trade/transfer irrigation rights with the possession, transfer or termination of water delivery rights against the IIO?*

There should be no requirement to transfer delivery rights, however it must be a central tenet of the rules that a delivery right is required prior to the irrigation right being able to be enforced.

Question 9-G *To what extent, and in what circumstances, is it appropriate for an IIO to impose restrictions on the trade/transfer of water allocated to an irrigation right to a location outside of the IIO’s area? What are the specific forms of any current restrictions, and their implications?*

To a significant extent, the Water Market Rules have dealt with this issue. Should trade of water pursuant to an irrigation right be restricted by an IIO, the owner is entitled to transform that right and trade from a separate entitlement.

In the case of trade from a bulk entitlement, provision for retention of conveyance losses is vital to ensure the limitation of third party impacts.

To understand specific forms of current restrictions, it is necessary for the ACCC to consult with the large array of IIO’s referred to previously in this submission.

Question 9-H

To what extent, and in what circumstances, is it appropriate for an IIO to impose restrictions on the trade/transfer of a specific volume of water from outside the IIO's area, to a location in the IIO's area?

An IIO must be able to impose restrictions based on physical capacity.

Chapter 10 Approval Processes

Question 10-A What are the practical implications of multiple approval authorities involved in the approval of a trade/transfer

The issues paper identifies the problems, viz:

“potential miscommunication between approval authorities, inconsistent information requirements, inconsistent applications by market participants or intermediaries and additional steps in the approval process”⁵²

The paper further identifies the ramifications, namely delay in approval.

Of greater concern is the statement in the explanatory statement that “complexities necessarily rise ... given that water access rights ... are rights by or under the law of a state and that changes to these rights...”⁵³

Trade or transfer of a right does not, should not and must not change that right.

It is a fundamental tenet of tagged trading that a right must retain its original characteristics. NSWIC will not support any change – intentional or otherwise – to this principle.

Question 10-B What are the advantages and disadvantages of enabling Basin state approval authorities to have direct access to each other’s registers and/or accounts for the purposes of determining or giving effect to particular kinds of trade/transfer?

NSWIC understands that the Commonwealth Department (DEWHA) is currently addressing this matter under the *Water Market System* banner.⁵⁴

This information, whilst based on State owned and controlled registers, should not be limited in terms of access simply to approval authorities. Particularly with respect to temporary transfer, real time access – practically via internet portal – must be provided to vendors and potential purchasers to enable trade platforms to operate effectively. In essence, users of any trade platform must be confident that a purchase executed via that platform is able to be settled.

Question 10-C What considerations are relevant when considering the form and manner of applications to trade/transfer tradeable water rights?

⁵² Issues Paper page 51

⁵³ Ibid

⁵⁴ Previously known as *Compatible Registers Group*

In a 21st Century environment, it is clearly necessary to allow electronic lodgement of transfer documentation to both dramatically reduce the timeframe and costs involved in the transaction.

That said, as water is a property right it must be treated with the same due diligence as a property transfer. NSWIC submits that permanent trade must remain underpinned by hard copy documentation which may still be electronically lodged.

Question 10-D Are there other legislative requirements limiting the ability of approval authorities to accept applications electronically?

The ACCC ought rightly investigate and report to stakeholders on this question. It is not the role of stakeholders to conduct legislative research.

Question 10-E Is there scope to develop application forms relating to the trade/transfer of tradeable water rights that are consistent between states? Would there be merit in doing so?

NSWIC refers the ACCC to the Water Market System team at DEWHA in this matter.

Question 10-F What are the advantages and disadvantages of allowing applications to be lodged through a single portal (to be forwarded to the appropriate approval authority or authorities)?

NSWIC understands that this is an aim being pursued by the DEWHA team.

NSWIC supports this approach.

Question 10-G What factors can negatively influence approval times? What measures should be taken to address these factors?

NSWIC notes with interest the choice of the ACCC to include in the Issues Paper information provided by the National Water Commission with respect to transfer processing timeframes. In particular, we note the inclusion of date in respect of water access entitlement trade that does not include timeframes in Victoria. The fact that Victoria *did not provide this information to the National Water Commission* is dealt with in a footnote. Such a dramatic lack of cooperative support has a significant bearing on the issue of approvals, given that the ACCC does not have the jurisdictional capacity, in the opinion of NSWIC, to enforce timeframes on a state approval authority via Water Trading Rules.

Until – and unless – each state authority that is potentially a party to a trade is either bound by or included in discussions in respect of timeframes, the discussions are baseless.

Question 10-H *What are the advantages and disadvantages of incorporating maximum approval times into water trading rules? What factors would need to be taken into account in setting these times?*

Unless such rules are enforceable against the state approval authorities, they are worthless. Moreover, NSWIC is concerned that such rules would apply only to non-government IIO's and hence contribute further to the inequities across jurisdictions.

Question 10-I *What requirements are placed on intermediaries when dealing directly with approval authorities regarding an application to trade/transfer?*

Aside from requirements to comply with relevant industry-external law (*Corporations Act, Trade Practices Act, Privacy Act* and the like), no specific law or rules governs water market intermediaries.

NSWIC has advocated and maintains a policy that water market intermediaries ought be subject to binding rules that include, as a minimum, requirements for professional indemnity insurance and the use of audited trust accounts.

Question 10-J *Do approval authorities recommend specific brokers or exchanges to water market participants? On what basis are such recommendations made?*

NSWIC is aware of anecdotal reports of such activity but has seen no evidence to substantiate such claims.

In the event that such activity was being undertaken, NSWIC would hold grave concerns for the integrity of the authority involved.

Question 10-K *Is there evidence that particular applications to trade/transfer are expedited or processed differently by approval authorities because those applications take place through a particular exchange or broker? If so, what is the justification for this?*

NSWIC is aware of anecdotal reports of such activity but has not seen evidence to substantiate such claims.

Any such activities would be highly improper and rejected by NSWIC.

Question 10-L *What influence, if any, does an approval authority's other activities have on its consideration of applications to trade and transfer tradeable water rights?*

The perceived conflicts of interest that the Issues Paper notes have the potential to become serious matters. This area ought be considered by the Water Trading Rules.

Question 10-M *Are there examples of approval authorities with conflicts of interest? If so, are measures taken to address this possible conflict? Are these measures accurate?*

NSWIC makes no submission on this matter.

Chapter 11 Reporting and the Availability of Information

General Comments

The introduction to this section of the Issues Paper deals with the harmonisation of terminology and characteristics of water products.

A primary motivation for engagement in the water market for an irrigator is the capacity to adequately manage risk in their individual operation. As the recent period of drought has clearly demonstrated, a license to access a particular volume of water does not provide factual access to that water. Each type of entitlement – within state boundaries and across state boundaries – provides a varying degree of reliability. The market clearly takes account of the reliability of any particular license type when pricing it.

Water is an input to an irrigation business. The availability of that water carries a risk. The higher the reliability of a water access entitlement, the higher its price. It is the role of an individual irrigation business to adequately manage their investment in the entitlement asset to match the risk profile of their operation.

Moves to standardise or harmonise water entitlements must be carefully considered to ensure that they are not having the underlying effect of limiting the range of water products on the market. Irrigators do not want a South Australian entitlement to be moved to have the same reliability as a Victorian entitlement (or any other myriad of combinations). Irrigators want an array of products with different reliability characteristics to ensure that they can effectively minimise their risks.

The ACCC must recognise that this is a market in which knowledge levels are, in equities market terms, sophisticated. This must be a market that emphasis the philosophy of *caveat emptor*. Should unsophisticated market participants wish to become involved, they should not be blocked from so doing – but the market must not be hobbled by the possibility that some players may need the protection of a limited product range.

Question 11-A *What issues do market participants encounter in relation to obtaining information to enable the trade/transfer of tradeable water rights?*

The availability of information is clearly an issue for market participants, but understandably so given the immature nature of the market.

Whilst NSWIC understands that the DEWHA Water Market System team is working toward central availability of information – a goal with which NSWIC concurs – accuracy is equally as important as availability. NSWIC submits that information provided from state registers must be warranted by that state to ensure confidence in a market system by market participants.

Question 11-B *How relevant are the particular characteristics of a tradeable water right to a decision to trade/transfer*

In respect of temporary/allocation trade, the characteristics are likely unimportant as the trade is simply of a volume of water.

In respect of a trade involving a permanent entitlement, the characteristics are vital as they represent the security which an irrigator wishes to apply against risk.

Question 11-C Are there particular characteristics of water access rights where greater consistency throughout the MDB would lead to more efficient markets?

NSWIC makes no submission on this matter.

Question 11-D What are the advantages and disadvantages of developing consistent terminology for use throughout the MDB in relation to the trade/transfer of tradeable water rights?

Please see our introductory comments to this section.

Question 11-E What are the advantages and disadvantages of providing information about the characteristics associated with tradeable water rights:

- (a) At a single point (e.g. a website)*
- (b) In a particular format and/or template?*

NSWIC understands that the DEWHA Water Market System team is developing a portal that will access information from state registers for both display and interrogation by trading platforms.

NSWIC supports this process.

Question 11-F What measures could be taken to make trading rules more easily accessible and transparent for stakeholders?

The ACCC needs to recognise that the water market is complex because water access entitlements are complex products. Trading rules have generally been put in place due to the complex nature of the physical delivery constraints in the market. This is not a market in equities – it is a market in a physical product with a complex supply chain. The capacity and constraints of that supply chain must be taken into account in assessing trade.

The answer to this question clearly lies within the scope of the Water Market System team at DEWHA. The development of a system that can be queried on the admissibility of a hypothetical trade will solve the issue.

Question 11-G What are the advantages and disadvantages of providing information about water trading rules and requirements:

- (a) At a single point (for example, a website)?*
- (b) In a particular format(s) and/or template(s)?*

The portal system to be developed by DEWHA should solve this issue.

Question 11-H Are there any concerns about the role of intermediaries in providing information about trading rules and other related matters to water market participants?

Pursuant to submissions made elsewhere in this document, intermediaries must be subject to a regulator regime that includes, as a minimum, a requirement to use trust accounts and to obtain and retain professional indemnity insurance.

NSWIC notes that in other regulated markets – equities, real estate, financial services – intermediaries not only require these basic customer protection mechanisms but are very highly regulated.

Question 11-I What are the advantages and disadvantages of requiring water market participants to report the price of their water trades/transfers as a condition of approval and/or registration?

NSWIC supports greater availability and accuracy of market data. In particular, we point to our recent criticism of the delay in the provision of data by the Commonwealth Government in their purchasing program. The ACCC ought point to this as the biggest flaw in the market approach taken by the Commonwealth.

As with any administrative arrangement, the costs of compliance must be considered. This is particularly relevant to small IIO's who may not, in many instances, have administrative support in any context to assist. NSWIC repeats its offer to facilitate engagement with this sector.

The costs will obviously also be borne by larger operators, with the cost eventually passed on to customers. In light of the NWI aim to move to full cost recovery, the ACCC ought consider the equity of increasing the compliance burden and cost against progress of certain states towards those aims. Unless progress is equivalent, inequity is exacerbated as a result of increased compliance burdens.

Question 11-J What practical measures could be taken to ensure the accuracy of pricing data that is reported?

Any reported data that falls into a range more than 20%, for example, outside of comparable sales ought receive further investigation from regulator officials.

Question 11-K To what extent do differences in how data (in relation to the trade/transfer of tradeable water rights) is collected, classified and reported affect the usefulness of trading volume and pricing information?

Clearly it renders the data inaccurate and hence less than useful.

Question 11-L What measures could assist in making trading volume and price data more readily available to interested parties?

This information ought be available via the portal developed by the DEWHA Water Market System team.

Question 11-M What concerns, if any, are there with the current approaches informing water market participants about allocation announcements?

All that is required is predictability and stability of the *timing* of announcements. The Water Market Rules should not interfere with the process in an attempt to create a system designed for non-sophisticated participants.

Question 11-N What are the advantages and disadvantages of water authorities providing forecasts for future water allocation announcements?

NSWIC makes no submission on this matter save and except that any announcement must be made publicly and the information must be available in full to any market participant that wishes to access it.

Question 11-O Is sufficient information available on how water allocations are calculated?

Yes. NSWIC refers to previous submissions in respect of sophisticated market participants.

Question 11-P How can the way in which a trading rule policy change is communicated affect the market?

Any provision of information can affect price. As a result, information must be handled such that it is provided to all market participants simultaneously. The “insider trading” provisions applicable to equities markets ought be replicated in water markets.

Question 11-Q What principles and procedures should be implemented in relation to the communication of policy changes that affect the water trading rules (e.g. should all stakeholders be notified of a change at the same time)?

NSWIC refers to its submission to the previous question.

Question 11-R How should the water trading rules provide for the use of registers to provide information about the trading or transfer or tradeable water rights?

NSWIC understands that the Water Trading Rules may not be enforceable against government or government owned entities. As a result, the Water Trading Rules must not impose obligations on private sector entities that are not equally imposed, with jurisdictional capacity, on public sector entities.

Question 11-S To what extent are inter-operable register between Basin states necessary to facilitate the operation of efficient water markets?

A single register is not necessary. A single portal, able to access multiple registers, will provide the information required for market operation. The information provided by the registers must be warranted in order for the market to retain confidence.



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Submission to ACCC

Transformation More Than Meets the Eye

081002

Andrew Gregson
Chief Executive Officer

Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

In making this submission to Australian Competition & Consumer Commission, NSWIC is responding with the views of its members. However, each member reserves the right to make independent submissions on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Background

On 1 September 2008, NSWIC met with Commission Ed Willett and staff of the ACCC to discuss the implications for Irrigation Infrastructure Operators (IIO's) of the Water Market Rules position paper recently published by the ACCC. IIO members of NSWIC were also present – Murray Irrigation, Murrumbidgee Irrigation, Coleambally Irrigation and Western Murray Irrigation. These entities are the major irrigation corporations in NSW and together comprise more than 5,000 irrigator customers.

These corporations are not opposed to water trade.

During the course of the meeting, the subject of Transformation was discussed at some length.

Parties present recognised that Transformation is an issue driven at a government policy level and that the ACCC has been asked to advise on rules surrounding that policy. Nevertheless, NSWIC and its members asked the ACCC to further consider the alleged benefits of Transformation and to provide the results of that consideration to government. We noted that we did not, on balance, see benefit over and above the significant imposition that it will cause.

Commissioner Willett agreed to accept a further written submission from NSWIC on this matter.

The Reasons for Transformation

IIO's in NSW to a large extent, and particularly in the case of large corporations and cooperatives, hold water as a group license. That is, the individual irrigators within an irrigation area do not hold their license directly. Instead, it is held on the group license with the individual irrigator have an equitable interest in that group license. The interest is noted on ASIC compliant registers.

In order for an individual irrigator to trade water out of an irrigation area, there needs to be a process whereby the individual license is separated from the group license to enable that trade to occur. Government has seen this process as a barrier to trade and has sought a process to remove it.

The process proposed is that any irrigator within an irrigation area must be able to separate their part of the group license and to hold it as an individual entitlement – to “transform” their entitlement from one to the other. The rules then require an IIO to deliver services to a “transformed” customer under the same terms as prior to their transformation (although we note the security provisions provided in the market rules).

This process raises a significant number of issues for IIO's and, as a result, questions should be asked by the ACCC as to the actual benefits that will accrue.

- 1. Is a Group License a barrier to trade?*

NSWIC is yet to see convincing evidence of a group license being a barrier to trade. Whilst acknowledging that submissions to the ACCC have been able to be kept confidential at the request of the party involved, NSWIC considers it questionable, at best, that no submissions suggested that IIO's have provided unreasonable hurdles in approving external trades.

It is our understanding that the major IIO's in NSW both can and will approve trades within 5 days in the event that all necessary paperwork is adequately completed and lodged.

This timeframe compares *most favourably* with the timeframes taken by government departments to approve trades – even trades within the same state.

Whilst the ACCC note that the ability to transform will be at the option of an irrigators (and hence a supporter of a group license is free to remain within the group license), NSWIC submits that external pressure (particularly from financiers) is likely to see transformation driven for reasons other than removal of trade restraints. We are unable to find a benefit for either irrigators or irrigation corporations in providing a perceived greater degree of security for financiers (a perception with which we disagree in any event).

It is no secret that irrigation areas are concerned at the potential loss of water and hence irrigated agriculture from their area. It is inappropriate, at best, to suggest that this concern has created an administrative barrier to trade without providing evidence of systematic abuse – or any evidence of abuse whatsoever.

2. *If it is a barrier to trade, can it be overcome in another fashion*

Leaving aside for a moment the lack of evidence, the ACCC should ask if time consuming, costly, draconian and counterproductive rules are the solution to a potential issue. In the vernacular, is a sledge hammer really required to crack this nut?

Alternately, NSWIC submits that the benefits of a group license can be maintained whilst ensuring that a barrier to trade is not formed by implementing rules that require IIO's to operate in a particular fashion when an irrigator wishes to sell water out of the area. For instance, the ACCC could set timeframes within which actions must occur, subject to documentation being in order. Failure to meet those timeframes could result in a penalty payment to the party concerned, or a fine from government. Systematic abuse by an IIO could be handled by an escalating penalty.

3. *Financial Security*

One of the key benefits espoused in favour of transformation has been the value of the asset as a form of security. NSWIC is aware that this view has been put strongly

by the Australian Bankers Association. We do not concur with the view and have yet to see evidence of it. In a legal context, and equitable interest is equally as strong as a direct interest in a property right. Why should this not be the case with water?

The Benefits of a Group License

Group licenses provide a wide range of benefits both for operators and irrigators.

These include:

Efficiency

Since privatisation, efficiency within NSW irrigation corporations has dramatically increased. As an example, Murrumbidgee Irrigation has achieved a 35% real reduction in costs since being privatised in 1999.

Accountability

Where customers and shareholders are from a common pool, the actions of those controlling the operator are subject entirely to the satisfaction of the customer. Put simply, a Board that does not satisfy the demands of its shareholder customers will be replaced at the next available opportunity.

This accountability results in both service levels and prices with which customers are content.

Responsibility

Unlike their interstate counterparts, irrigation corporations in NSW are governed by the Corporations Act and, as such, face normal commercial demands. They must operate at a profit. The ACCC must be mindful of the repeated “bail outs” that have been occasioned interstate. Such events have not been duplicated in NSW.

Security

Like any business, an irrigation corporation must protect its revenue stream. Such protection comes at a cost, which is obviously passed on to customers. The Corporations in NSW are able to achieve revenue security by virtue of holding a group license. Without payment of legitimate invoices, the product may be withheld. An inability to engage in this method will clearly increase operating costs (and risk), which must be passed on to shareholders and customers. Increased costs, we submit, are a counterproductive result from ACCC regulation.

Transformation – The Drawbacks

Administrative Compliance

Much of the Water Market Rules Position Paper is written around actions that will need to take place subsequent to transformation.

Aside from the administrative requirements for transformation itself, something which IIO's accept as a normal course of business, the ability for irrigators to split from a group license but still receive services creates a significant further administrative burden for IIO's, the State Government and the State Water Corporation in NSW.

Put simply, each transformed irrigator becomes both a customer of the IIO and State Water. Further, management and compliance issues for the new entity will be the responsibility of the Department of Water and the Environment. Rather than simply be government by one body, the task will effectively be "tripled up". This is clearly an inefficient use of resources which will result in higher costs for all.

Financial Insecurity

In an era of decreasing water availability, IIO's are having to manage their businesses extremely closely. It is inevitable that these businesses will have to operate with limited access to their main commodity – water.

The natural result of this management will be greater attention to cash flow. At present, the group license enables an IIO to ensure that it will be paid for its services. The result is that it does not have to charge a significant risk premium to customers as part of its operating costs and it does not have to enter into costly and time consuming legal action to recover unpaid costs.

In seeking to provide security for payment of ongoing access fees and/or termination fees, the ACCC has itself proved the administrative difficulty that will be placed on IIO's. The Position Paper published by the ACCC is, at best, confusing on this matter. Pursuant to our submission in response and those of our members, the security provisions remain inadequate in any event.

Perverse Results

A primary role of the ACCC is to ensure that consumers pay a fair price in a monopoly environment. It is clear that water delivery, due to its geographic and physical constraints, will maintain its monopoly characteristics. The ACCC must therefore recommend rules that ensure that monopoly pricing does not ensue.

The ACCC notes, in its Water Charging Rules paper, that monopoly pricing has not occurred within IIO's, attributing this to the fact that customers and shareholders are merged. In short, a Board that elevates prices to its customers above acceptable levels will be removed by the shareholder/customers.

In encouraging transformation, the nexus between customers and shareholders will be broken. Those that choose to transform their entitlement will become customers only.

Given the higher costs of administering customers that are not part of the group entitlement, it is probable that varying charging tiers will emerge. The tendency toward discriminatory pricing – a classic characteristic of monopoly pricing – will therefore have been engaged.

NSWIC submits that this is clearly a perverse outcome, an outcome that is contrary to the basic tenets of the ACCC and an outcome that the ACCC should recommend should be avoided – by ruling against transformation.



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APPENDIX TWO

Response to ACCC

Water Trading Rules Position Paper

090914

Andrew Gregson
Chief Executive Officer

Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

This document represents the views of the members of NSWIC. However each member reserves the right to 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.

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

Satisfactory.

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

Partially completed and to be expanded in Draft Rules.

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

Satisfactory

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

Satisfactory

(x) *Publication of final determination*

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

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 instrument⁵⁵, 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”⁵⁶. An explanatory note appears in Reprint 1 of the Act⁵⁷ 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)* 1989⁵⁸.

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.

⁵⁵ *Commonwealth of Australia Constitution Act* (Cth) 1900, Section 109

⁵⁶ Section 241(1)(b)

⁵⁷ Reprinted 1 January 2009 with amendments up to Act 139, 2008.

⁵⁸ 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.

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 2010⁵⁹), 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.

⁵⁹ 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 ACCC⁶⁰, 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”⁶¹ be made tradeable. NSWIC concurs that, indeed, they could. This does not, however, 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,

⁶⁰ At page 33.

⁶¹ At page 39.

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 Overalllocation 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 paper⁶² yet then manages to concludes that “stakeholders generally agreed that metering should be required before trade can occur”⁶³. 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.

⁶² At page 61.

⁶³ 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 suggests⁶⁴ 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.

⁶⁴ 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 intermediaries⁶⁵ whilst concurrently concluding that such regulation is unnecessary⁶⁶.

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.

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.

⁶⁵ At page 107.

⁶⁶ At page 108.

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 than the ACCC has yet grasped.

Whilst NSWIC is not averse to the concept of trade of unregulated entitlements⁶⁷, 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 to 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.

6.6 Farm dam trade

⁶⁷ Although refer to our submission to the Issues Paper (page 12) – NSWIC does not support trade between regulated and unregulated systems.

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 matter⁶⁸, 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.

⁶⁸ 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



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BASIC LANDHOLDER RIGHTS

090316

Mark Moore
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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

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

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”⁶⁹

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.

MEASURING OF BLR

NSWIC maintains a basic philosophy; *“if you can’t measure it, you can’t manage it.”*

⁶⁹ *Water Management Act 2000* – Section 52, Chapter 3, Part 1, Division 1

Presently a works approval is not required when accessing BLR⁷⁰. 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.

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).

⁷⁰ Landholder not authorised to construct a dam or water bore without a works approval.

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.



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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.

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

Compliance with Consultation Expectations

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

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

Our policy requires consultation to proceed through five stages.

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

Satisfactory.

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

This process must occur subsequent to the close of submissions.

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

This process must occur subsequent to the close of submissions.

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

This process must occur subsequent to the close of submissions.

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

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

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

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

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

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

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

Clearly the first of these considerations must have an integral effect on the geographical targeting of purchases. It is clearly inefficient and ineffective to focus – advertently or not –

purchasing effort in a geographic region far removed from the environmental asset that requires the water.

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

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

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

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

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

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

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

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

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

NSWIC submits that such strategic alignment is currently sadly lacking.

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

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

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

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

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

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

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

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

The Commonwealth Government has, on one hand, provided significant funds to develop water markets but on the other hand has not provided the market with the data which it 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, and 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 notes⁷¹ in respect of infrastructure investment programs that “water recovered through infrastructure investments is converted into legally secure water entitlements”.

⁷¹ At page 22, paragraph 1

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

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

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

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, its 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”⁷². NSWIC understands that the process is now complete, although reserves its right to make further submissions should this situation alter.

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

⁷² At page 32

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

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

Aside from the empirical impact that the Commission will undoubtedly be aware of, the trade barriers in place in Victoria are serving to undermine stakeholder support for both programs. Whilst the Victorian Government remain belligerent and the Australian Government remain recalcitrant in taking any firm action whilst continuing to purchase primarily from NSW, there is a clear – even if inadvertent – targeting of one state over another. Such and inequitable state without a clear strategy to remove the inequity will undoubtedly destroy stakeholder support and hence the effectiveness of the programs.

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

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

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

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

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

The agreement must be seen in context; it merely extends a percentage limit to a volumetric limit – and a modest limit at best. Whilst Victoria have agreed to an extra 300 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.”⁷³ 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?

⁷³ At page 25

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

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

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

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

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

This matter has been covered by previous questions.

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

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

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

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

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

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

How might these costs be reduced?

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

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

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

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

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

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

SUBMISSION CONCLUDES



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APPENDIX THREE

Response to ACCC

Water Trading Rules Draft Advice

1 February 2010

Andrew Gregson
Chief Executive Officer

Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

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

Opening Statement

NSWIC is of the opinion that the consultation process of the ACCC has failed. We have written to the Chairman of the Murray-Darling Basin Authority to advise as such, having advanced reasons in that letter. A copy of the letter is appended to this submission.

It is our opinion that the ACCC have engaged in a process best described as listening without hearing. The Draft Advice is a litany of disagreement between the ACCC and a wide range of interest groups. Moreover, it is inherently contradictory, viz;

“The Basin Plan water trading rules will apply across the MDB.”⁷⁴

and yet

“the trading rules .. will apply .. unless inconsistent with an interim or transitional water resource plan.”⁷⁵

On the one hand, the ACCC definitively state that the rules will apply across the Basin, whilst on the other express the opinion that there “is merit in applying Basin Plan water trading rules **wherever possible** (emphasis added) in the MDB.”⁷⁶

The ACCC seems hell-bent on asserting that rules will apply to all whilst openly acknowledging that they will not.

This absurdity is reflective of creating rules that do not apply equally to all. Perhaps the greatest irony is the self declared role of the ACCC that it “promotes competition and fair trade in the market place to benefit consumers, businesses and the community.”⁷⁷ In providing advice to create rules in defiance of the submission of industry and clear evidence of such failing, the ACCC has become hopelessly conflicted.

The Draft Advice to the ACCC is to create unfair rules and an unfair market place. This approach is rejected by NSWIC.

We do not believe that the ACCC has taken note of industry submissions. The process has called upon industry (and other stakeholders) to comment on ACCC positions, those comments have been criticised or, more often than not, simply dismissed. We do not believe that publication and subsequent defence of positions by the ACCC constitutes consultation. On that basis, we have advised the MDBA that we do not endorse any part of the ACCC advice and have insisted that a full consultation process must now be undertaken by the MDBA in respect of the Water Market Rules.

⁷⁴ At page 8 and again at page 14.

⁷⁵ At page 18.

⁷⁶ At page 18.

⁷⁷ Seen at www.accc.gov.au on 18 January.

Specific Comments

Regulation of Third Parties

The Advice states that the rules “cannot .. directly regulate the conduct of some entities involved in the water market, for example water market intermediaries”⁷⁸ on the basis that they are not contained within one of the relevant groups nominated in the Act.

NSWIC submits that a water market intermediary is necessarily acting on behalf of a member of one of those categories. In the most likely scenario, they will be acting on behalf of the holder of a water access right in an agency relationship at common law (if not more formally under state-based real property law). This agency relationship is, in the opinion of NSWIC, sufficient to create jurisdiction under the Act.

NSWIC therefore submits that the first part of the ACCC’s aversion to creating rules governing intermediaries in the Water Trading Rules is without basis.

The second basis for the ACCC, that such regulation is not necessary, is contrary to the overwhelming opinion advanced in a multitude of submissions from various industry groups. In short, those that are actively engaged in the water market have provided weighty opinion to the ACCC which has been comprehensively ignored.

Expiry of Transitional Water Resource Plans

The ACCC proposes to advise the MDBA that “Transitional WRPs .. are due to expire in various stages from 2012 to 2017.”⁷⁹

This statement either grossly misrepresents the complexity of the issue or exposes a lack of understanding by the ACCC.

NSWIC has submitted on multiple occasions that there is no transitional water resource plan pursuant to the Act identified (or, in our submission, identifiable) in Victoria. With no plan identified or identifiable, it is clearly not possible to state an expiration date. In light of this, it is clearly incumbent on the ACCC to provide full and accurate advice to the MDBA on a matter material to the design and implementation of the Water Trading Rules.

Foreign Ownership

Both NSWIC and the National Farmers Federation – two very large industry bodies – submitted that the matter of Foreign Investment Review Board control of water assets required further serious consideration. The ACCC dismissed this concern on the basis that “there is little benefit from simply holding water – the benefit derives from its use”.⁸⁰

NSWIC indeed concurs that benefit derives from use. The benefit in the instance of foreign entitlement is in controlling that use. In essence, water is a secondary market that allows significant influence over primary commodity markets. A foreign owner of significant water entitlement can use that control to determine primary production – “I will provide you with

⁷⁸ At page 11.

⁷⁹ At page 17.

⁸⁰ At page 39.

water to use on the basis that you grow what I tell you and sell it to me at a price that I am willing to pay”.

There is clearly potential for significant foreign investment in the Australian water market which may have detrimental effects on local commodity markets. NSWIC (and the NFF) have indicated that they would prefer sensible existing mechanisms in real property (FIRB) to be extended to the property of water *prior* to an issue arising. The lack of a train wreck to date does not justify complacency on this issue.

Stock and Domestic Entitlements

The draft advice states that “in many cases stock and domestic rights are not a type of right which is inherently tradeable” on the basis that they are “unlicensed”.⁸¹

Riparian rights in NSW are not the subject of entitlement, but those that access stock and domestic supply other than via riparian rights most certainly are based on licensed entitlement. As such, rules need to be in place in respect of trade for these entitlements. NSWIC reiterates its submissions to date – stock and domestic entitlements must not be tradeable.

The ACCC concludes “where the sale of a water access right would leave a property without water for stock and domestic purposes, it would be open to the landholder (or future purchaser of the land) to purchase a water access right to meet any future stock and domestic needs”⁸². On this basis, the ACCC have clearly concluded that they are content to see enforcement agents advising households that they are unable to access water for drinking and sanitation and to issue infringement notices to livestock.

In contradiction of this position, the ACCC notes in Recommendation (3-G) that “adequate safeguards are in place to meeting critical human water needs in the event of very low allocation levels.”⁸³ That is, a holder of a stock and domestic entitlement ought be able to sell their entire entitlement and not have access to stock and domestic water; except that adequate safeguards must be in place to ensure that they do have access to domestic water.

NSWIC finds this conclusion contradictory.

Australia will not accept – at a public policy level – water not being made available to humans and livestock. We are not willing to accept enforcement and hence trade in stock and domestic entitlement must not be provided for.

The 4% Rule

NSWIC notes the strong rhetoric advanced by the ACCC against the imposition of a 4% annual cap on permanent trade.

⁸¹ At page 62.

⁸² At page 63.

⁸³ At page 63.

NSWIC further notes the draft advice that the cap should be progressively removed via a timeframe that is not compliant with the National Water Initiative.

NSWIC concludes that the ACCC does not believe its own rhetoric.

NSWIC does not support the imposition of a 4% cap. Such cap should be removed immediately in Victoria. It is incumbent on the ACCC to demand exactly that.

Information Regarding Tradeable Water Right Characteristics

Contrary to the submissions of industry groups – those representing the equivalent of sophisticated investors – the ACCC proposes that the Trading Rules require state government agencies to collate and publish vast reams of data to assist unsophisticated investors to understand the water market.

NSWIC reiterates its rejection of this position.

The ACCC neglect to disclose that costs associated with such activities will be sheeted home to water entitlement holders either through Water Planning and Management charges or through the regulated operating expenses of the state agency. In short, those currently involved in the market will be forced to pay for provision of information to those that are not. Ironically, it will be the ACCC that will be the entity setting those charges for the period from 2014 in NSW, which we submit is a clear conflict of interest in respect of providing this advice.

Trading Volumes and Prices

The ACCC recommended that the Rules provide for the provision of pricing data in a timely and accurate manner by parties to a trade to an approval authority.⁸⁴ The submission of NSWIC – that this data must then be published in a similarly timely and accurate manner – has been ignored.

As such, the reason for the provision of the data has been undermined. Without the publication to the market of this data, there is absolutely no point in requiring its timely provision to approval authorities.

SUBMISSION CONCLUDES

⁸⁴ At page 235.



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Mr Mike Taylor
Chairman
Murray Darling Basin Authority

Via electronic mail

15 January 2010

Dear Mr Taylor,

Re: ACCC Advice to MDBA on Water Market Rules

As you will be aware, the ACCC are in the process of drafting advice to the MDBA in respect of the development of Water Market Rules pursuant to the *Water Act (Cth) 2007*.

The ACCC has been active in advising in respect of water markets and surrounding issues over the course of the past two years. During that process, NSWIC and its Member bodies have lodged countless submissions, waded through reams of ACCC missives and sat through a significant number of briefing sessions and meetings.

We have been extremely uncomfortable with the “consultation” process carried out by the ACCC. The process itself has been exhaustive, but it is our opinion that depth of process is touted as evidence of veracity of process.

It is our opinion that the ACCC has perfected the art of listening without hearing. The current Draft Advice on Water Trading Rules is a fine example. A wade through its 263 pages will provide you with numerous instances where the concerns, wishes and opinions of industry and its representatives are dismissed, derogated or entirely ignored. The process essentially defines the ACCC position, asks for people to comment on that position and then defends the initial position. That, in our opinion, is the antithesis of consultation.

We recognise that the MDBA was required to accept the advice of the ACCC in respect of Water Trading Rules that will appear in the Basin Plan. At this juncture, we think it appropriate to alert you to the fact that we are of the opinion that the advice you will be given is not based on effective consultation and does not reflect the concerns, interest or reasoned advice provided by NSWIC and others. In light of that, the task of the MDBA in seeking input to the Basin Plan will be all the more time and resource consuming.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Gregson". The signature is stylized and includes a long, sweeping horizontal stroke that extends to the right.

Andrew Gregson
Chief Executive Officer