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Response to ACCC

Water Trading Rules Issues Paper

090501

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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.

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.[1]

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.

[1] 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 along 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 wilingess 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"[2] 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.

[2] 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 instrument[3], 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"[4]. An explanatory note appears in Reprint 1 of the Act[5] noting that "it is intended that the transitional water resource plans for water resource plan areas in Victoria are to be prescribed by regulation..."

Transitional water resource plans in New South Wales are simply identified as the Water Sharing Plans adopted under the *Water Management Act (NSW)* 2000*.* These plans expire in 2014. They are specified in Schedule 4 of the Commonwealth Act.

Transitional water resource plans in Victoria are not simply identifiable. It is widely recognised that the Victorian plans – howsoever defined – do not expire until 2019. This date was apparently set based on the review date of Bulk Water Entitlements, potentially considered a *de facto* water resource plan, as 15 years subsequent to the 2004 adoption of amendments to the *Water Act (Vic)* 1989[6].

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).

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[3] *Commonwealth of Australia Constitution Act* (Cth) 1900, Section 109
[4] Section 241(1)(b)
[5] Reprinted 1 January 2009 with amendments up to Act 139, 2008.
[6] 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.

Moreover, with the timeframe provided for the Water Trading Rules (March 2010[7]), 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.

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

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 sold[8]. 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.

[8] 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.[9]

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?*

[9] 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.

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 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 Basin[10] – 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 that 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?*

[10] Including the Gwydir, Namoi and Border Rivers.

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.

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.[11]

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 that 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.

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

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?*

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 possible[12], 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?*

[12] Within the same system.

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.

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"[13] 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.

[13] 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"[14], 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)?

[14] Ibid, page 43

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.

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 of 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 papers, 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* consultation[15] and be sufficiently flexible to allow effective and efficient implementation.

Questions D and E

Refer to the above.

[15] 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"[16]

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..."[17]

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.[18]

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.

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[16] Issues Paper page 51
[17] Ibid
[18] Previously known as *Compatible Registers Group*

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

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 irrigators 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 date 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 date inaccurate and hence less than useful.

Question 11-L *What measures could assist in making trading volume and price date 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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Consultation

The Expectations of Industry

090303

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 an independent view on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Executive Summary

This document sets out the consultation process that the irrigation industry expects from Government on policy matters affecting the industry.

Specifically, the industry expects that the contents of this document inform the consultation process with respect to preparation of the Basin Plan by the Murray Darling Basin Authority.

Background

Industry has been critical of consultation processes entered into by both State and Commonwealth Government entities in the change process with respect to water policy. Irrigators have significant sums invested in their businesses, all of which are underpinned by the value, security and reliability of their primary asset – water.

Irrigators recognise the imperatives for change and are content to provide advice on policy measures to ensure effective outcomes for all involved.

In light of these two factors, it is not unreasonable that irrigators request adequate consultation.

Recent consultation efforts have ranged from excellent to woeful[19]. Irrigators believe that a method of consultation should be determined prior to the commencement of a policy change process. To that end, this document sets out the methods which we believe are acceptable and ought be adopted by Government both State and Commonwealth.

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

[19] See case studies later in this document.

Forms of Consultation

We consider two forms of consultation to be acceptable – Direct and Indirect. The preferred option will be dictated by circumstances.

Direct Consultation

This method involves engaging directly with affected parties, together with their representative organisations. As a default, it ought always be considered the preferred method of consultation.

Irrigators acknowledge that practical exigencies must be considered to determine if Direct Consultation is possible. Such considerations will include:

- The number of affected stakeholders (the smaller the number, the more ideal this method);
- The timeframe available for implementation (the longer the timeframe, the more ideal this method)[20]; and
- The geographical distribution of stakeholders (the closer the proximity, the more ideal this method).

Indirect (Peak Body) Consultation

This method involves engaging with bodies that represent affected parties. NSW Irrigators Council is the peak body representing irrigators in this state. The National Irrigators Council is the peak body in respect of Commonwealth issues.

Irrigators acknowledge that there will be occasions on which consultation with peak bodies is necessary for practical reasons. Such reasons may include:

- An overly large number of affected stakeholders;
- A short timeframe (not artificial) for implementation;
- A large geographic spread of stakeholders; and
- An issue technical in nature requiring specific policy expertise.

This form of consultation requires some specific considerations that must be addressed in order for it to be considered acceptable;

- Timeframes

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

Indirect Consultation is, in essence, the devolution of activity to external bodies. That is, the task of engaging with affected stakeholders to assess their views and to gather their input is "outsourced" to a peak body. That peak body cannot operate in a vacuum and, as such, must seek the views of its members lest it become unrepresentative. Dependent on the nature of the issues and the stakeholders, this may take some time. It is vital that peak bodies be requested to provide advice on necessary timeframes prior to seeking to engage them in an Indirect Consultation model.

- Resource Constraints

  Peak bodies do not possess the resources of government. In most instances – and certainly in the case of irrigation industry peak bodies – their resources are gathered directly from members and hence must be well accounted for.

  Peak bodies engage in a significant range of issues and activities, many of which feature their own time constraints.

  Prior to commencing the consultation process, discussions with peak bodies must be held to ensure that the needs of stakeholders with respect to resourcing and timeframes are respected. This may include ensuring that consultation does not occur during times of known peak demand; coordination with other government agencies to avoid multiple overlapping consultation processes; and coordination with peak bodies existing consultation mechanisms (for example, NSWIC meeting dates are set annually and publicly available. These are an ideal forum for discussion as they provides access to key stakeholders with no additional cost to stakeholders).

Stages of Consultation

Irrigators believe that a multi-stage consultative model, in either the Direct or Indirect applications, is necessary.

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

Irrigators are wary of change for the sake of change. In order to engage industry in the process of change, an identification of its necessity is required. This should take the form of a published[21] discussion paper as a minimum requirement.

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

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

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

It is imperative that the document clearly note that the proposed solutions are not exhaustive. The input of stakeholders in seeking solutions to an identified problem is a clear indicator of meaningful consultation.

It is likely, in practice, that steps (i) and (ii) will be carried out concurrently. This should take the form of a document seeking written submissions in response. The availability of the document must be widely publicised[22]. The method for doing so will vary depending on the method of consultation. As a threshold, at least 90% of affected stakeholders ought be targeted to be reached by publicity.

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

Subsequent to the closing date, a document ought be published that summarises the submissions received in the various points covered. It must also append the full submissions.

Acknowledgement of a consideration of the weighting of submissions must be given. As an example, a submission from a recognised and well supported peak body (such as NSWIC) must be provided greater weight than a submission from a small body, an individual or a commercial body with potential commercial interests.

There are no circumstances in which submissions ought be kept confidential. Whilst we recognise that identification of individuals might be restricted, any material on which a decision might be based must be available to all stakeholders.

The document must then identify a preferred approach, clearly stating the reasons why that approach is preferred and why alternate approaches have been rejected.

Where the need for change has been questioned by submissions, indicating that a case has not been made in the opinions of stakeholders, further discussion and justification of the necessity must be made in this document.

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

The document prepared in stage (iii) must now be taken directly to stakeholders via forums, hearings or public discussions. All stakeholders, whether a Direct or Indirect model is chosen, must have an opportunity to engage during this stage.

The aim of this direct stage is to explain the necessity for change, to explain the options, to identify the preferred option (together with an explanation as to why it is the preferred option) and to seek further input

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

and feedback. Further change to a policy at this point should not, under any circumstances, be ruled out.

(v) *Publication of final determination*

Subsequent to stage (iv), a document must be published summarising the feedback received from that stage, identifying any further changes, identifying why any particular issues raised across various hearings at stage (iv) were not taken into account and providing a final version of the preferred solution.

What Consultation Is Not

“Briefings” after the fact are not consultation (although they may form part of the process). Stakeholders will not be well disposed to engagement where prior decisions have been made by parties unwilling to change them. Briefings in the absence of consultation will serve to alienate stakeholders.

Invitations to attend sessions with minimal notice (less than 10 days) is not consultation. Consideration must be given to the regional location of parties involved, together with the expenses and logistical issues of travel from those regions.

Case Study One

Australian Productivity Commission (Review of Drought Support)

Getting it Right

During 2008, the Australian Productivity Commission commenced a review of Government Drought Support for agriculture. The review commenced with the publication of a document to which submissions were sought. A significant period of time was allowed for submissions.

Subsequent to the close of submissions, a draft position was published which took into account written submissions that were received, identified issues raised in submissions and identified a number of changes considered subsequent to submissions.

The Commission then engaged in a large series of public hearings in areas where affected stakeholders were located. Parties were invited to provide presentations in support of their submissions. Parties who had not lodged written submissions were also welcome to seek leave to appear. The meetings were open to the public, who were also given the opportunity to address the hearing.

A series of “round tables” in regional areas was conducted with identified and self-disclosed stakeholders. These meetings gave those who were unable or unwilling to provide presentations in public the opportunity to have input. At the same time, no submissions were kept confidential, the Commission recognising that the basis for its determinations must be available to all.

Importantly, present at the hearing were three Commissioners. It is vital that the decision makers themselves are available to stakeholders, rather than engaging staff to undertake this task.

We understand that a final publication will be made available in 2009.

Case Study Two

CSIRO (Sustainable Yields Audit)

Getting it Wrong

In early December, CSIRO (in conjunction with a number of other Government entities) conducted a regional "consultation" series with respect to the Sustainable Yields Audit. The series was, in our opinion, ill-informed, poorly organised, poorly executed and poorly received.

In late November, CSIRO sought advice from NSWIC over the format and timing of the series. We provided advice that:

- The series did not cover sufficient regional centres to engage all stakeholders. In particular, Northern NSW had not been included;

- The series should not be by invitation, but should be open to all comers given the implications not only for irrigators but for the communities that they support;

- Ninety minutes was vastly insufficient to cover the depth and breadth of interest that would be raised by attendees; and

- That the timeframe between invitation and the event was insufficient.

None of that advice was adopted.

Invitations were sent to an undisclosed number of stakeholders who had been identified by an undisclosed method. In the short space of time available to advise attendance, CSIRO threatened to cancel a number of sessions on the basis of low responses. Given the limited notice and invitation list, NSWIC became aware of a number of stakeholders who wanted to attend but were unable to.

During the sessions, information was presented as a "briefing" despite being described as consultation. As such, extremely limited time was available for questions to be addressed – a key feature of consultation. Moreover, where information that was presented was questioned, a defensive stance was taken – a key feature of lack of willingness to engage stakeholders in a consultative fashion.

In particular, NSWIC is particularly concerned at the lack of willingness to engage on factual matters contained within the report. Where glaring inaccuracies were pointed out, defensiveness was again encountered. In several instances, inaccuracies that had been advised by stakeholders were perpetuated in later documents.

Further, several presenters were clearly not aware of the full range of detail surrounding the matters that they discussed. It is imperative that those seeking feedback on a subject understand that subject in depth prior to commencing consultation.

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Submission to ACCC

Transformation
More Than Meets the Eye

081002

Andrew Gregson
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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.

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 counter productive 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.