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The Secretariat
Chief Executive Officers' Group on Water
C/- Natural Resource Management
Department of Agriculture, Fisheries and Forestry
GPO Box 858
CANBERRA ACT 2601

Submission to the Water Property Rights Report

The Inland Rivers Network (IRN) and Nature Conservation Council of NSW (NCC) appreciate the opportunity to comment on the development of national principles for water entitlement and allocation, and guidelines for the provision of adjustment assistance. The recommendations in this submission come out of NCC and IRNs first hand experience participating in the New South Wales water reform process, and informed by what we see as the major shortcoming within that process.

We have reached a point where we can no longer ignore the state of our rivers and difficult changes need to be made to ensure that this fundamental resource is sustained in the future. The report has focused on three main objectives: providing stable and well-defined water entitlements; ensuring environmental protection now and for the future, and ensuring there is equity in all forms. In support of meeting these objectives, IRN and NCC have developed the following position:

1. The rights of the environment are paramount to the reform process, and must be clearly defined, guaranteed with adaptive management to respond to new information;
2. Water licence entitlements must accurately reflect the volume of water that can be sustainably extracted;
3. Clear definition of user responsibilities is essential for adequate recognition of environmental rights;
4. Clear definition of user responsibilities is essential in achieving sustainable natural resource management;
5. Trading rules to be developed in a manner that ensures environmental rights are guaranteed independently of market and trading operations, ensuring water for the health of the environment is secured;
6. Public funding is necessary to address equity and adjustment issues, to assist in instituting and achieving powerful incentives for greater water efficiency and sustainable land use practices; and
7. Oppose entrenching rights to compensation.

These points are discussed in the following pages and identify how such an approach will facilitate these objectives, particularly that of environmental protection. If you have any further enquires, please do not hesitate to contact Greg Williams at IRN on (02) 9212 5112 or Sally Steele at NCC on (02) 9279 0955.

Yours sincerely,

Greg Williams
Coordinator
Inland Rivers Network

Brooke Flanagan
Executive Officer
Nature Conservation Council of NSW

1 The rights of the environment are paramount to the reform process, and must be clearly defined, guaranteed with adaptive management to respond to new information

- 1.1 In 1994 COAG identified environmental protection as one of the fundamental aims of the national water reform process. To achieve this, the ecological requirements of the water sources must be fully defined and protected, with clear principles and rules underpinning water source allocations.
- 1.2 It is essential that the water reform process clearly apply the principles of Ecologically Sustainable Development (ESD) in meeting the fundamental goal of environmental protection and resource security, particularly for the future. Unfortunately, current reforms in New South Wales have **not** met this fundamental aim and we have serious concern as to whether the New South Wales Water Sharing Plans have even met the conditions of the NSW *Water Management Act 2000*.
- 1.3 The *Water Management Act 2000* has provided farmers with 15 year licence entitlements (section 69), compared to 1 year licences prior to the *Act*, giving them far greater security and stability than they have ever had. This length of time also allows for substantial mortgages on these licences.
- 1.4 Environmentally the picture is far more grim, with the opportunity for adaptive management greatly limited by policies locking in extraction regimes of 10 and 15 years, a situation that only exacerbates the effect of past and current management mistakes. Further, minimal water flows have been provided to assist river restoration, with extraction from river and groundwater systems still being far from sustainable. The Independent report prepared by ACIL Consulting indicates that the Water Sharing Plans allow extraction levels to only be decreased by approximately 0.25% - 1.8% in some regulated river valleys¹. This is despite the New South Wales State of the Environment Report 2001 clearly indicating that freshwater ecosystems in this state may well be the most degraded ecosystems as a direct result of river regulation. In addition to this report there is a plethora of scientific evidence that indicates that our rivers are degrading at a rapid rate.
- 1.5 In comparison to the stability and security given to water users, environmental improvements remain marginal, with environmental rights and user responsibilities still unclear and ill-defined.
- 1.6 This failure of NSW Water Sharing Plans to identify the ecological requirements of water sources and secure this water has come at an enormous cost to the public and government. Massive amounts of compensation will have to be paid to water users, should more water than what the Water Sharing Plans allow for the environment be required.

¹ ACIL Consulting (2002) *Economic Impacts of the Draft Water Sharing Plans. An Independent assessment for the NSW Department of Land and Water Conservation.*

- 1.7 It is fundamental that the Government retains the ability to ensure adaptive management with clearly defined access and use entitlements. Adaptability is essential given the current level of knowledge and understanding of our water resources and their sustainable use, and the current state of the environment. Adaptive management is essential for enabling progress towards sustainability, thereby ensuring future resource availability and hence equity for community, landholders and the environment alike. Reduction of the already minimal opportunity for adaptive management will only further entrench current unsustainable levels in a negligent, unreasonable and inequitable manner. It is also necessary to avoid constant and costly compensation / clawing back of water, and it is imperative that adaptive management provisions do not trigger compensation.
- 1.8 Further, it must be ensured that equity is always provided, ensuring that downstream water users, Indigenous people and the community in general are never excluded from the benefit or use of this fundamental resource. Waters public nature must be retained.

Recommendation: The ecological requirements of the water sources must be fully defined and guaranteed, with clear principles and rules underpinning water source allocations. Recognition of environmental rights also requires the integration of ESD principles at all levels of decision – making and management, as well as the inclusion of adaptive management provisions.

2 Water licence entitlements must accurately reflect the volume of water that can be sustainably extracted

- 2.1 This is a fundamental requirement for the achievement of sustainable water use and for meeting the COAG aim of environmental protection.
- 2.2 The State Water Management Outcomes Plan (2002) highlights a number of water sources across NSW that have been grossly over-allocated, with some sources currently having a total share component over 400% of the extraction limit². Despite this, it only provides “a pathway for reducing the share components to 200 percent of the long term average annual extraction limit to be established not later than the end of the term of the State Water Management Outcomes Plan” for surface water sources.
- 2.3 NCC and IRN consider that water sources must not remain over-allocated, and the total volume of share components specified on access entitlements be reduced to match the extraction limit of the water source. This will provide the following advantages:
- Reduction of unsustainable growth in diversions and inappropriate investment;
 - Accurate reflection of the real value of entitlements;
 - Reduction of ongoing cutbacks in allocation levels; and
 - Significant increase in the ecological sustainability of water sources.

Recommendation: Water licence entitlements must accurately reflect the volume of water that can be sustainably extracted. This is essential if the ecological requirements of water sources are to be guaranteed and user entitlements are to be more clearly defined.

² NSW Department of Land & Water Conservation (2002) *State Water Management Outcomes Plan*. NSW Department of Land & Water Conservation.

3 Clear definition of user responsibilities is essential in achieving sustainable natural resource management

- 3.1 User responsibilities, and their scope within the context of legal duty of care obligations, must be defined as part of the recognition of environmental rights. It *must* be recognised that access entitlements come with responsibilities. The environmental implications of use and access must be incorporated as clear responsibilities that arise from this duty of care. This is also necessary to ensure that users have a clear set of rules and obligations to follow.
- 3.2 These responsibilities include sustainable, efficient water use, as well as the management of wider impacts of farming such as salinity, soil erosion, pollution, loss of vegetation and the decline of regional biodiversity.
- 3.3 Application of the polluter (or impactor) pays principle will further assist in defining user responsibilities for use of the resource and on and off farm impacts.

Recommendation: The recognition of clear user responsibilities that come with access privileges is essential in achieving sustainable natural resource management.

4 Inclusion of full cost recovery for water supply to assist in achieving greater water efficiency and sustainable water use

- 4.1 IRN and NCC support the inclusion of clear obligations on the part of water users to pay the full cost of water supply and minimise adverse impacts of water use and trade on the environment. Environmental benefits do not naturally flow from the creation of a market and cannot be relied upon to ensure the health of water sources and sustainable resource use. However, full cost recovery will assist in achieving greater water efficiency and sustainable water use.
- 4.2 The pricing of water must be reformed so that prices are based on water usage and the full recovery of costs, in rural as well as urban centres. This is particularly pertinent as rural charges, on average, cover only a small proportion of costs. For example, the National Competition Council (2001) found that in New South Wales, only 54% of costs attributable to customers were recovered at the time of assessment, and this would increase to 82% by 2003-4.³ However, environment groups have argued that the National Competition Council failed to include the full costs of environmental damage in its assessment of water charges. Any costs incurred by government agencies other than the Department of Land Water Conservation are ignored. Full cost recovery must include all externalities such as the cost of delivery, maintenance of infrastructure, costs of environmental damage such as salinity and maintenance of overall river health.
- 4.3 In part, the inclusion of full cost recovery will assist in overcoming some of the environmental concerns with water trading and the functioning of the water market that are outlined below.

³ National Competition Council (2001) *Assessment of Governments' Progress in Implementing National Competition Policy and Related Reforms*. National Competition Council.

Recommendation: To achieve sustainable water use, restore degraded ecosystems, assist environmentally-friendly market functioning and encourage greater water efficiency, water prices must reflect externalities including the full cost of water delivery.

5 Trading rules to be developed in a manner that ensures environmental rights are guaranteed independently of market and trading operations, ensuring water for the health of the environment is secured.

- 5.1 Clear trading rules for the water market must be developed in a manner that ensures that environmental rights are secure and independent of market movements.
- 5.2 IRN and NCC agree that clear rules and entitlements to use and trade water are necessary, and must be provided for all users, *including* the environment. In particular, the market will offer great potential to ease the adjustment process, *but* this must be done only after environmental rights are defined, and secured. Further, the situation must not arise where the environment through the taxpayer, is priced out of the market, and cannot afford to buy back the water required for ecosystem health.
- 5.3 Further, there must be a detailed examination of the environmental effects of market operations to assist in tailoring its operation to be both equitable and environmentally sustainable. There should also be an investigation into whether market rules can be developed to ensure equitable access to water and the ecologically sustainable operation and management of this public resource. This should include avoiding shifts in extraction points and use that will damage the environment. Alternatively, use licenses could be issued with the inclusion of environmental conditions. The investigation should also look for mechanisms that prevent the potential establishment of water cartels.
- 5.4 Currently, the NSW *Water Management Act 2000* provides initial clear guidelines for trading and water access entitlement security, enabling sufficient security of investment over reasonable timeframes. Trading allocations still give entitlements and allocations to users, thereby providing them with access to the resource and some security, without removing the resource from public hands. IRN and NCC agree that the water market will further increase resource certainty for landholders, without creating a private property right.
- 5.5 It must be impressed on all involved in the reform process that the market cannot be relied on to modernise farming systems and improve environmental standards. There are indications that water markets are going to exacerbate the water crisis. More water is now being used and applied to water wasteful crops, moving into higher value business without necessarily delivering environmental benefit⁴.

⁴ For more details on the environmental problems of the water market, see the paper by May Isaac at the Brisbane Institute: www.brisinst.org.au

5.6 The Productivity Commission notes that environmental service provision by markets is greatly constrained by uncertainty of long-term environmental impacts and imperfect information about future values⁵. Hence, adaptive management is essential to enable the market to best provide environmental services. The market has to be regulated in order to ensure positive environmental outcomes are delivered.

Recommendation: The development of trading rules must ensure that environmental rights are secure and guaranteed, and independent of market and trading operations, particularly as the market cannot be relied on to improve environmental standards. Further, the situation must not arise where the environment, through the taxpayer is priced out of the market and cannot afford to buy back the water required for ecosystem health.

6 Public funding is necessary to address equity and adjustment issues to assist in instituting and achieving powerful incentives for greater water efficiency and sustainable land use practices

- 6.1 Once-off appropriate adjustment assistance may be necessary where there has been rapid and large-scale change, and clear inequities. Such assistance and incentives will assist individual landholders to make efficiency improvements.
- 6.2 Structural adjustment packages should be designed to assist landholders in implementing improved land management practices, including improved water efficiency and changing to less environmentally harmful practices.
- 6.3 Structural adjustment should also assist inefficient users to exit the industry and prevent farming in unsuitable areas. Many marginal farming enterprises in Australia are not sustainable, and unlike initial predictions, inefficient users are not choosing to exit the industry⁶. Structural adjustment should facilitate phasing out of unsustainable practices, particularly in areas where the environmental consequences of the activity are too great.
- 6.4 Adjustment assistance, in contrast to entrenching rights to compensation, represents a shared approach to achieving real environmental outcomes in a cost-effective way.
- 6.5 Given the benefits and outcomes that will emerge from such adjustment, there must be appropriate cost-sharing between the government and landholders. Application of the polluter (or impactor) pays principle (particularly in relation to environmental management expenses) will lead to equitable cost-sharing arrangements and also further assist in defining user responsibilities for environmental impacts and protection.

⁵ Productivity Commission (2001), *Cost-Sharing for Biodiversity Conservation: A Conceptual Framework*, Staff Research Paper

⁶ See the paper by May Isaac at the Brisbane Institute: www.brisinst.org.au

- 6.6 A commitment must be made by the States to improve environmental flows immediately, ensuring that efficiency improvements are actually meeting the fundamental aim of the water reform process to benefit the environment. There are advantages in trading environmental water on a temporary or permanent basis. There should be provision of adjustment assistance to ensure efficiency improvements provide the desired environmental enhancement.
- 6.7 Assistance to landholders will most likely be derived from taxation revenue, therefore the structure and granting of assistance must be based on national sustainability goals. Further, assistance must be applied in conjunction with strong regulation to ensure that the investment fulfils its objectives and provides demonstrable outcomes for the environment.
- 6.8 Public fund contributions should come from both state and federal governments, particularly given that the issue transcends state boundaries and water efficiency and environmental protection is in the wider national interest. Further, these funds should not be sourced from existing environmental funding programs.
- 6.9 IRN and NCC also agree with the development of national guidelines for the provision of assistance and believe that if the states deviate from these guidelines (into which they have had an input), they should pay for the alternative assistance that they believe is warranted.

Recommendation: Appropriate assistance may be necessary to address equity and adjustment issues where there has been rapid and large-scale change. Such assistance will also help in instituting and achieving powerful incentives for greater water efficiency and sustainable land use practices. However, there must be appropriate cost-sharing between the government (the public) and landholders given the benefits and outcomes that will emerge from such adjustment. Assistance should be provided in a manner that assures the objectives of the changes are actually met.

7 Oppose entrenching rights to compensation

- 7.1 IRN and NCC strongly oppose any general requirement to compensate landholders for changes to environmental policies and regulations. There is absolutely no legal precedent for compensation due to the regulation of a public resource, and it is inequitable to do so with public funds. As recently commented by the former chief of the Victorian EPA, Brian Robinson, “the idea that you should compensate people for requiring them to stop damaging other people’s rights is unusual to say the least.” It is akin to providing compensation to factory owners who are no longer permitted to dump their effluent into nearby river systems.

- 7.2 Environmental protection laws seek to prevent environmental degradation and ensure that public resources are used and treated sustainably, and to ensure that they are available for current and future use. The State retains ownership and the ability to regulate water. Even with property rights, such as in the case of freehold land, the State retains the right to regulate usage of the land in relation to native vegetation, and as regulation and restriction does not amount to acquisition, there is no general right to claim compensation. Compensation is only required when the Commonwealth compulsorily acquires property. The concept of property being totally indefeasible has been discarded in Australia since Federation. Current laws provide individuals with resource access entitlements over a resource in which no private property rights have ever existed.
- 7.3 The creation of such a precedent could have onerous and expensive implications in other areas of regulation, such as planning, native vegetation protection, and health and safety. It would also make it very difficult for governments to apply any form of regulation.
- 7.4 Changes have occurred to water entitlements on conversion to new entitlements, that is they have occurred *after* the original annual entitlement was completed. Further, the compensation provisions encompassed in the *NSW Water Management Act 2000* only relate to new entitlements, and are not intended to apply retrospectively at the conversion point from old to new entitlements⁷.
- 7.5 There is absolutely no inherent public benefit in compensation, as it does not assist in progress towards the goals of sustainability and greater efficiency, in contrast to adjustment assistance. Compensation is a general obstacle to reform, entrenches past practices and implies that the government is taking something that belongs to another. It is a dangerous fallacy to suggest that water is not a public resource; the common wealth of all Australians.
- 7.6 User responsibilities that arise from water entitlements, and the duty of care that users owe in the use of public resources refute any right to compensation.
- 7.7 The strengthening of water user entitlements and security may have a deleterious impact on the rights of others, who may well have their rights reduced as a result of fixed and secure entitlements held by others.

Recommendation: There must be no provision of compensation as a result of the regulation of a public resource such as water. There is no legal requirement or precedent to do so, and such provision would be an inequitable use of public funds.

⁷ It is worth noting that in the *Water Management Act* (NSW) the government has legislated for compensation for water users if their 15 year licence entitlements are altered, providing users with greater security than they have ever had.