

# **AN INDUSTRY PROPOSAL FOR WATER RIGHTS IN NSW**

## **"BLUE PAPER"**

*"A future in which we achieve from our natural resources the greatest possible  
long term social, economic and environmental benefits for all Australians"*

***{Insert - Vision statement and pictures of Murray River 1896 and 1996}***

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# 1. Definition of terms

## Collective Schemes

- The definition of collective schemes in this document includes privatised / state-owned irrigation utilities, joint water supply authorities, drainage trusts and similar arrangements.

## Contingency Pool

- Government investment in water savings and / or resumption settlement will create volumes of "discretionary" water which may be applied to various uses to meet the needs and expectations of the broader community. This may include the use of water to meet quality and flow objectives. It may also include specific allocations to local government areas seeking water for industrial development, but only where savings have been created from government investment within sustainable extraction limits.

## Extraction Rights

- The right to extract specified volumes of water during various demand periods within a season or within specific geographical zones.

## Off-allocation and other opportunity flows

- Water in a regulated river declared available for extraction, after a review of environmental needs, over and above announced annual share availability.

## Property Rights (general definition)

- NSW Irrigators Council considers that a property right will have been created if :
  - fixed shares of the resource are issued with defined reliabilities of supply
  - just terms acquisition is triggered when access to, or reliability of supply of these shares are in any way diminished other than through seasonal variability.
  - shares are treated in the same manner as real property.
  - shares can be used as collateral to secure financial dealings.
  - the ability to transfer is part of the right and the rights to transfer are defined.

## Resumption Settlement (refer also to Appendix A)

- A review of a property right may lead to the amendment or substitution of its conditions, but only if certain requirements are satisfied. If the amendment or substitution of conditions prejudices the reliability of supply or expectation of delivery of any individual / business / farm in respect of which the right was issued; or the sustainable extraction limit for the valley, there is a need for resumption settlement.

- The expropriated interest is the market value thereof, that is to say, the amount that would have been paid for the right if, at the time of its taking, it had been sold on the market by a willing seller to a willing buyer.

### **Riparian Rights**

- The right for landholders with direct river frontage to extract water for their non-commercial stock and domestic needs and irrigation needs, up to 4 hectares, without a licence.

### **Shares**

- A defined and fixed proportion of the water resource of that valley in the form of one share per ML. Within Water Management Plans that favour capacity sharing, shares may be defined as a fixed proportion of storage volume and/or inflows.
- Shares will be treated in a manner similar to as real property under the *Real Property Act*.

### **Sustainable Extraction Limit**

- a defined volume of water which can be extracted within a Water Management Unit. Water available within the Sustainable Extraction Limit will vary annually based on climatic conditions and resource availability.

### **Water Use Approvals**

- Issued to a landholder defining the purpose the water may be put to. In Land and Water Management Plan (LWMP) areas this will be consistent with the Plan and in other areas it will initially include all current uses.

### **Water Management Unit**

- Consistent with the White Paper, Water Management Units will form the geographical boundaries of Water Management Plans. They will be largely based on existing definitions of catchments, and aquifers.

### **Water Management Plan**

- Water Management Plans will be defined for each Water Management Unit. The plans will be developed by Water Management Committees or the Healthy Rivers Commission as appropriate (refer to section 4 for discussion of roles and responsibilities)

## 2. NSW Irrigators Council position

Water is an essential ingredient for life. Effective management of water resources in rural New South Wales is vitally important to the economy, the environment and the social well being of the people of New South Wales and Australia.

In NSW there is more land to farm than there is water presently available to service, and competition for water is increasing. There is competition :-

- ❑ between extractive use and in-stream and other environmental needs;
- ❑ between existing irrigators and new irrigation investments
- ❑ between agriculture and other industries, particularly mining, fishing and urban water.

Successful and timely water reform outcomes will be achieved by a commitment to change from the water users. In return, a greater role must exist for water users in determining the rules and how the available water is to be shared and there must be certainty that the value of industry investments will not continue to be eroded over time without compensation.

The impacts of change due to the reform process can only be managed if industry is permitted to work closely and co-operatively in the planning for change.

The NSW Irrigators Council (NSWIC) is the peak body representing irrigation farmers across NSW. Council supports the development and growth of sustainable irrigated agriculture through :-

- ❑ the adoption of appropriate Government policies, laws and regulations;
- ❑ the coordination of irrigation industry policy research; and
- ❑ the provision of authoritative information to the community.

NSW Irrigators Council (NSWIC) has arrived at this position in close consultation with rural communities and peak representative bodies throughout NSW. The outlines position provides a vision for achieving legislation that meets the needs of water users, governments and other stakeholders.

A number of issues in this paper have a direct and indirect impact on other stakeholders. In this regard, NSWIC :-

- ❑ has reached an agreed position with **NSW Farmers Association** on principles proposed in this paper and in particular the issue of riparian rights.
- ❑ will continue to work towards an agreed position with the **Nature Conservation Council of NSW and other key environmental groups** on the management / tradability of environmental water and other issues.
- ❑ will continue to work towards an agreed position with the **Local Government and Shires Association** on town water rights and other issues.

## 3. Executive Summary

### 3.1. A Vision for Water Resource Management in NSW

NSWIC vision for Rural and Regional NSW is consistent with “*Managing Natural Resources in Rural Australia for a Sustainable Future*”.<sup>1</sup>

In moving towards this vision NSWIC supports three broad long term outcomes :-

- healthy ecosystems and catchments in which the integrity of soils, water, flora and fauna is maintained or enhanced wherever possible;
- innovative and competitive industries that make use of natural resources within their capability, to generate wealth for social and economic well-being;
- self sustaining, pro-active regional communities that are committed to the ecological sustainable management of natural resources in their region.

#### Property Rights is Fundamental

Property Rights should be based on current entitlements, including off-allocation and other opportunity flows

Any changes to the water property right, including delivery probabilities, must be compensable by way of resumption payments.

A process including independent, transparent and expert reviews of environmental and socio-economic health of catchments is required.

### 3.2. Summary of NSW Irrigators Council Policies on Key Issues

#### 3.2.1. Property Rights

A fundamental component of the COAG Water Reform Agenda was the introduction of secure water “property” rights<sup>2</sup>. COAG said that “the State Government members of the Council would implement comprehensive systems of water allocations or entitlements backed by separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality”<sup>3</sup>. A property right is a right that is legally enforceable.

To NSW Irrigators Council this will be satisfied when:

- fixed shares of the resource are issued with defined reliabilities of supply
- just terms acquisition is triggered when access to, or reliability of supply of these shares are in any way diminished other than through seasonal variability.
- shares are treated in the same manner as *real property*.
- shares can be used as collateral to secure financial dealings.
- the ability to transfer is part of the right and the rights to transfer are defined.

Water Property Rights should be described in terms of Water Shares and Extraction Rights. All rights should be reviewed as part of the review of Water Management Plans every 15 years, with just terms acquisition applicable if rights are removed or attenuated. Water Use Approvals are also appropriate.

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<sup>1</sup> Managing Natural Resources in Rural Australia for a Sustainable Future, discussion paper Dec 1999”.<sup>1</sup>

<sup>2</sup> COAG Communique February 25 1994, p4

<sup>3</sup> COAG Communique February 25 1994, p21

### 3.2.2. Restructure and Resumption

NSWIC supports and welcomes the concept of compensation in the form of "resumption settlement". Resumption payments must be mandatory under just terms principles for any changes arising from actions by the Government of the day

The *NSW Land Acquisition (Just Terms Compensation) Act 1991*, should be amended to include provision for water rights.

Shares should be issued on the basis of one share equals one megalitre of existing entitlement. Where existing entitlements, as issued under the volumetric allocation scheme, exceed the current sustainable extraction limit, a transition period of 12 months will enable each valley (Water Management Unit) to identify how to adjust shares accordingly.

A Structural Adjustment Package should be available to assist those regions and individuals where this transition results in significant impacts.

Irrigators are prepared to discuss partnership arrangements in the development of the restructuring package.

### 3.2.3. Healthy Rivers

NSWIC supports the Healthy Rivers Commission definition that "a healthy river encompasses a broad range of physical, economic and social characteristics that, in total, describes the rivers environmental status and its ability to support patterns of commercial activity and the social amenity to which the community aspires".

Within the framework which recognises the rights of all stakeholders, NSWIC recognises and supports the need for adaptive management of ecosystem health.

The process for providing in-stream needs should be defined, locally driven, outcome based and auditable. Research and monitoring of in-stream health requires adequate funding to achieve credible results.

### 3.2.4. Responsible Bodies

NSWIC is of the view that the community is best placed to deal with resolution of the problems caused by over allocation, but recognises that there is a role for independent advice to the Minister on the rectification proposals including structural adjustment and resumption financial and other assistance.

### 3.2.5. Separation of Land and Water

The NSWIC supports the ARMCANZ principles approach to separation as follows:-

"Although water property rights would not be permanently attached to land, they may still be linked to land at any point in time by means of constraints on where the entitlement can be exercised, or conditions on who is eligible to own water on a property right. Jurisdictions may choose to apply such ownership controls in order to limit speculation by non-users of the resource and to ensure effective use of the limited water available."

### 3.2.6. Riparian Rights

Existing Riparian Rights should be recognised as part of the transition to the new rights regime Riparian Rights should remain non-tradeable but may be partitioned for subdivision in declared sensitive areas.



### **3.2.7. Off-allocation**

Off-allocation and other opportunity flows must remain available to be shared between environmental and extraction needs and be established as a right

The off-allocation / opportunity flow sharing regime needs to be developed on a valley by valley basis. Access rules should be defined and any attempts to modify access arrangements should require resumption settlement.

### **3.2.8. Town Water Rights**

The transition to town and industrial Water Shares should be consistent with that proposed for other water users. Once again like other Shareholders, any loss of shares or reliability of supply as a result of changes to the Water Management Plan / Sustainable Extraction Limit for a valley, should result in just terms acquisition at market value.

### **3.2.9. Collective Schemes**

The new water rights legislation should reinforce the sovereignty of collective schemes, and provide for each of the schemes to set separation and trade rules that protect the rights of the majority of members of the collective.

### **3.2.10. Water Trading**

Water Management Plans should provide for water trading, subject to constraints as described in section 3.2.10 of the Blue Paper.

Water Management Plans should clearly define the hierarchy of rights in terms of “the right to use” versus the “right to transfer”.

There should be no legislative restrictions on trade, these issues being dealt with if necessary in respective Water Management Plans.

### **3.2.11. Water Use Approvals**

Water Use Approvals are a land management issue. Approvals should be issued to landholders defining the purpose the water may be put to. In Land and Water Management Plan (LWMP) areas this will be consistent with the Plan and in other areas it will initially include all current uses.

A transition term of five years should be provided for with existing water use deemed to be approved water use for the duration of the transitional period.

Review cycles for Water Use Approvals should be 15 years.

### **3.2.12. Administration**

Water rights should be defined in a manner consistent with the Real Property Act, with registration of rights and encumbrances provided through the Land Titles Office.

The Land Titles Office should also be responsible for administering the register for permanent transfers. The register should be kept but generally not publicly available except under freedom of information.

## 4. Responsible bodies and Accountability

### 4.1. General Discussion

- As a general principle, NSWIC favours a less adversarial approach whereby all interest groups within a Water Management Unit can reach agreement on the key objectives and strategies for a Water Management Plan.
- NSWIC is also of the view that the community is best placed to deal with resolution of the problems caused by over allocation, but recognises that there is a role for independent advice to the Minister on the rectification proposals including structural adjustment and resumption financial and other assistance.
- Figure 1 describes three possible paths for the formulation of objectives and strategies as part of the initial Water Management Plans.

- Path 1 – Where existing River Flows Committee's are having difficulty reaching any sort of agreement, the Healthy Rivers Commission will be asked to **arbitrate** and provide a determination for the Water Management Unit in question.
- Path 2a – Where existing Committee's have reached agreement on most (but not all) of the key objectives and strategies, the Healthy Rivers Commission may be called in to **mediate** differences.
- Path 2b – where Committees have reached agreement on all objectives and strategies, the Plan would be sent to the Healthy Rivers Commission for **comment / endorsement**.

After a specified period of time in which relevant State Departments have the opportunity to comment on the Plan, Healthy Rivers Commission would then forward the Plan and their endorsement to the Minister for Land and Water Conservation.

If the Commission has particular concerns or queries in relation to the Plan, they will be required to respond to the River Committee seeking clarification / comment.

Where agreement cannot be reached between the Commission and the Committee, the Minister will have ultimate decision-making power, having regard to the Water Management Plan, the HRC report and the Committee response to this report.

- The aim of this multiple path process is to :-
  - ensure that we preserve and promote existing goodwill where this has been achieved in some valleys (Water Management Units).
  - encourage Water Management Units to adopt a proactive, inclusive process as part of the development of Water Management Plans.
  - ensure that there is no inactivity in a particular Water Management Unit whilst waiting for a Healthy Rivers Commission hearing / determination.
  - ensure that an alternative, independent, credible mediator is available where agreements cannot be reached.
- Following the establishment of initial Water Management Plans, subsequent plans (every 15 years) will have similar options for future plan development.

- Responsibility for the periodic review of Plans will be a matter for Government, who may choose to delegate this responsibility to appropriate bodies. These will involve both on-going (5 year) and end-of-term (15 year) reviews. NSWIC would be prepared to support the establishment of an independent audit group to review the annual progress on the implementation of Water Management Plans, against community agreed benchmarks.

## 4.2. Government

- The Government has a responsibility to ensure that the adverse impacts of water reforms are addressed through industry restructuring and / or just terms acquisition.
- The Minister for Land and Water Conservation is responsible and answerable to Cabinet in respect of the legislation and its implementation. If other Ministers need to concur, it should be within the Cabinet and not within this legislation. It is not practical nor appropriate to have more than one Minister responsible for the legislation, since water management legislation cuts across a number of Ministerial portfolios, including the Environment and Regional Development and Local Government.
- The Ministerial Corporation should not be able to trade water, unless the water has been obtained through prior purchases or through contributions to water saving measures with Government funds.
- The Ministerial Corporation cannot claim ownership of water savings which are paid for out of irrigator water charges.
- The Land Titles Office should be responsible for maintaining a public register of water rights and permanent transfers, including encumbrance registers.
- Responsibility for the periodic review of Plans will be a matter for Government.

## 4.3. Healthy Rivers Commission

- The Healthy Rivers Commission defines a healthy river as “encompassing a broad range of physical, economic and social characteristics which includes the river’s environmental status and the river’s ability to support patterns of commercial activity and the social amenity to which the community aspires”
- The Commission will be responsible for making determinations on flow objectives, quality objectives, social objectives and resumption payments based on the principles described above, where Water Management Committees have been unable to reach agreement.
- In such cases, each Water Management Unit will carry forward existing rules until such time as the Commission has had a chance to make a determination. This transition period will be 5 years maximum.
- The Commission must be adequately resourced to conduct this important role.
- The process of making a determination on each Water Management Unit should involve some opportunity for public hearings and opportunity for stakeholders to comment on draft recommendations.
- The Healthy Rivers Commission may have a role in end-of term (15 year) reviews of Water Management Plans.

#### **4.4. Water Management Committees**

- NSWIC considers that Water Management Committees (WMC) should be established based on existing River Flows Committees.
- However, the operating protocols of these Committee's must be reviewed to ensure that effective decision making is not hampered and that decisions are truly reflective of community values.
- The WMC's should have responsibility for developing objectives and strategies, not interpreting the objectives put forward by the Minister. NSWIC advocates plans that are put together by the community; that meet community and government policy outcomes; that set the operational plans for the river operator and that include adequate mechanisms for accountability and evaluation.
- Where existing / agreed flow and quality objectives are in place, these agreements will form the basis of the Water Management Plans to be recommended to the Minister.
- Where agreements cannot be reached there will be role for the Healthy Rivers Commission to mediate or arbitrate (see section 4.3).

#### **4.5. Water Advisory Council**

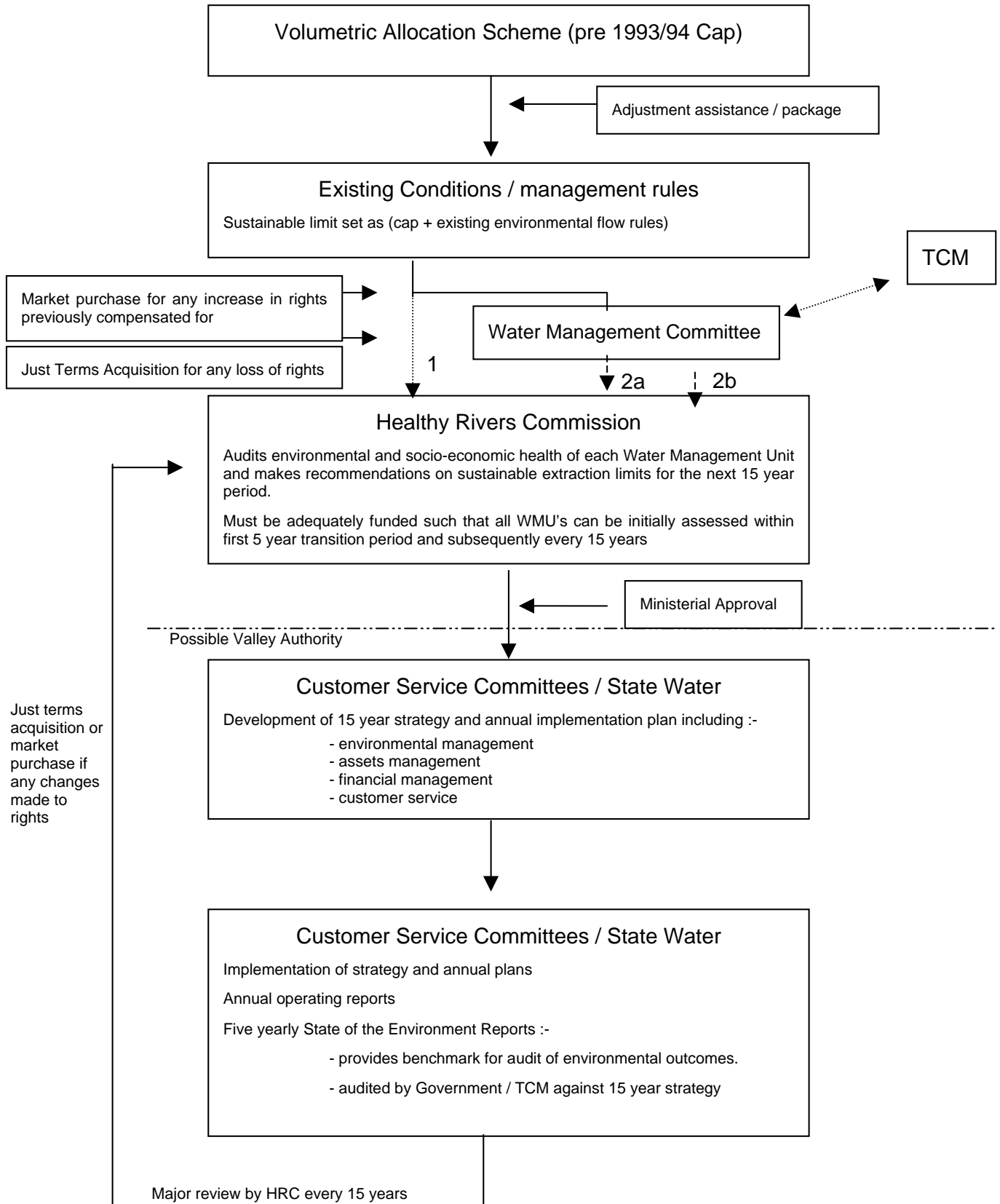
- Substantial changes to the role and responsibilities of the Water Advisory Council are required before NSWIC could agree that the Council serves a useful purpose in the new water rights framework.
- Such changes might include :-
  - a responsibility to undertake more effective communication with key stakeholder groups
  - provision for more proactive, strategic advice to the Minister as opposed to the current role of commenting on decisions already taken.
  - revised composition of the WAC

#### **4.6. Customer Service Committees and State Water (as river operator)**

- Existing Customer Service Committee's should be retained and their role strengthened.
- Customer Service Committee's, in conjunction with NSW State Water, will take responsibility for the development and implementation of 15 year Strategic Plans and Annual Implementation Plans, based on the determinations of either the Healthy Rivers Commission or the Water Management Committees.
- Annual reporting of operations will take place as well as 5 yearly "State of the Environment" reporting.
- These 5 yearly reports will be audited against agreed objectives – Government may choose to assign this responsibility to other bodies such as the Water Management Committees or to private auditors.

Customer service committees are therefore accountable for meeting environmental and operating objectives of each Water Management Unit.

Figure 1 :- Proposed responsibilities under new Water Management legislation



## 5. Protection of the water environment

- ❑ The environmental requirements of the river must be defined and fixed where possible. When it cannot be defined, for example in valleys where there is translucency, we require fixed and transparent rules relating to translucency which allow for yearly variations due to climatic conditions.
- ❑ The environmental shares should where possible be separately defined in terms of property and managed by the Customer Service Committee and State Water according to objectives and achievement criteria established by the Water Management Committee.
- ❑ The process for providing in-stream needs should be defined, locally driven, outcome based and auditable. Research and monitoring of in-stream health requires adequate funding to achieve credible results.
- ❑ Unique off stream environmental allocations should have a defined right or share (eg Barmah Forest, Macquarie Marshes), where appropriate.
- ❑ A Water Management Plan should be the basis of sustainable extractable limits. This is inherent in the plan. The plan incorporates the environmental needs of a river therefore there is no purpose served by imposing extractable limits in addition to the Water Management Plan.
- ❑ The Water Management Plan will have agreed and defined environmental management protocols for each valley. Periodic reviews of environmental outcomes will be delivered for community review, similar to the process currently applied to Land and Water Management Plans.
- ❑ Off-allocation and other “opportunity flows” must remain available to be shared between environmental and extraction needs and be established as a right.
- ❑ NSWIC is of the view that environmental allocation should be tradeable in line with ARMCANZ guidelines and consistent with other rights.
- ❑ A “contingency pool” of water could be developed through government funded savings from infrastructure projects. This contingency could be used within a fifteen year period to increase environmental flows if five yearly reviews deem it necessary. Water within this pool might be available on the temporary market to help fund more works but not available on the permanent market.
- ❑ Any water savings actually achieved through government investment could be used to address environmental health issues in rivers. The savings must be real, identifiable, made and proven before allocation to the contingency pool.

## 6. Water Management Planning

- ❑ Water Management Plans set the framework in which the Implementation Plan is developed by State Water via the Customer Service Committee (as river operator).
- ❑ The legislation should allow individual Water Management Plans to define the sharing models and priorities as appropriate for communities. Communities need to be confident that the totality of shares is locked up and there will be no erosion of rights by increasing the total shares.
- ❑ All users have a defined volume or resource share with a probability of supply attached.

- ❑ Provision should be made in Water Management Plans for safety mechanisms to avoid unacceptable adjustment issues and provide transition times for communities as a result of separation of access and use rights. (refer to section 7 and 13)
- ❑ There should be 15 year reviews of Water Management Plans.
- ❑ The Plans should be audited against community agreed benchmarks – for example, defined / agreed management rules for each Water Management Plan using reliability described in terms of 100 years modelling of early season and complete season availability.
- ❑ The terms and rules for trading rights should be described in the Water Management Plans. Plans should clearly define the hierarchy of rights in terms of the right to use versus the right to trade.
- ❑ Regional and local protocols for Water Use Approvals should be included in the Water Management Plan.
- ❑ Water Management Plans should decide the level and factors of security conversions available, in both directions, on the basis of agreed modelling data.
- ❑ High security access to continuous accounting and off-allocation is currently not available in most valleys. This should continue in these valleys as long as high security users retain guaranteed security of supply. Consideration of future access will be a matter for Water Management Plans.
- ❑ The off-allocation and opportunity flow sharing regime needs to be developed on a valley-by-valley basis as part of Water Management Plans.
- ❑ Shares within the Water Management Plan should be the basis of sustainable extractable limits. This is inherent in the plan. The plan incorporates the environmental needs of a river and is therefore there is no purpose served by imposing extractable limits in addition to the Water Management Plan.
- ❑ Sustainable Extraction Limits will be set for each share class, including general security, high security and off-allocation. This will require that the starting points for extraction limits are agreed to by the affected community. Changes to the extraction limit as a result of reviews of Water Management Plans should be shared between each share class. ie - each share class has commensurate responsibility for ensuring the environmental health of the system, to be determined within Water Management Plans, subject to resumption settlement.
- ❑ Sustainable Extraction Limits may not be relevant in some circumstances of significant flows, and may be able suspended on a yearly basis. This will be a matter for the respective Water Management Plans.
- ❑ Water Management Plans should be mindful of cultural and heritage values.

## **7. Separation of Land and Water Rights**

- ❑ NSWIC agrees that the separation of land and water into two separate assets is a reality. However, Water Management Plans must contain safety mechanisms to avoid unacceptable adjustment issues and provide transition times for communities.

- The NSWIC supports the ARMCANZ principles<sup>4</sup> approach to transition as follows:-
  - “Although water property rights would not be permanently attached to land, they may still be linked to land at any point in time by means of constraints on where the entitlement can be exercised, or conditions on who is eligible to own water on a property right. Jurisdictions may choose to apply such ownership controls in order to limit speculation by non-users of the resource and to ensure effective use of the limited water available.”
- Local Governments and collectives must have the ability to react to significant geographical shifts in share distribution. This will be dealt with as part of Water Management Plans or possibly Local Environment Plans.
- If separation takes place, the characteristics of the new water access right must continue to include the ability to register an interest and use it as collateral for financial arrangements
- As a principle, NSWIC does not support widespread speculation in the water share market, although a limited level of speculation is a legitimate component of effective risk management for today’s water managers.
- NSWIC supports the concerns of local governments in relation to their rating structures and the need for a review to identify what complementary changes are required to protect same.

## 8. Rights to Water

### 8.1. Definition of Rights

#### 8.1.1. Water Shares

- Water shares will define the basis of sharing the agreed sustainable extraction limits. The number of shares held will represent a portion of water available in the Water Management Unit.
- Ideally, upon conversion to the new system the total number of shares in any valley should equal the volume of water available under the sustainable extraction limit, unless a full capacity sharing model is implemented in which case the total number of shares should equal the total resource availability, including environmental shares.
- In valleys where the current volumetric allocation exceeds the likely sustainable extraction limit, the inherent problems in defining rights under the current system will be carried over to the new system. NSWIC is of the view that this issue must be addressed – section 13.2.2 provides details of mechanism for dealing with these issues.
- Generally, subject to the agreed transition arrangements as described in section 13.2.2, 1 share will be issued for each megalitre of allocation currently held including existing hierarchies. In areas where storage or yield capacity sharing is implemented, the shares might be shares of the total yield / capacity.

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<sup>4</sup> “Water Allocations and Entitlement: A National Framework for Implementation of Property Rights in Water”, 1995.



Shares expressed as percentages, as described in the White Paper<sup>5</sup> are not the preferred system.

- ❑ Water shares should be defined under the Real Property Act, with registration provided through the Land Titles Office.
- ❑ There should be no fixed tenure or review of water shares – the need to review environmental needs of rivers and resume shares, if necessary, will be provided for in the 15 year reviews of extractable limits as part of Water Management Plan reviews, including resumption payments where required.
- ❑ Shares must be unassailable at law except through resumption following redefinition of extractable limits with appropriate market value resumption settlement. Normal legal appeal processes should also apply through the Land and Environmental Court or the Administrative Appeals Tribunal.
- ❑ Proposed changes to the extractable limit must be audited against community agreed benchmarks – for example, defined / agreed management rules for each water management plan using reliability described in terms of 100 years modelling of early season and complete season availability.
- ❑ Water Management Plans should clearly define the hierarchy of rights in terms of “the right to use” versus the “right to transfer”.
- ❑ Users should be able to convert water share securities in both directions. Each valley should decide the level and factors of conversions available based on agreed modelling data for each Water Management Plan area.
- ❑ High security is a different and preferential water share. The elements and extent of preference are to be detailed in each Water Management Plan.
- ❑ Additional water shares for town industrial or domestic requirements, over and above current entitlement equivalents, must be obtained through either efficiency gains or by entering the market.
- ❑ Councils should have the ability to access restructuring assistance for the purchase of water if required to attract industrial development.

### 8.1.2. Water Extraction Rights

- ❑ Water Extraction Rights define how much water can be extracted at a specific location at a specified time and specified rate.
- ❑ System design limitations and “natural” chokes in rivers result in an inability to provide all shares at any one point in time. Extraction rights are required in some cases as a means of recognising and supporting other shareholders rights. They may include features such a daily flow rate limits.
- ❑ For example, daily flow rates could be defined as follows - 1500 shares might be available in the form of 1300 shares during peak demand periods and 200 shares being available throughout the remainder of the year. The exact mechanism applied will be a matter for each Water Management Unit.
- ❑ There should be 15 year reviews of water extraction rights as per the review of Water Management Plans.
- ❑ Conversion to Water Extraction Rights, should be based on current demand management protocols for each valley.

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<sup>5</sup> A proposal for updated and consolidated water management legislation in NSW - A White Paper, 1999

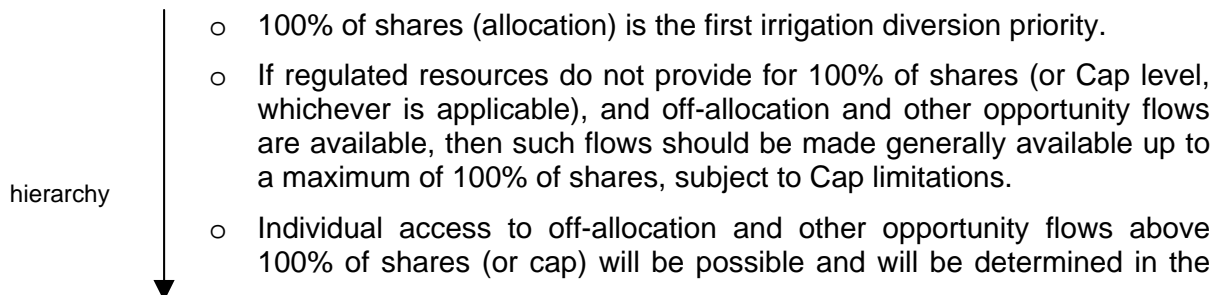
- Water Extraction Rights are tradable, subject to the protection of other shareholders extraction rights and definition of geographic / system boundaries in which trade can occur.

### 8.1.3. Riparian Rights

- The NSWIC and its members acknowledge that riparian rights, for stock and domestic purposes only, have contributed significantly to the value of properties with river frontage. Existing riparian rights should therefore be recognised as part of the transition to the new rights regime.
- However, it is recognised that through increasing subdivision of rural properties, use of riparian rights has increased demand on water resources. The NSWIC acknowledges that this trend will continue unless action is taken.
- With this in mind, the Minister should have the ability to declare as sensitive, areas where a high rate of subdivision is causing a detrimental impact on other users. Subdivision of properties in these areas would then require subdivision of the riparian rights.
- Riparian rights should remain non-tradeable but may be partitioned for subdivision in declared sensitive areas.

### 8.1.4. Off-allocation and other opportunity flows

- Off-allocation and other opportunity flows are part of the resource set.
- Off-allocation and other opportunity flows must remain available to be shared between environmental and extraction needs and be established as a right.
- Whilst access to these flows have always been opportunistic, they have become over time a major source of supply for some regions and significant investment has been made on the basis of continuing availability.
- Transition for off-allocation and other opportunity flow rights, in recognition of current MDBC Cap implementation, will be a matter for each implementation plan in response to the approved Water Management Plan. Between Valleys differences exist in current distribution of off-allocation and other opportunity flows. i.e. pro rata versus history of use.
- The off-allocation / opportunity flow sharing regime needs to be developed on a valley by valley basis. Access rules should be defined and any attempts to modify access arrangements should require resumption settlement.
- Off-allocation and other opportunity flow rights should be tradeable on the permanent market. Other shareholders rights must be considered, particularly in relation to the social impacts on communities that have developed a high reliance on these flows.
- The following hierarchy is suggested as a basis for sharing the extractive component of off-allocation and other opportunity flows :-



Water Management Plan based on currently agreed Cap management protocols in each valley. For example, irrigators in some valleys have a history of use quota which is seen as a preferential right to off-allocation and other opportunity flows, based on historic dependence on diversions above 100% allocation. In these situations, access above 100% of shares will be based on history of dependence. Other valleys may have different sharing protocols.

### 8.1.5. Town and Industrial Rights

- ❑ The transition to town and industrial water access rights should be on the basis of current allocations, recognising the need for a transition period to address any consequences of sustainable extraction limits being lower than entitlements held. Climatic adjustment of access as a result of the Cap requires clarification and resolution as does the current imbalances.
- ❑ Additional water for town and industrial requirements, over and above current entitlements, must be obtained through either efficiency gains, by entering the market or by other means such as security mixes.
- ❑ Once again like other access rights, any loss of access rights or reliability of supply as a result of changes to the Water Management Plan for a valley, should result in just terms acquisition at market value.
- ❑ On the basis that urban and industrial shares are based on existing entitlements, there is no need for growth factors to accommodate future requirements. There does however, need to be an anomalies process incorporated into the transition phase for those Council's that may be relatively prejudiced by past entitlement decisions.
- ❑ Existing security of town and industrial water should be preserved, v/v high security, however Council's should have the ability to consider security mixes that best suit their needs.
- ❑ If Council's have a mix of water securities, they should be treated consistent with other shareholders who likewise have mixed securities.
- ❑ The same provisions regarding access to off-allocation and carry-forward should apply to town and industrial rights as applied to other shareholders with the same shares, specific to each Water Management Plan.
- ❑ Where town and industrial supplies are incorporated as part of existing collective schemes, the transition and management of these supplies will be a matter for these schemes and the relevant urban / industrial customers.
- ❑ NSWIC supports the principles raised in the White Paper regarding trade in effluent credits when addressing future growth requirements, subject to appropriate water quality standards.
- ❑ NSWIC questions the validity of having septic tank management protocols tied to urban Water Use Approvals.
- ❑ In order to accommodate specific needs such as proposed industrial developments, Local Governments should have the ability to make application for water that may be available in the "contingency pool" of water held by the State Government for community needs including environmental flows, but only where savings have been created from government investment within sustainable extraction limits. (refer to section 1).

### 8.1.6. Special Additional Licence Rights

- Special Additional Licences should have access rights described which are consistent with tenure and monitoring arrangements of other access rights.

### 8.2. Collective Schemes

- The new water access rights legislation should reinforce the sovereignty of collective schemes, and provide for each of the schemes to set separation and trade rules that protect the rights of the majority of members of the collective.
- In at least some of these situations, where there are Corporations Law management structures in place, it can be argued that it is a directors responsibility to protect the future of the infrastructure in this way in the best interests of the company.

## 9. Water Trading and Transfers

- Water Management Plans should provide for water trading within the following constraints, consistent with ARMCANZ principles :-
  - Riparian Rights – not tradable but can be partitioned for subdivision in declared sensitive areas.
  - Stock and Domestic Rights (other than riparian) – not tradable but can be partitioned for subdivision.
  - Water Shares (allocation) – permanent and temporary trade, subject to agreed protocols / priorities in each valley and recognising the need for cap climatic adjustment consideration and a transition period to correct imbalances (see section 13.2.2)
  - Water Shares (off allocation and other opportunity flows) – permanent trade only.
  - Water Extraction Rights – limited trade available subject to physical limitations and other shareholders rights. Within any system where the extractive capacity is limited, the Water Extraction Right must be attached and moved with the Water Share.
  - Water Use Approvals – not able to be separated from the landholding.
- The new water rights legislation should reinforce the sovereignty of collective schemes, and provide for each of the schemes to set separation and trade rules that protect the rights of the majority of members of the collective.
- Water Management Plans should clearly define the hierarchy of rights in terms of “the right to use” versus the “right to transfer”.
- Off-allocation and other opportunity access rights should be tradeable on the permanent market.
- There shall be no legislative restrictions on trade, these issues shall be dealt with if necessary in respective Water Management Plans.
- Trade should be permitted for surplus town / industrial water rights, consistent with trade rules for high security irrigation rights. Where Council's have a mix of securities the rules should be also be consistent with similar shareholders.

## 10. Water Use Approvals

- Water Use Approvals are a land titles issue.
- Generally, the *Environmental Planning and Assessment Act (1979)* shall be applicable, except where Water Use Approvals have been issued, in which case it is unreasonable and administratively inefficient to have two separate regimes to have to comply with. In this case Water Use Approvals under the new *Water Management Act* will be sufficient.
- The appropriate authority for issued Water Use Approvals is NSW Agriculture.
- NSWIC supports the following process for Water Use Approvals :-
  - Transitional term of five years to be provided for.
  - Existing water use is deemed to be approved water use for the duration of the transitional period. Any renewals of existing licences that fall within the transition period will be renewed according to existing regulations
  - Review protocols, preferably on a regional basis, to be developed during the 5 year transitional period
  - Water Use Approvals will not have regard to Sustainable Extraction Limits, shares or extraction entitlements.
  - Where there is an approved Land and Water Management Plan in place, these provisions will be taken to constitute a Water Use Approval.
  - Review cycles to be 15 years
  - Delays in the review of Water Use Approvals should not interrupt the business cycle. Previous use approvals will continue to apply until the review is complete.
  - Reviews should be a compliance review of any contractual obligations associated with Water Use Approvals, not a review of system health, etc. Compliance assessment should be self assessment against regional and local protocols included in the water management plan.
  - Non compliance with Water Use Approvals conditions may result in suspension of the approval.

## 11. Administration System

- If separation of water land and water rights takes place, the characteristics of the new water access right must continue to include the ability to register an interest and use it as collateral for financial arrangements
- Water rights should be defined under the Real Property Act, with registration of rights and encumbrances provided through the Land Titles Office, not the DLWC.
- The Land Titles Office should also be responsible for administering the register for permanent transfers. The register should be kept but generally not publicly available except under freedom of information.
- NSWIC does not consider it necessary to provide for a public register of temporary transfers. Temporary market reporting will develop as commercial

interests see opportunities, as has been evident with the development of the existing water exchanges in the Southern Murray-Darling Basin.

- The new water rights legislation should reinforce the sovereignty of collective schemes, and provide for each of the schemes to set separation and trade rules that protect the rights of the majority of members of the collective.

## 12. Appeals and Objections

### 12.1. Anti competitive conduct

- General competition laws including the Trade Practices Act are sufficient to scrutinise anti competitive conduct. It should be recognised that Companies such as Murray Irrigation Ltd and Murrumbidgee Irrigation Ltd already control over 50% of access rights in some valleys.
- With respect to Irrigation Corporations, it is considered that the Corporations Law has provisions for dealing with anti competitive conduct, if required.

### 12.2. Protection of Rights

- The system applying to each Water Management Unit should be driven by local input with each Unit adopting the model that is appropriate to their needs. This may, in some circumstances where appropriate, allow for an autonomous valley authority, replacing the present State Water valley administration.
- If legal redress is required for any issue then a process of initial mediation and defined disputes resolution process should be established. If agreement cannot be found then normal legal avenues should be available, or the Administrative Appeals Tribunal available to resolve disputes with the Government agencies. Any process must be independent of Government and transparent.
- State Water and the Customer Service Committees must be held accountable for the administration of water.
- The legislation needs to provide for protecting against and in some instances compensating for :-
  - impacts on communities – mostly about time to adjust
  - impacts on other shareholders rights – if rights are attenuated or removed as a result of someone else's action the affected party must have the right to be heard and seek redress either through reinstatement or financial. Activation of water on-farm up to the limit of shares provided for each irrigator would not constitute sufficient reason for seeking redress, except where there is an existing imbalance, which must be addressed in the transition period with restructuring assistance.
  - the right to seek redress should be at a "system level". That is, the planning and approval process should include appropriate duty of care provisions and provide immunity to the individual who complies with all Water Extraction Right / Water Use Approval conditions agreed to in the plan.
  - and in doing so, needs to guard against interference by groups who purport to protect the common good.
- The new water rights legislation should reinforce the sovereignty of collective schemes.

## 13. Transitional arrangements

### 13.1. Restructure and Resumption

- ARMCANZ<sup>6</sup> states that “where river systems are already highly committed, consideration should be given to addressing environmental problems by the re-allocation of water with consideration of compensation to affected entitlement holders being determined by jurisdictions.”
- NSWIC supports and welcomes the concept of compensation in the form of “resumption settlement”. It must be mandatory under just terms principles for any changes arising from actions by the Government of the day, and should also be applied in any restructuring of water entitlement to ensure river health under any new water sharing arrangements. More details on resumption settlement can be found in Appendix A)
- The *NSW Land Acquisition (Just Terms Compensation) Act 1991*, should be amended to include provision for water rights.
- Structural adjustment package to be developed to assist irrigators impacted by water reforms, up to and including changes to the irrigation year 1999/2000.
- Just terms acquisition compensation (“Resumption Settlement”) to be paid on all adjustments to sustainable extraction limits, shares, extraction rights and use approvals after 2000.
- Any attempts to modify access arrangements to off-allocation and other opportunity flows should be compensable.

### 13.2. Conversion

#### 13.2.1. Water Use Approvals

- Transitional term of five years to be provided for.
- Existing water use is deemed to be approved water use for the duration of the transitional period.

#### 13.2.2. Shares

- The transition from volumetric allocations to the new shares regime is a critical issue. Initially, the conversion process should be based on 1 ML of existing entitlement being converted to 1 share under the new system.
- However, in many valleys the extent of entitlements arguably exceeds the sustainable extraction limit. Simply converting 1 ML of current entitlement into 1 share will carry forward all of the inherent problems of “over-allocation” with the current system.
- NSWIC proposes that a transition period of 12 months be set aside to formulate the transition arrangements. In this time, each Water Management Unit will be given responsibility for determining the conversion rates and adjustment issues. Recommendations would then be made to the Government.

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<sup>6</sup> “Water Allocations and Entitlement: A National Framework for Implementation of Property Rights in Water”, 1995.

- It is necessary that adequate provision for restructuring assistance be provided for in the legislation. This package should recognise that as a result of the transition, in every Water Management Unit there will be “winners and losers” and that adequate provision for assisting the “losers” is essential.

### **13.2.3. Extraction Rights**

- Conversion to water extraction rights, should be based on current demand management protocols for each valley.

### **13.2.4. Off-allocation and opportunity flows**

- Transition for off-allocation and other opportunity flow rights, in recognition of current MDBC Cap implementation, will be a matter for each annual Implementation Plan in response to the approved Water Management Plan. Differences exist in current distribution of off-allocation and other opportunity flows. ie pro rata versus history of use.



## APPENDIX A

### Resumption Settlement

#### The NSWIC definition of a property right

“A property right exists when the community supports and protects the exclusive use and enjoyment of an entitlement and allows that entitlement to be traded or passed to others.”<sup>7</sup>

To NSW Irrigators Council this will be satisfied when:

- fixed shares of the resource are issued with defined reliabilities of supply
- just terms acquisition is triggered when access to, or reliability of supply of these shares are in any way diminished other than through seasonal variability.
- shares are treated in the same manner as *real property*.
- shares can be used as collateral to secure financial dealings.
- the ability to transfer is part of the right and the rights to transfer are defined.

#### A transition period is required

Shares should be issued on the basis of one share equals one megalitre of existing entitlement.

Where existing entitlements, as issued under the volumetric allocation scheme, exceed the current sustainable extraction limit, a transition period of 12 months will enable each valley (Water Management Unit) to identify how to adjust shares accordingly.

A Structural Adjustment Package should be available to assist those regions and individuals where this transition results in significant impacts. NSWIC has prepared an adjustment package for consideration by other stakeholders and government. The rationale for this package is summarised in Appendix B.

#### Defining when resumption settlement is applicable

Annual climatic variability and resulting resource availability is not compensable.

Extraction limit is set at current management rules / reliability in each valley which we regard as sustainable limits based on our current knowledge.

To benchmark / define what this is :-

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<sup>7</sup> ARMCANZ (1995) - Water Allocations and Entitlement: A National Framework for Implementation of Property Rights in Water”.

- ❑ Government management rules, including dam operating protocols, catchment management rules and environmental flows rules that are in place are described and known publicly. These management rules could include defined capacity shares in valleys where this is favoured.
- ❑ these management rules are modelled over 100 year period to describe reliability of supply under variable climatic conditions.
- ❑ modelling assumptions are clearly described and known publicly. This does not prevent changes to modelling to improve accuracy (as agreed by the WMC's) but rather sets the benchmark by which future changes are compared.
- ❑ changes to management rules, operating protocols and / or extraction limits triggers the need for new model runs using the agreed benchmark assumptions with resultant change in reliability being used as the basis of resumption settlement.
- ❑ Resumption settlement used by individuals or in some cases the collective schemes (Corporations) for structural adjustment to offset impacts.
- ❑ It is the reliability of supply that is being resumed not the water itself or the shares, except in situations of buy-back before determining Sustainable Extraction Limits.
- ❑ Amendments must be made to the Just Terms (Land Acquisition) Act 1991 to allow water to be considered property to which the Act applies, in a similar way to land.

*For example :- 1000 shares under a set of agreed management rules might deliver a reliability of 65% (that is, 1000 ML can be expected 65 years in every 100). If changes to the rules and protocols or extraction limits are proposed, the new conditions are modelled with the same modelling assumptions and the reliability impact is defined. If 65% drops to 62% then just terms acquisition is applicable on 3% resumption at market rates. A defined mechanism for determining "market value" is required. The "resumption settlement" can then be used by individuals to implement the appropriate adjustment measures on their respective farms, which may include decisions to sell remaining shares and exit irrigated agriculture.*

## Achieving security whilst allowing adaptive management

The description of rights and resumption settlement provides the necessary security for water users. However, the legislation also needs to cater for the ability to make future adjustments if the current sustainable extraction limits need to be reduced or indeed increased, on the basis of better scientific knowledge and socio-economic data.

The mechanism proposed below provides a framework for ensuring that additional water for the environment can be found whilst recognising that individuals should not be asked to bear the full financial burden on behalf of the broader community if values change.

In most circumstances the "line in the sand" will be drawn at current management rules including properly managed (existing) environmental flows and cap management protocols. There are some situations where the problems of over allocation are so immense that the partnership funding arrangements will clearly require greater Government commitment to enable shares to reflect sustainable extraction limits. The restructuring package therefore needs to consider buy-back provisions in order to address these situations.

NSWIC would be prepared to consider any suggestions on variations that may improve the proposed mechanism by which more water can be obtained for in a transparent way environmental needs.

**Obtaining more water for future environmental needs :-**

Determined that more water is required for environmental flows in a particular WMU. (section 3)

Resumption settlement requires financial resources.

The State and Federal Government should identify the up-front cost of resuming shares or reliability in a particular WMU as part of the Plan for each Unit.

NSW Irrigators would be willing to consider partnership funding arrangements. Under such arrangements, when the resumption cost is set for each Plan, special additional levies could be established in each WMU to ensure that irrigators contribute to the financial partnership for resuming water. The percentage contribution and the tenure of the levy would be a matter for negotiation and should reflect the need for community and intergenerational equity.

Other community groups / private interests could contribute via philanthropic donations.

There should also be consideration of a broad-based community levy to support reform measures, subject to community acceptance.

Appropriate structures would need to be put in place to ensure transparency and accountability for private and public contributions to such schemes.

## **APPENDIX B**

### **Rationale for a Restructuring Package<sup>8</sup>**

#### **Buy back of licences in excess of cap and licences in excess of sustainable extractive limits for groundwater.**

Previous Government policy to issue licences has arguably resulted in over allocation of the available resource in NSW, particularly, but not exclusively, in regulated systems. The DLWC has a duty of care in the issuing of these licences which has not been exercised to date. The imposition of the cap on diversions was one step in admission by Governments that over allocation had occurred, but the total cost of this has been borne by the industry and we now need to ensure that extractive capacity (current entitlements) and existing sustainable limits are re-aligned.

#### **Funding delivery system efficiency improvements.**

Major delivery system efficiency improvements (both river and major distribution company level) can be achieved if sufficient will and money are applied. Large improvements could be made which reduced wastage of water.

Examples are: piping the Darling Great Anabranh supplies;

- enroute storage's along rivers to capture rain rejection events, etc;
- piping stock and domestic systems; etc.

#### **Assistance for enterprise change**

The water reforms are intended, in part, to encourage higher value production from the available resources. Some irrigators have been able to easily adapt to this such as changing from grazing to crop production. Some enterprises though are restricted in their ability to transform their production base due to incompatible equipment requirements, lack of skill and technical expertise, or current high debt loads.

While this process will occur over time, if the Government wishes to see a major change in a short time, clearly assistance is required to facilitate the changes.

#### **On farm efficiency savings.**

As irrigators generally will have less water delivered, they should be encouraged to invest in on-farm water savings. Water savings which result from on-farm investment must remain the property of the irrigator.

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<sup>8</sup> NSWIC will be release the full details of its restructuring package in the coming weeks.

## **Impacts from market activation of portions of licences which were previously unused by the holders.**

Licence holders should reasonably expect to be able to exercise that licence in accordance with the supply probability curve benchmarked. Activation by individual irrigators via the market should not have adverse impacts on other water users when the sustainable level of resources are allocated.

The cap on diversions however may reduce the capacity of this licence activation, without correspondingly adjusting the extractive capacity. The continuing encouragement of the market however has maintained the expectation that all licences could be activated and the Government needs to address this issue.

A structured buy back of licences suggested above will address this issue. Impacts to date should be considered as in-kind industry contribution to the reforms.

## **Other measures**

Rural Partnership schemes exist or are planned in the MIA, Sunraysia and Western NSW regions which will be able to encourage some farmers to undertake business planning and other enterprise associated planning. These are in place or proposed to deal with a range of regional and commodity structural adjustment issues and should not be considered as part of any restructuring relating to water.

Funding should be provided to groups or regions to look at new enterprises which could assist irrigated farm viability. The NSW Department of State and Regional Development may be able to take a lead role in this activity.