



NSW IRRIGATORS' COUNCIL

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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.”¹

and yet

“the trading rules .. will apply .. unless inconsistent with an interim or transitional water resource plan.”²

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.”³

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.”⁴ 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.

¹ At page 8 and again at page 14.

² At page 18.

³ At page 18.

⁴ 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”⁵ 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.”⁶

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 no 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”.⁷

⁵ At page 11.

⁶ At page 17.

⁷ At page 39.

NSWIC indeed concurs that benefit derives from use. The benefit in the instance of foreign entitles 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 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”.⁸

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”.⁹ 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.”¹⁰ 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.

⁸ At page 62.

⁹ At page 63.

¹⁰ At page 63.

The 4% Rule

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

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.¹¹ 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

¹¹ 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.

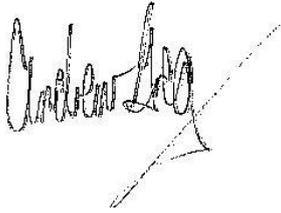
We have been extremely uncomfortable with the “consultation” process carried out by the ACCC. The process itself has been exhaustive, but it is our opinion that depth of process is touted as evidence of veracity of process.

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', with a long, sweeping flourish extending from the end of the signature.

Andrew Gregson
Chief Executive Officer