



# National Irrigators' Council

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PPSA Review  
Commercial and Administrative Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Sir/Madam

## **Re: Bringing water entitlements within the Personal Properties Securities Act 2009**

The National Irrigators' Council (NIC) is the peak body representing irrigators in Australia, supporting 31 member organisations covering the Murray Darling Basin States, irrigation regions and the major agricultural commodity groups. Council members collectively hold approximately 7,000,000 mega litres (ML) of water entitlements.

The NIC is directed by guiding principles designed to underpin current and future policy decisions impacting on our members. It is funded by irrigators for the benefit of irrigated agriculture which provides jobs in rural and regional communities. Irrigated agriculture makes a significant contribution to the social and economic wellbeing of rural and regional communities and to the national economy. The total gross value of irrigated agricultural production in Australia in 2012-13 was \$13.4 billion.

The NIC provides this feedback to the request for comment regarding the review of the Personal Property Securities (PPS) Act 2009, Consultation Paper 1 (Reach of the Act). The NIC will not be responding by way of a 'yes' or 'no' answer to the recommendations included in the consultation response template. This approach has been necessitated by the fact that many of the proposed recommendations are underpinned by arguments that are either circular or inconclusive and it is therefore difficult for NIC members to determine the extent to which the recommendations will impact on them; the paper appears to pose as many questions as it answers.

The consultation paper recommends the deletion of Section 8(1)(i) and (5) be deleted. The NIC believes this is an overly simplistic way to address concerns about security interests with regard to water rights. This recommendation does not provide consideration as to why water rights were excluded from the PPSA in the first instance.

It must be further recognised that the PPSA deals with security interests in 'personal property', however, the question remains as to whether all tradable water rights would be regarded as personal property under the PPSA. Tradable water rights can be broadly divided into two groups:

- 1 Statutory licences, such as water access entitlements granted by states; and
- 2 Contractual rights, such as irrigation rights and water delivery rights granted by an irrigation infrastructure operator (IIO).

If the recommendation were to be adopted as currently proposed, further investigation would be necessary to determine whether both statutory licences and contractual rights constitute “property” in the eyes of the law. Currently, there remains considerable uncertainty as to the scope of the PPSA’s definition of “*personal property*”.

A further complication relates to IIOs where they currently have a number of rights over customers’ landholding, irrigation rights and water delivery rights with those relating to landholdings potentially not considered “personal property” while those relating to contractual entitlements may be considered “personal property” dependent on whether contracts are deemed “property”. IIOs need to be assured that rights currently in place through customer’s contracts regarding security agreements would be protected. Such agreements enable IIOs to protect their interests through refusal to approve a customer’s application to transfer relevant tradable water rights until the customer has paid all outstanding fees owing.

If an IIO’s contractual rights were brought within the PPSA, these would need to be registered by the IIO on establishment of the relevant contractual agreements, and for every subsequent transfer. While this may be a straightforward administrative process, and in some instances would replace registers currently operated internally by individual IIOs, robust transitional arrangements would be necessary to ensure the priority of the IIOs interest is protected.

In addition, there would need to be agreement from all state and territory governments who are currently able to declare certain rights, entitlements or authorities granted under their laws are not “personal property” for the purposes of the PPSA. As it is currently proposed, any change to the PPSA would involve water rights information being recorded in the PPS register as well as state registers, adding a further layer of red tape and potential for confusion.

Based on the above comments, we do wish to raise the following questions which may further assist in the consultation process and the development of final recommendations. These questions include:

- the reasons water rights were initially specifically excluded as a requirement of the PPS Intergovernmental Agreement (PPSA Review Consultation Paper 6.9: Water rights) and an understanding of what has since occurred to warrant a change.
- the difference in the treatment of water rights held under contract or otherwise through an irrigation infrastructure operators (IIO), compared with water rights held under statute (private diverters) (consultation paper 3.2: Does a security interest need to be a proprietary interest ..... *the concept of a "security interest" should only capture interests that are proprietary or possessory in character.*)
- the protection of IIOs’ security interest in contracted irrigation rights and the issue of priority of interests
- what transitional arrangement would be required to protect the interest of an IIO in relation to contracted entitlements
- statutory security interests –v- non-statutory security interests and their treatment under the PPSA
- the application of termination fees or security for payment of fees or charges for delivery of water

While the NIC will continue to monitor and seek to be involved in this matter, we are concerned that the current proposals relating to the PPSA and water rights could result in less certainty for IIOs in relation to security interests and an increase in red tape which almost always adds further to irrigators’ input costs. This matter warrants further consideration to ensure that the security interest protections currently afforded to IIOs and irrigation licence holders are maintained or strengthened within a simplified process.

Australian irrigators operate on low margins and any small increase in input costs arising from additional red tape as a result of changes to the Act, erodes profitability and competitiveness when they already operate in a tough international competitive environment.

The NIC looks forward to being kept informed and engaged on this matter.

Yours sincerely

Tom Chesson  
Chief Executive Officer