

Suite 901, Level 9, 276 Pitt Street,
Sydney NSW 2000

PO Box Q640,
Queen Victoria Building NSW 1230



Tel: 02 9264 3848
nswic@nswic.org.au
www.nswic.org.au

ABN: 49 087 281 746

Submission

Reconnecting River Country Program - Landholder Negotiation Framework

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NSW Irrigators' Council

The NSW Irrigators' Council (NSWIC) is the peak body representing irrigation farmers and the irrigation farming industry in NSW. NSWIC has member organisations in every inland valley of NSW, and several coastal valleys. Through our members, NSWIC represents over 12,000 water access licence holders in NSW who access regulated, unregulated and groundwater systems.

NSWIC members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton and horticultural industries. NSWIC engages in advocacy and policy development on behalf of the irrigation farming sector. As an apolitical entity, the Council provides advice to all stakeholders and decision makers.

NSWIC welcomes this opportunity to provide a submission to the Department of Planning and Environment.

NSWIC sees this as a valuable opportunity to provide expertise from our membership to inform the response. Each member reserves the right to independent policy on issues that directly relate to their areas of operation, expertise or any other issues that they deem relevant.

Irrigation Farming

Irrigation provides more than 90% of Australia's fruit, nuts and grapes; more than 76% of vegetables; 100% of rice and more than 50% of dairy and sugar (2018-19).

Irrigation farmers in Australia are recognised as world leaders in water efficiency. For example, according to the Australian Government Department of Agriculture, Water and the Environment:

“Australian cotton growers are now recognised as the most water-use efficient in the world and three times more efficient than the global average”¹

“The Australian rice industry leads the world in water use efficiency. From paddock to plate, Australian grown rice uses 50% less water than the global average.”²

Our water management legislation prioritises all other users before agriculture (critical human needs, stock and domestic, and the environment with water to keep rivers flowing), meaning our industry only has water access when all other needs are satisfied. Our industry supports and respects this order of prioritisation. Many common crops we produce are annual/seasonal crops that can be grown in wet years, and not grown in dry periods, in tune with Australia's variable climate.

Irrigation farming in Australia is also subject to strict regulations to ensure sustainable and responsible water use. This includes all extractions being capped at a sustainable level, a hierarchy of water access priorities, and strict measurement requirements.

¹ <https://www.agriculture.gov.au/ag-farm-food/crops/cotton>

² <https://www.agriculture.gov.au/ag-farm-food/crops/rice>



Executive Summary

NSWIC welcomes the opportunity to provide this submission on the Landholder Negotiation Framework that will support the Reconnecting River Country Program. In reviewing the Discussion Paper, NSWIC hopes to assist in the successful implementation of this program.

The following submission draws attention to several issues of concern for NSWIC and its members. These points are outlined and summarised below, before being explored in depth in the submission.

1. NSWIC supports the Sustainable Diversion Limit Adjustment Mechanism (SDLAM) supply and constraints projects, including the Reconnecting River Country program. NSWIC recognises the successful implementation of such projects not only delivers important environmental outcomes, but also reduces the volume of water entitlements bought back from irrigators.
2. Recent assessments view the likelihood of all constraints projects being operational by the 2024 deadline to be very low. In preparation for the highly probable event these timeframes are not met, NSW should commence representations to the Ministerial Council to recognise progress toward SDLAM supply and constraint programs as part of the 2024 reconciliation in the spirit of the Basin Plan.³
3. NSWIC and its members would appreciate clarification on the necessity to legislate the Landholder Negotiation Framework, sharing concerns that doing so will only delay landholder negotiations, create legislative rigidity, and prolong the attainment of desired environmental outcomes.
4. **NSWIC is unequivocally opposed to compulsory acquisition, or any planned inundation of private property without landholders' consent.** Relaxing constraints without the necessary landholder permission is inconsistent with the Basin Plan, the Constraints Management Strategy, and Reconnecting River Country Program objectives, and does not demonstrate good faith.
5. NSWIC is concerned by planned limitations on Crown liability in dealing with constraints relaxation, and urges that – at minimum – such amendments to the Act to exclude Crown liability, are not enacted until negotiations are finalised and agreements delivered.
6. NSWIC and its members share concerns about disparity between previous discussions regarding constraints management and what the Landholder Negotiation Framework proposes. Successful implementation of the program in areas with willing landholders will inevitably build trust and respect with government agencies. As positive outcomes are experienced and shared, it is more likely that other landholders may be willing to negotiate agreements of their own. These cannot be forced under perceived or real threat of compulsory acquisition or inundation without consent.

³ Basin Plan 2012 (Cth) ss 808 - 809



Background

In a regulated river system, flow levels are managed to optimise a balance of environmental, communal and industry benefits. As a result, wetlands and floodplains surrounding regulated river systems have become less likely to receive water from high river flows.

Under the Murray-Darling Basin Plan, Basin Governments aim to promote environmental outcomes by relaxing constraints on water flow. For NSW, the Reconnecting River Country Program aims to achieve a balance of economic, social, cultural, and environmental outcomes across southern NSW by relaxing constraints and improving wetland and floodplain connectivity.⁴ The program is part of the Sustainable Diversion Limit Adjustment Mechanism (SDLAM), contributing to the larger goal of recovering the equivalent of 605GL of water for the environment. The program focuses on relaxing or removing constraints along areas of the Murray-Darling Basin to reconnect floodplains and wetlands.

Managing constraints under the program enables higher flow levels and minor inundation of areas of private land. As is integral to the rights and safety of those landholders, these inundation events will require extensive negotiations with all affected landholders, as well as appropriately mitigating the impacts of these flow events.

The Landholder Negotiation Framework Discussion Paper outlines how negotiations with effected parties will transpire. NSWIC has reviewed this discussion paper and provides this feedback to assist in the development of this program in the interests of our members.

Submission

1. NSWIC supports the Sustainable Diversion Limit Adjustment Mechanism (SDLAM) supply and constraints projects, including the Reconnecting River Country Program

NSWIC strongly supports well-designed and locally supported SDLAM projects to achieve the equivalent of 605GL of water recovery as the most critical component of the Basin Plan's implementation, providing the lowest risk to communities, and realising targeted environmental outcomes. NSWIC also maintains that:

- Flexibility and adaptability for new and improved projects are essential to success.
- All stakeholders and communities affected by projects must be effectively involved in development and delivery.

NSWIC supports SDL Adjustment Mechanism supply projects, including constraints management, and recognises the successful implementation of such projects not only reduces the volume of water entitlements bought back from irrigators, but also delivers important environmental outcomes.

NSWIC supports progressing SDLAM constraints measures to the extent that:

⁴ [Reconnecting River Country Program | Water \(nsw.gov.au\)](https://www.nsw.gov.au/reconnecting-river-country-program)



- Directly affected landholders are consulted and in a position to make informed decisions. All agreements will be voluntary.
- Constraints are managed solely to deliver environmental water and improve environmental outcomes, with environmental water holders bearing the full losses.
- Clear rules are developed in consultation with stakeholders to ensure no third-party impacts on entitlement reliability.
- Clear rules are developed in consultation with stakeholders to ensure constraints are not managed to facilitate delivery of productive water.

2. Landholder Agreements are unlikely to be fully reached by the Basin Plan reconciliation in 2024, however, NSWIC expects NSW to remain committed and demonstrate progress.

As the 2024 MDBA reconciliation nears, NSWIC is aware of the urgency placed on recovering the full 605GL for environmental outcomes.

The most recent *Five-year assessment of the Murray Darling Basin Plan* reported that:

“Based on past experience with similar projects, the 2024 deadline for all constraints to be fully operational appears highly ambitious, if not unrealistic. ..., negotiations in the 2000s to secure the right to release 25 000 ML/day from Hume Dam involved negotiating legal easements with 103 landholders from Hume to Yarrawonga and took almost eight years to complete. In comparison, easing constraints for the five supply measures will require negotiations with over 3000 landholders and must take place over six years to 2024, assuming Basin States start immediately ...

To enable worthwhile projects to be implemented in realistic timeframes, Basin Governments should be open to the possibility of extending the 30 June 2024 deadline... “⁵

NSWIC and its members are committed to demonstrating consistent progress toward constraints management and expect the NSW Government to be actively demonstrating progress. As stated in the *Basin Plan 2012* (Cth):

8.08 Targets by which to measure progress towards environmental objectives

(2) As the targets will be used to measure progress towards achieving the objectives ...

(a) the achievement of the objectives in Part 2 should be given priority over the achievements of the targets.⁶

8.09 Assessment of progress towards objectives ...

The Authority must measure progress toward achieving objectives ... by having regard to the following:

- (a) Progress towards achieving the long-term average sustainable diversion limits;
- (b) Ecological objectives and ecological targets set out in long-term watering plans;
- (c) Climatic conditions;

⁵ [Inquiry report - Murray-Darling Basin Plan: Five-year assessment \(pc.gov.au\)](#) [131]

⁶ *Basin Plan 2012* (Cth) ss 8.08 – 8.09



- (d) The Basin-wide environmental watering strategy;
- (e) Basin annual environmental watering strategy;

NSWIC supports this position, agreeing that the overall environmental objectives outlined in the Basin Plan are a more indicative measure of success than the water recovery targets set. In the interest of maintaining this progress, NSWIC recommends that the Department works promptly with landholders willing to negotiate voluntary flood easement agreements and accordingly begin impact mitigation where necessary.

Given it is now widely documented that it is unlikely constraints will be relaxed by 2024, NSW should commence making representations to Ministerial Council for progress towards implementation of SDLAM supply measures to be taken into consideration in 2024 (should a reconciliation occur) in the spirit of the Basin Plan considering progress (as described above).

This would ensure that landholders do not feel the negotiation process is pointless given the unrealistic timeframes posed, whilst also ensuring that valuable potential environmental outcomes are not lost (a risk highlighted by the Productivity Commission in its five-year assessment in 2018).

3. Clarification is sought of the necessity of embedding the framework in regulation/legislation, particularly noting timeframe concerns.

NSWIC and its members question why the Landholder Negotiation Framework need to be embedded in legislation. As identified in the Discussion Paper, relevant legislation exists permitting:

- Relaxation of constraints - *Basin Plan 2012* (Cth)
- Compensation for easement/acquisition of land - *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
- Exclusion of liability from water release in good faith – *Water Management Act 2000* (Cth)

NSWIC and its members seek clarification on the necessity to legislate, concerned that doing so will only delay landholder negotiations, create legislative rigidity, and prolong the attainment of desired environmental outcomes.

4. NSWIC is unequivocally opposed to compulsory acquisition, or any inundation without landholder consent. Relaxing constraints without the necessary landowner permission is inconsistent with the Basin Plan, the Constraints Management Strategy, and Reconnecting River Country Program objectives, and does not demonstrate good faith.

Under the *Basin Plan 2012* (Cth), the objectives and outlines place the environment, communities, and industries as the three desired beneficiaries of a healthy river system:⁷

s 5.02 Objectives and outcome for Basin Plan as a whole

- (2) The outcome for the Basin Plan as a whole is a healthy and working Murray-Darling Basin that includes:

⁷ *Basin Plan 2012* (Cth) s5.02



- (a) communities with sufficient and reliable water supplies that are fit for a range of intended purposes, including domestic, recreational and cultural use; and
- (b) productive and resilient water-depending industries, and communities with confidence in their long-term future; and
- (c) healthy and resilient ecosystems with rivers and creeks regularly connected to their floodplains and, ultimately, the ocean.

NSWIC recognises the long-term benefits to communities and ecosystems that the Reconnecting River Country Program may achieve. NSWIC does not believe that compulsory inundation of land, without consent, is consistent with encouraging productive and resilient water-dependent industries, nor does it promote communities' confidence in their long-term future. Given the significant trust deficit and low confidence in Basin communities already, as documented in *the Independent assessment of social and economic conditions in the Basin*,⁸ it is unfathomable that compulsory acquisition approaches are even being considered.

The Constraints Management Strategy sets out overarching principles stated as being central to its development and should guide its roll-out. One of these principles' states that:⁹

- In pursuing environmental outcomes through the relaxation of removal of constraints, solutions need to:
 - Recognise and respect the property rights of landholders and water entitlement holders

NSWIC agrees that successful constraints management must recognise and respect landholder property rights, and believes that the principle of voluntary participation by landholders is an integral part of this.

The Reconnecting River Country Program and its Landholder Negotiation Framework emphasises the importance of reaching mutually beneficial outcomes for the environment and landholders at multiple points.

The preamble states that the Department will; “*work with landholders to reach mutual agreements...*”¹⁰ Under the Framework context it is stated that; “*The Department is committed to negotiating voluntary outcomes...*”¹¹

NSWIC agrees and recognises that mutual agreements toward voluntary outcomes are essential to the long-term health of the Murray-Darling Basin and community. It is crucial that the Department work constructively alongside willing landholders first, while exercising patience and respecting those landholders who harbour concerns about inundation.

The program and framework statements, however, are inconsistent with later aspects of the Framework that propose compulsory acquisition or relying upon the exclusion of Crown liability for inundation, in instances where agreements cannot be reached.

Whilst NSWIC appreciates the challenges involved in fully progressing the Constraints Projects, at no point should compulsory acquisition be on the table. Negotiations cannot be

⁸ [seftons-report-september-2020_0.pdf \(mdba.gov.au\)](#)

⁹ [Constraints management strategy | Murray-Darling Basin Authority \(mdba.gov.au\)](#) [ix]

¹⁰ [Reconnecting River Country Program: Landholder Negotiation Framework \(nsw.gov.au\)](#) [i]

¹¹ [Reconnecting River Country Program: Landholder Negotiation Framework \(nsw.gov.au\)](#) [9]



conducted in good faith with the real or perceived threat of compulsory acquisition or forced inundation without liability hanging over landholders' heads. This will only add to the already strong regional perception that the Basin Plan is a punitive reform being done *to* Basin communities, not *with* them.

5. That landholders are concerned by limitations placed on Crown liability in dealing with relaxing of constraints

Step 5 of the Landholder Negotiation Framework discusses options where agreements are not met. One is that the NSW Government may rely on statutory exclusion from liability under the *Water Management Act 2000* (NSW). This option reads as an indication that in failure to meet an agreement, the Department may proceed to relax constraints regardless and be excluded from all liability for inundation impacts on private land.

Under s398(2)(b) of the current *Water Management Act*, neither the Crown nor any other person is liable for damages resulting from the release of water for water management work, provided the release is done in good faith.¹²

The *Water Management Amendment Act*, provides an amendment to s398(1), adding an exclusion of liability to the release of environmental water in good faith, the relevant section with (c) added¹³ is set out below:

Water Management Act 2000 – Amended (NSW)

S 398 Exclusion of Crown liability

(1) Neither the Crown nor any other person is subject to any action, liability, claim, or demand arising:

- (a) from the unavailability of water, or
- (b) from any failure in the quantity or quality of water, or
- (c) from the release of water for environmental purposes,

as a consequence of anything done or omitted to be done in good faith by the Minister, by a prescribed authority or by any person acting on behalf of the Minister or a prescribed authority, in the exercise any functions under this Act.¹⁴

A key consideration of both s398 (1) and (2) relies on the continuation of good faith exercised by the Minister, a prescribed authority, or any person acting on behalf of the Minister or prescribed authority. While good faith has traditionally proven to be a difficult concept to define in Australian law, it has generally been synonymous with reasonableness,¹⁵ and a requirement for a party to not act capriciously.¹⁶

¹² *Water Management Act 2000* (Cth) s398 (2)(b)

¹³ Note: For clarity, (c) remains in the *Water Management Amendment Act* and it is our understanding that it has not yet come into effect in the *Water Management Act*. The excerpt above demonstrates what the section will look like once the amendment comes into effect.

¹⁴ *Water Management Act 2000* (Cth) s 398

¹⁵ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 258

¹⁶ *Garry Rogers Motors Aust Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41-703, 41



NSWIC suggests that inundation of land in the absence of a voluntary agreement will not constitute good faith, and consequently will not exclude relevant authorities from statutory liability.

NSWIC has concerns with this amendment – one being a procedural matter of when such amendment comes into effect. Whilst the discussion paper says: “*this amendment to the WM Act will not commence until the Framework has been established*” – NSWIC is of the view that would be premature, as beyond just establishing the framework there must have been reasonable opportunity for agreements to be negotiated, and the agreements fully delivered upon.

NSWIC recommends that in the interest of maintaining trust and positive relationships with landholders, relevant authorities clarify that an exclusion of liability only exists when an agreement has been made in good faith.

6. NSWIC and its members share concerns that there is a disparity between previous discussions regarding constraints relaxations and what the Landholder Negotiation Framework proposes

Many NSWIC members have expressed that in communications leading up to this framework, the Department maintained that constraints relaxation would never result in involuntary inundation of private property. The *First Review of the Water for the Environment Special Account* notes that:

*“Stakeholders have noticed the different messages from governments about the efficiency measures and constraints measures programs and are particularly alert to inconsistent and conflicting messages”.*¹⁷

At the 2019 Murray-Darling Basin Ministerial Council, Victoria and NSW agreed to appoint independent experts to review constraints modelling. On 16 December 2019 the Independent Expert Panel Review of Constraints Modelling submitted its report to the Victoria and NSW Ministers for Water. In relaxation of river constraints, the Panel considers an approach of establishing landholder agreements to increase flow rates and undertake mitigation works. While the Panel did receive significant support for this approach, it recognised the improbability of its successful implementation before 2024 because of:

- The likelihood that a significant number of landholders would not voluntarily enter into agreements.
- The requirement for upfront voluntary agreements would encourage landholders to demand unreasonable terms and conditions before agreeing.
- The level of confidence in the modelling and other data currently available is low – mistakes would be likely and trust would be eroded.
- Given the level of confidence in the data, buffers would be required to be extensive, increasing the number of landholder agreements, the costs and the number of potential opponents.

¹⁷ [First Review of the Water for the Environment Special Account \(awe.gov.au\)](http://awe.gov.au) [3]



- Access structures would need to be designed with significant freeboard, increasing costs and, if oversized, risking reputations.
- The failure to describe the local environmental benefits in a compelling way that resonates with landholders and the broader community.
- The lack of trust in the institutions involved in delivering the Plan.
- The strong opposition to the Basin Plan in some communities

“For the above reasons, and given lessons learned from negotiating the Hume to Yarrawonga 25,000 ML easements from 2001 to 2017, the Panel considers there would be very little prospect of negotiating the landholder agreements on reasonable terms. In fact, there would be a significant risk that many landholders would object to the proposed constraints measures creating new groups that oppose the Basin Plan.”¹⁸

The report further considers that this would likely result in large sums of government funding being expended without flows being released, consequentially leading to damaged reputations and relationships between State and Commonwealth Governments, the MDBA and local communities. Most crucially, the report states:

“While some, but not all of the problems listed above could be overcome by using State or Commonwealth powers to compulsorily acquire easements, this would generate very strong opposition and the Victorian and New South Wales governments have ruled this out.”

While NSWIC also recognises the barriers that relaxation of constraints faces, NSWIC and its members remain supportive of the program, appreciating the environmental outcomes it poses to deliver as well as the long term socio-economic, and cultural benefits.

NSWIC recommends that this report does not diminish the Reconnecting River Country Program, but rather highlights the necessity it is implemented strategically and in good faith. Successful implementation in areas with willing landholders will inevitably build trust and respect. As positive outcomes are experienced and shared, it is more likely that other landholders may be willing to negotiate agreements of their own.

Conclusion

The Constraints Program necessarily relies on successful partnerships, collaborations and trust with landholders and communities to achieve important environmental outcomes. Stakeholders from various perspectives, industry, and environment, agree on the importance of this program.

The NSW Government approach to negotiations must therefore seek to build these successful partnerships and collaborations, and at no point look to force this on landholders. This must be done right, to work.

While NSWIC and its members see significant value in the Reconnecting River Country Program, the Landholder Negotiation Framework must consistently remain equitable to all those affected and demonstrate a good faith approach to working meaningfully with communities.

The NSW Government must again unequivocally rule out compulsory acquisition, or inundation without consent – as Victoria has already done. Such heavy-handed approaches

¹⁸ [Murray-Darling Basin constraints modelling \(water.vic.gov.au\)](https://www.water.vic.gov.au) [53-54]



are not a constructive basis for working through legitimate stakeholder concerns in progressing this important project, nor would it be constructive at overcoming trust deficits already deeply entrenched in Basin communities. NSWIC recognises the importance of strengthening trust and relationships between NSW Government and those communities that rely on the river, in order to progress desired outcomes.

It is disappointing that we are now one decade into the 12- year implementation of the Murray-Darling Basin Plan, and only just now at the point of public consultation on a negotiation framework – without negotiations having even commenced. It must be on the public record that the irrigation industry wants SDLAM supply projects progressed and will not tolerate bearing the risks of government delays and inaction, such as more buybacks.

As the 2024 reconciliation draws near, and timeframes remain unlikely to be fulfilled, NSW must act to demonstrate progress towards implementing supply projects. NSW must be preparing for 2024 now – to demonstrate to Basin communities that they will not be leaving them out to dry in 2024, as well as giving them confidence that negotiations will not be a pointless exercise. We recommend NSW get a wriggle on.

NSWIC recognises the progress toward the shared goal of a healthier river system and is dedicated to continuing working in the interests of all those affected. While NSWIC does not condone any inundation of land in the absence of a voluntary agreement, it is confident in a long-term strategy of exercising patience, showing respect for landholders' concerns and genuinely working alongside communities.

Kind regards,

NSW Irrigators' Council.