



# National Irrigators' Council

**Response to  
ACCC Interim Water Markets report  
October 2020**

Contact:

**Steve Whan**  
**CEO, National Irrigators Council**  
Level 2, 14 Brisbane Avenue, BARTON ACT 2600  
Email: [ceo@irrigators.org.au](mailto:ceo@irrigators.org.au)  
Ph. 02 62733637

## Contents

<b>Summary</b> .....	<b>2</b>
<b>Background</b> .....	<b>4</b>
<b>Key NIC policy objectives</b> .....	<b>4</b>
<b>Policy objectives for the water market</b> .....	<b>5</b>
<b>General comments on interim report conclusions and work still to be done</b> .....	<b>6</b>
Existence of the water market .....	6
Information and knowledge .....	8
Investors in the markets .....	9
Irrigation Infrastructure Operators (IIOs) .....	10
<b>Conduct of market participants</b> .....	<b>11</b>
There is insufficient regulatory oversight, and enforcement and compliance activity, in relation to some practices of some market participants .....	11
<b>Improving trade processes and market transparency</b> .....	<b>15</b>
Practical changes to trade processing are needed to improve the quality and timeliness of core market data .....	15
Practical changes need to be underpinned by clear and comprehensive mandates to provide efficient trade services and high quality information to market participants .....	16
Digital technologies offer the opportunity to streamline trade services, at the same time as improving information quality and availability.....	18
<b>Improving market architecture</b> .....	<b>21</b>
The design of the southern connected Basin market architecture has not kept pace with increasing trade activity, and the ACCC is seeking to identify options for reform.....	21
<b>Changes to market governance</b> .....	<b>28</b>
There is a need to reconsider governance frameworks to enable independent and clear decisions on the development of market settings .....	28
<b>References</b> .....	<b>31</b>

## Summary

- NIC welcomes the interim conclusions on some of the core issues around the existence of a water market, the benefit it has produced along with some of the deficiencies caused by complexity and lack of transparency.
- While there are areas that need improvement, the flaws do not outweigh the benefits of having water markets and the capacity to transfer allocation and entitlement to its highest value use.
- It is noted that the interim report highlights work to be completed assessing whether there is evidence of market manipulation or anti-competitive conduct, drawing this out and reaching conclusions will be a key part of the final report.
- Reform is needed to improve transparency and consistency of information, including on allocation, supply and demand, without adding administrative burden or additional cost to farmers and irrigation operators.
- Recommendations must respond to demonstrated market failure; have a cost/benefit assessment and must aim to reduce duplication, cost and administrative burden.
- NIC agrees with some of the positives of investors listed in the interim report, including:
  - Investors provide new sources of capital to irrigated agriculture
  - Investors increase water market liquidity
  - Investors provide irrigators with a range of water products which help manage water risks.
- NIC agrees with the principle that: **“harmful behaviours should be regulated rather than classes of market participants excluded”** (ACCC, 2020, p. 247).

## Conduct of market participants

- NIC agrees there is a case for greater regulation of brokers and intermediaries:
  - Option 1: Support nationally consistent licencing. No firm view on whether State or Federal operation is best.
  - Option 2: NIC does not see the justification for applying the financial regulation framework to water products at this stage. If it were considered further a cost benefit analysis and a firm indication of whether State Governments will agree is required.
  - Option 3: NIC does not believe a new independent regulator is a proportionate response. NIC fears it would be a very costly body which would duplicate state regulators, increase administrative burden and cost.
- NIC would like to see more analysis in the final report of what level of ownership in a market enables an owner to potentially manipulate that market.

## IIOs

- The interim report lacks recognition that IIOs are not for profit, benefit to member or Government owned. NIC’s IIO members are owned by irrigators. IIOs providing water markets services have developed them in response to customer need. The strong feedback from our members indicates customers are happy with the services and have a greater level of trust in them, than in many other market participants.

- NIC supports improvement in information quality and consistency from IIOs as long as that is funded, with a benefit at least matching the cost. Our submission details a number of issues to be considered.
- NIC is concerned about the interim report's implication that IIOs may be processing trades in a way that provides advantage to the IIO. We support fair and equitable trading with appropriate cost recovery, we note, however, that the interim report casts an aspersion on IIOs without providing supporting evidence.

### ***Trade processes & market transparency***

- NIC is broadly supportive of the preliminary recommendations on process and transparency.
- Improving information around supply, allocation decisions and demand is a critical component of reform. State Governments need to provide this information and significantly improve transparency of decision making.
- If it proves to be practical to implement a single portal for water markets transactions, then NIC would support IIOs providing consistent data. However, IIOs cannot be expected to fund implementation themselves.

### ***Market architecture***

- NIC strongly supports transparent communication of process and decisions on allocations.
- Changes to market architecture need to be based on demonstrated market failure and consider positive and negative impacts of change.
- NIC can see the desirability of more harmonised market rules, however, there needs to be recognition that catchments have very different characteristics and uses.
- Carryover has produced positive benefits. Any consideration of harmonisation needs to recognise different catchment characteristics, demonstrate need (or market failure) and impact on value of and use of entitlements.
- Further consideration of a separate market for storage needs to be justified with evidence of market failure and consideration of impact on existing owners.
- NIC supports considering mechanisms for addressing potential delivery shortfalls.
- Conveyance loss caused by an entitlement or allocation moving from a zone above a constraint to below is creating negative third party impacts on other owners in originating zones. NIC supports further consideration of equitable solutions.

### ***Market Governance.***

- NIC supports changes to governance that will reduce duplication.
- NIC is not attracted to the option of a new national regulator.

## Background

National Irrigators' Council (NIC) appreciates the work of the ACCC to date, reflected by the Interim report on Murray Darling Basin water markets.

This comment on the interim report should be read in conjunction with in NIC's initial submission. The principles outlined in that submission remain relevant.

For the sake of brevity, we have sought to not reproduce those, however we would emphasise the key points outlined in the original submission as listed below:

### Key NIC policy objectives

- Separating land and water and creating markets had a direct benefit to irrigators; it made water entitlements a property right and that gave a level of security to irrigators that was not previously available.
- The protection and enhancement of the property right attached to water is a key principle for NIC.
- Changes in crops grown are driven by the return farmers receive at the farm gate. Commodity prices, market access and input costs impact these decisions. Water markets facilitate change by allowing water to be moved (within physical constraints) to its highest value use.
- Water markets have enabled inflow of capital and have enhanced the value of irrigated agriculture. This has had positive impacts overall but negative impacts in some regional areas, mostly reflecting the economic returns for water use (as measured at the farm gate).
- NIC acknowledges concerns from some irrigators about non-water users owning entitlement, in particular, allocation and carryover. Restrictions on ownership would cause negative impacts for irrigating businesses including those relying on access to allocations, unintended consequences and costly compensation. NIC supports the ACCC taking specific action if any anti-competitive behaviour is identified, or evidence of market manipulation.
- Carryover rules have developed differently in different catchments, often for very practical reasons. The rules are built into the value of the property right and have been an important part of enabling better planning of farming operations.
- The ACCC should consider whether there are aspects of the operation of carryover that have unintended consequences or unfair impact on water markets. Evidence of any such impact needs to be shown before considering any changes.
- It is not possible or practical to have a fundamental reversion of water markets, either back to the pre-1990s situation of water tied to land, or even to have a blanket exclusion of non-water users owning water entitlement or allocation.
- NIC's priority is to ensure that the water markets are working fairly, efficiently and transparently. It is important to reduce the complexity and confusion around the myriad of different exchanges and products and to ensure that enough information is publicly available for a competition authority to make an informed judgement regarding what constitutes anti-competitive or unfair behaviour.

## Policy objectives for the water market

1. All entitlement of the same category continues to have the same characteristics regardless of who owns it, and continues to be treated in the same way as any property right.
2. Trade restrictions are based on real physical constraint, avoidance of third-party impacts on the water rights of those not party to the trade - and backed by transparent expert analysis of system capacity.
3. Reform to the water market should enhance simplicity, transparency, timeliness and consistency of information without adding administrative burden or additional cost to farmers and irrigation operators.
4. Ensure the water market is easily accessible for all potential participants including small entitlement holders.
5. Basin Governments should improve the consistency, transparency and timeliness of water market information across State Government registries, including ensuring confidence in the accuracy of price disclosure and extent of price disclosure. Market information is improved by including clearer and timelier information on water supply, demand, delivery constraints, allocation and use.
6. State based water registry information – particularly in the Southern Murray Darling Basin - is brought together in a consistent platform providing timely information on the market, trades and water availability along with historical usage information.
7. Within particular markets, the holders of significant shares of water entitlement or those engaged in the trade of significant volumes of allocation, should notify their positions in a similar way to the ASX.
8. ACCC takes a continuing role in monitoring and acting, if necessary, to ensure there is no anti-competitive behaviour or market manipulation in the water market, particularly during periods of low supply.
9. Ensure that codes of conduct for water brokers are adequate to ensure market participants' rights are protected.
10. Consider whether any further regulation is required for provision of financial type advice relating to the water market.
11. Governments move toward standardised requirements for positive account balances along the Southern connected system.
12. As a significant water owner, Government environmental water holders should be required to provide transparent, advance information about intention to engage in particular markets and undertake to minimise impact on the market, including third party impacts on other market participants.

It is pleasing to note that the ACCC's interim report is consistent with many of these points.

In responding to the interim report, NIC will make comments around some of the general conclusions on the market, market participants, conduct and fairness. We will then provide more specific comments arranged around the 'Options for Market Reform' presented by the ACCC.

## General comments on interim report conclusions and work still to be done.

NIC welcomes the ACCC's interim conclusions drawn on some of the core issues around the existence of a water market, the benefit it has produced along with some of the deficiencies caused by complexity and lack of transparency.

The fundamental point is that while there are areas that need improvement, the flaws do not outweigh the benefits of having water markets and the capacity to transfer allocation and entitlement to its highest value use.

Our initial submission highlighted the need for the ACCC to work to identify whether there was any anti-competitive behaviour or market manipulation occurring. We note that the interim report highlights the work to be completed in this area and drawing this out and reaching conclusions will be a key part of the final report.

It is vital that any recommendations for market change, particularly change that might impose additional cost, be fully justified with evidence of market failure and cost/benefit analysis. It is not enough to recommend additional regulation and cost on the basis of 'might' happen or hearsay.

Perhaps one of the most important interim conclusions is summarised by the comment "the ACCC's preliminary analysis indicates that water allocation price movements are strongly driven by relative scarcity of water allocation." (ACCC, 2020, p. 101)

Scarcity is driven by supply, impacted by drought and movement of entitlement out of the productive pool and by demand which has also seen significant change.

NIC is broadly supportive of the need to improve information and transparency. However we make the very strong point that market reform must be dictated by evidence of need, must result in less, not more, administrative burden and lower the cost of participation.

We are concerned that the interim report is somewhat vague in some of its possible recommendations. It is important that the final report clearly identifies the outcome sought accompanied by a cost/benefit assessment.

As a general point it is important to be clear that there is not one water market, there are many markets for a product which is very different to shares or electricity. This is a product that is impacted by drought, evaporation, delivery constraints, lack of interconnectivity etc. That makes comparing it with the operation of the electricity market or even the ASX unrealistic.

### **Existence of the water market**

The principles NIC outlined in our original submission, and above, included:

*It is not possible or practical to have a fundamental reversion of water markets, either back to the pre-1990s situation of water tied to land or even to have a blanket exclusion of non-water users owning water entitlement or allocation.*

NIC welcomes the very firm interim conclusions pointing to the fact that water markets are beneficial overall. The analysis of growth in Gross Value of Irrigated Agricultural Production on page 116 mirrors points made in NIC's submission. There has been a significant increase in the value of production in the Southern Basin, but it has not been uniform, and that means some areas have done better than others.

NIC has previously commented in submissions on the Basin Plan that some communities have suffered much more negative impacts than others. Generally, this is determined by how much water was recovered through buyback – with its inherently much more negative socio-economic impact. However, it is also the case with the operation of the market.

NIC does not support 'protectionism' (other than trade restrictions based on physical or environmental constraints) and we would endorse the theme of the Sefton review, among others, that areas that have been disadvantaged need to be assisted with well-considered long term structural adjustment or regional development rather than with ad hoc ineffective programs or (even worse) a forlorn hope that the clock can be turned back.

It is particularly important to note this comment: "overall growth in GVIAP has occurred in the context of a significant reduction in the consumptive pool, as recovery of water for the environment has removed up to 30 per cent of the total volume of entitlement on issue in some catchments" (ACCC, 2020, p. 116).

It is impossible to overstate the importance of this. Overall, irrigators have seen 1 in every 5 litres of previously available irrigation water move from agriculture to the environment. It is a testament to the skill of our irrigators and their commitment to efficiency and productivity that they (assisted by Government programs) have increased the value of production.

Irrigated agricultural production is a long-term sustainable job generator for rural communities, generating more direct on farm and off-farm jobs than dry land agriculture and continues to provide employment in many Basin communities. Water markets enable better productivity and drive efficiency, and fundamentally they are the mechanism that has allowed Government to return water to the environment.

NIC welcomes, and wishes to highlight, the interim report's conclusion on domestic investment at 7.9.2:

"Many of the important benefits of water markets cannot be realised without the participation of investors.

The ability to purchase water rights without agricultural land has led to water being purchased for financial investment rather than agricultural production. Retired farmers are also retaining their water entitlements for investment purposes to fund their retirement, rather than selling them on retirement.

Some stakeholders suggested that restrictions on access to the water market by non-irrigators is the appropriate response to deflate water prices, while others advocated that the purchase of water allocations should be limited to those who hold a water use licence or water use registration. In terms of investors' use of carryover, some stakeholders suggested the appropriate solution is to tie carryover rights to delivery share or water use licences rather than entitlements.



As noted above, restrictions based on classes of water market participants, or the purpose for which the water will be used, are not permitted under the Basin Plan trading rules. Even if they were permitted, the introduction of rigid laws that prohibit a class of market participants, such as investors, from participating in the market would preclude valuable financial investment.

Investors provide irrigators with access to capital, increase water market liquidity, and provide a range of water products that help irrigators to manage water supply risks, such as forward contracts and carryover parking.

It has been noted that leases from retired farmers to irrigators can be beneficial to the next generation irrigation community. If there are gaps in the existing regulatory framework that allow harmful behaviours by market participants such as investors, then those regulatory gaps should be addressed rather than certain market participants excluded.” (ACCC, 2020, p. 249)

NIC supports this sensible – if not necessarily popular – conclusion and it is consistent with our submission to the inquiry. NIC notes that the ACCC has concluded in other chapters that water supply and agricultural demand are the main drivers of price. In the most recent drought that was very clearly the driver of prices hitting a peak in the Southern Basin in 2019 and early 2020, a peak which has now receded with recent rains.

On pages 14 and 15 of NIC’s submission we dealt in more detail with concerns expressed by some regarding investor involvement in the market. Those points accord with the position taken by the interim report. We acknowledge that additional participants in a market will have an upward impact on prices to some degree but that overall the benefit of the products provided has assisted irrigated agriculture.

NIC also highlights the points we made in our earlier submission around the practical difficulty in excluding investors now that they own assets or even in determining definitions (National Irrigators' Council, 2019, pp. 14-15).

### ***Information and knowledge***

A key theme of NIC’s earlier submission was transparency and consistency of information. It is pleasing that this also forms a key theme of the interim report.

NIC has long argued that any reform of the water market must improve transparency and consistency of information without adding administrative burden or additional cost to farmers and irrigation operators.

NIC suggests that the final report should highlight the second part of that point very clearly. NIC agrees there is need and scope for greater improvement, but any recommendations must come with a cost/benefit assessment and must aim to reduce duplication, cost and administrative burden.

Water markets and water markets information must be easily accessible for all potential participants including small entitlement holders. Information on supply and demand is just as important as information on price.

It would be desirable if Basin Governments were to improve the consistency, transparency and timeliness of water market information across State Government registries, including confidence in the accuracy of price disclosure and extent of price disclosure. Market information could be improved by including clearer and timelier information on water supply, demand, delivery constraints, allocation and use.

NIC strongly supports the interim report's statement that: "an efficient and well-functioning market is one which enables participants to readily access relevant and comprehensive market information" (ACCC, 2020, p. 90).

The interim report presents some interesting research on the characteristics of the people participating in the water market. It suggests that lack of knowledge about the market and lack of trust are inhibiting factors in participation.

To some extent that mirrors the conclusion drawn by the Interim Inspector-General of the Murray Darling Basin (Interim Inspector General of the Murray Darling Basin, 2020, pp. 41-42). The Interim Inspector-General was accused by some of being 'patronising' when he highlighted lack of knowledge of the water market as being a problem but it is clear from this research that there is often a real gap in knowledge between participants and non-participants.

The problem with non-participation in the water market is that non-participants may not be maximising their farm income and that in itself, creates a further gap between those with capacity and knowledge and those without.

The Interim Inspector-General recommended education for people entering farming (recommendation 5). That, in NIC's view, must be combined with removing barriers (real and perceived) and costs for market participation. We have dealt more below with some of the specific measures being considered by the ACCC.

### ***Investors in the markets***

The interim report highlights a number of positive benefits of investors in the markets and flags some areas for further inquiry.

NIC agrees with some of the positives listed in the interim report, including:

- Investors provide new sources of capital to irrigated agriculture
- Investors increase water market liquidity
- Investors provide irrigators with a range of water products which help manage water risks.

In our submission we asked the ACCC to examine the potential for anti-competitive behaviour particularly focusing on thin markets. The interim report notes: "Participants at the Shepparton forum submitted that larger buyers operating in shallow markets may be able to influence market quantities and prices to their advantage."

NIC has not seen evidence of this, one way or another, but it remains an issue to be explored. In our initial submission NIC pointed to the need to determine whether there was a point at which holders of significant volumes of water in particular markets (ie particular valley's or categories of entitlement) could exercise undue influence over that market.

The interim report does not appear to seek to define what level of ownership in a market (particularly a thin market in drought), might constitute that possibility of influence or whether it should be disclosed. NIC would like to see the final report address this point.

We note the ACCC has indicated that it is continuing to investigate some aspects of concerns raised by stakeholders and “unusual trading activities”, and that the ACCC has a concern about conduct that is “[harming the efficient working of water markets and distorting price signals](#)” (ACCC, 2020, p. 172). As highlighted in our earlier submission, the fair operation of the market should be a key objective of this inquiry and we would support cost effective recommendations that will achieve that.

NIC agrees with the key point made above on investment in general, and also made in relation to foreign investment on page 247: **“harmful behaviours should be regulated rather than classes of market participants excluded”** (ACCC, 2020, p. 247).

NIC supports the commentary on foreign investment; the figures around foreign investment in water provided by the register, give no cause to believe that foreign investment is either excessive or even significant. There is certainly nothing to suggest that current levels of foreign investment allow a foreign power to manipulate the water market or present any risk to Australian production.

It is noted, for example, that the area in the Basin with the largest degree of foreign investment is in the Northern Basin where 28.9% of surface water entitlement was foreign owned (Southern Basin 5.5%) as at 30 June 2019 (Australian Taxation Office, 2020, p. 11). Given a substantial portion of that Northern Basin water is in unregulated systems there is, by definition, no ability to manipulate the market.

NIC would agree that the most positive outcome of this inquiry process would be to ensure that the regulation and information on the water market is appropriate to produce a competitive and transparent market not to impose restrictions on particular categories of investors.

### ***Irrigation Infrastructure Operators (IIOs)***

The interim report contains several references to IIOs. NIC is concerned about the tenor around a number of those comments. Several of NIC’s IIO members will respond individually to the report, however it is important to emphasise some key points about our IIO members:

- NIC’s IIO members are customer owned. They are either not-for-profit (including cooperative) or benefit to member organisations. None are for-profit private companies.
- Those that run water market services do so essentially on a cost recovery basis, with very minimal staffing. These services have been put in place responding to member / customer demand.
- Customer feedback on IIO trading platforms is generally positive with anecdotal comment from customers indicating a higher level of trust in IIO run market operations than many other market platforms.
- IIOs already provide information directly to the Bureau of Meteorology (BOM) on trades. Consideration of a requirement to provide additional information, via IIOs either to BOM or a new data collector, needs to recognise that IIOs have no legal

ability to verify price information on forms.

At several points in the interim report there is an implication that IIOs may choose to process trades in a way that advantages them and disadvantages people wishing to trade water out of that scheme. There is no evidence provided to justify that.

NIC does not support using processing times or cost in a way which is effectively protectionist. If these practices are occurring, it is important that the ACCC provide evidence. If that evidence does not exist then that must be made clear. NIC objects to broad negative implication and inference made about IIOs in the interim report.

We note the tendency in the past for the ACCC to recommend burdensome requirements on IIOs in response to 'potential' issues. Any new reporting or administrative requirement placed on IIOs results in cost to their customers and it must be justified.

NIC supports improving information recorded and provided by IIOs, however that must be on the very clear principle that it is clearly justified, that it does not duplicate, and does not impose additional costs on customers, which then acts as a barrier to market participation. It is also critical that IIOs be involved in design of any new requirements.

## Conduct of market participants

### ACCC position:

***There is insufficient regulatory oversight, and enforcement and compliance activity, in relation to some practices of some market participants***

*The ACCC's preliminary view is that market integrity regulation needs to be improved for water rights trading. This regulation could be limited to brokers, or could cover other market participants such as investors and IIOs. In the case of water brokers, our preliminary view is that regulation should be introduced. The ACCC continues to examine the conduct of investors and other market participants, including the need and adequacy of regulation of these parties.*

*The ACCC has identified the following three options for improving market regulation and seeks feedback about which option would best improve market integrity. These options are discussed in chapter 7.*

- (a) *Government-initiated licensing scheme: This option proposes a compulsory licensing regime at the federal or Basin State level, which sets out the relevant requirements for intermediaries and is supported through civil penalties for non-compliance. This would be limited to regulating intermediaries.*
- (b) *Applying the financial regulation framework to all water products: The financial regulation framework provides a comprehensive, ready-made market regulation framework that could be applied to tradeable water rights. Its provisions are relevant to the activities of a range of market participants.*
- (c) *Independent market-focused government regulator: This option envisages establishing a market-focused regulator. This could involve creating an entirely new body, or giving an existing regulator new functions. For example,*

*this could be achieved through adding market integrity protections to new or existing legislation, such as a rule prohibiting market manipulation, or through introducing a mandatory industry code. This option would enable the regulation of market participants such as intermediaries, investors and IIOs if necessary, and could be used to consolidate some existing regulation.*

### **NIC response**

NIC supports greater oversight of standards for brokers and intermediaries. NIC's principle on reform, as expressed in our initial submission to the inquiry, said at point 3 "Reform to the water market should enhance simplicity, transparency and consistency of information without adding administrative burden or additional cost to farmers and irrigation operators".

The policy goes on with points 8 to 10 to say:

8. ACCC takes a continuing role in monitoring and acting, if necessary, to ensure no anticompetitive behaviour or market manipulation in the water market, particularly focusing on periods of low supply.
9. Ensure that codes of conduct for water brokers are adequate to ensure market participants' rights are protected.
10. Consider whether any further regulation is required for provision of financial type advice relating to the water market." (National Irrigators' Council, 2019, p. 3).

These points are relevant to the three options presented for consideration by the ACCC. NIC agrees that there should be greater regulation of brokers and intermediaries. At this stage we are not in a position to make a final decision on what level of regulation is appropriate as we do not have an assessment of the costs involved in each proposal.

Clearly all proposals need cost benefit analysis. As a general principle we would favour responding to proven need at the lowest possible cost.

On **Option 1** (a State or Federal licencing scheme) we support licencing but do not have firm views on whether that should be enforced at state or federal level. The licencing scheme must be nationally consistent, and if enforced at state level, then it must be mirrored across states with mutual recognition across state borders and a single publicly accessible database for the publicly available information.

A national system enforced at federal level would not be opposed outright but there needs to be a clear cost benefit justification and clarity over whether this would involve creation of a new body. NIC's view is that broker / intermediary licencing should not be restricted to the Murray Darling Basin but should apply to other water markets, particularly as they mature.

The 2014 review of the Water Act 2007 recommended (at Rec 9) that: *industry develop, in consultation with the Australian Government, an industry-led scheme of regulation for water market intermediaries. The scheme could include voluntary accreditation, a code of conduct and a defalcation fund. If a scheme is not developed, the Australian Government should regulate water market intermediaries. State referrals would be necessary to give effect to Basin-wide or national regulation.*

The Government agreed in part with the recommendation, and during a briefing NIC held with Government officials at the time on the Government's response to the Water Act review recommendations, suggested that the water broking sector could do more in the self-

regulation space, but there was no agreement that the Commonwealth would intervene. NIC was advised at the time (2015) that there had been a few reported cases of misconduct and no evidence of overall adverse effects on the market that might require Commonwealth intervention. Government advice at the time suggested that an industry-led scheme mirrored the Government's agenda around deregulation.

It is worth noting the Australian Water Brokers Association (AWBA) Code of Conduct details the obligations of water market intermediaries under the Code. Some of those obligations include the requirement that funds held on behalf of a client must be held in a separate account with a financial institution until those funds are paid to the persons entitled to them. The Code also requires that funds held by a member on behalf of a client must be audited at the least annually by an independent accountant.

NIC strongly supports mandatory provisions in licences around trust accounts, their operation, accountability to customers and declaration of interests. We do however also acknowledge the important role water brokers play matching buyers and sellers. Regulation should address the points above but not lead to a concentration of the market providing less competition.

It does appear that despite the previous recommendations and voluntary codes that there remain significant questions around the operation of some (not all) brokers. This warrants further action.

NIC notes that the AWBA has advocated action along the lines of option 1. NIC does believe action needs to be taken to strengthen confidence in the water market and that some action in this area is a critical part of that.

**Option 2:** Applying the financial regulation framework to water products

NIC made the point in our initial submission that this should be considered, however, it needs to have a clear cost benefit analysis and at this stage we are not seeing justification for the additional cost this would impose.

NIC is not attracted to extending the financial regulation framework to brokers and intermediaries at this stage. We note that using ASIC as an existing body with an existing framework of user charges may limit the longer-term running costs of the system for the industry and might provide a framework for enforcing a code of conduct and ensure a consistent national licensing system.

However, we are concerned about cost versus benefit and if a recommendation was made along these lines we would want to see an indication in the final report whether State Governments will be likely to agree.

**Option 3:** Independent Market Focused regulator

A new independent regulator does not seem a proportionate or cost-effective response - particularly if it is only established to deal with the issues focused on by options 1 and 2, ie the regulation of brokers and intermediaries.

From the description in the option it would appear that any new peak regulator would be taking on a much broader role. This should be considered in conjunction with the issues raised in section 15 on Market Governance.

That section identifies gaps in governance frameworks resulting from the disparate allocation of responsibility across and within Governments and market participants.

NIC is open to considering reform and streamlining of the process. However, that must be on the very clear proviso that it does not duplicate and add a layer of additional cost. A viable proposition for an overarching regulator covering some of the functions discussed in section 15 should only proceed if it results in streamlined, more effective administration and operational cost savings for market participants.

An overarching regulator may well offer advantages in bringing together market information and potentially enhance transparency and, through that, build public and participant confidence in water markets. However, we can also see that without complete commitment from all State Governments (Basin State governments in the short term at least), progress would very likely be slow, resulting in continued duplication and higher costs.

At this stage our view is that this option is unlikely to succeed and would likely result in increased cost for little justified benefit.

The comment in this section of the interim report around the operation of IIOs is also important to note. The report includes references to deficiencies in the extent of information on trades recorded by IIOs, integration and reporting to state registers, differences in fees etc.

NIC would support moving toward more comprehensive and integrated information coming from IIOs. However, we are concerned that the interim report does not provide context around the way these IIO services have developed, the lack of resources available to IIOs or any discussion around the issue that IIOs are in fact - not for profit, cooperative or benefit to member organisations - with often very limited staff resources.

The final report should make it clear that those IIOs providing services have done so to meet a member and market need, and they have not had a template to use nor any Government guidance and funding to do so.

Water market services are not the core business of most IIOs. They will not object to change which will benefit operation and information on water markets. However we would caution about imposing on IIOs increased administration or requirements for investment which would ultimately come at a cost to their members, and when such costs are not able to be recouped either from market transactions or external funding.

There are also some practical issues around increasing the information required in IIO facilitated trades which will be explored further below.

Finally, NIC notes comment suggesting potential for IIOs operating trading platforms to give preferential treatment to trades that might be seen to benefit the IIO or to use differential pricing or processing time frames on internal and external trades as a way of making trading out of the area less attractive.

The 'potential' is noted but no evidence is provided that these practices are occurring. If there is evidence, of preferential treatment or unfair practice, then the ACCC should present such evidence to avoid casting a general aspersion on IIOs.

The overwhelming feedback our member IIOs receive from their members, using their services, is that they provide a valuable and trusted service.

## Improving trade processes and market transparency

### ACCC position:

#### ***Practical changes to trade processing are needed to improve the quality and timeliness of core market data***

*Market participants face difficulties in accessing reliable and representative market data, such as the current average price, the number and volume of recent trades, and current bids and offers. Trade processes are outdated and fragmented across many public and private service providers.*

*There is a need to update trade processes to better reflect current market developments, and ensure important market data is available to participants. The ACCC has identified several practical improvements that, in its preliminary view, should be made as soon as practicable. These practical improvements are listed below, and are discussed further in chapter 11.*

- (a) Basin States to improve trade data validation and quality checking processes before providing data to the Bureau of Meteorology as required under the Water Regulations 2008 (Cth).*
- (b) Update trade application forms to capture the reason for trade or trade type, struck date, lodging party and matching pathway (for example, matched on exchange, via broker, and so forth.).*
- (c) Remove the ability for zero dollar trades to be approved or recorded unless certain conditions are met (as exception, and with explanation provided) and continue progress to move trade forms online.*
- (d) Increase harmonisation across the Basin States' registers through consistent terminology and data structures.*

### NIC response:

NIC's policy objectives include:

- Basin Governments should improve the consistency, transparency and timeliness of water market information across State Government registries, including confidence in the accuracy of price disclosure and extent of price disclosure. Market information is improved by including clearer and timelier information on water supply, demand, delivery constraints, allocation and use.
- State based water registry information – particularly in the Southern Murray Darling Basin - is brought together in a consistent platform providing timely information on the market, trades and water availability along with historical usage information.

In that sense the preliminary recommendations would be a good step. The ACCC interim report makes a practical decision that it is more likely to be successful by moving towards harmonisation and interoperability rather than by recommending a single national structure.



History tells us that we are more likely to get incremental improvement rather than fundamental restructuring.

In that sense we would then agree with the ACCC that: “interoperability and compatibility of trade processing systems and registers is needed to (i) facilitate interstate trade more easily, and (ii) to encourage harmonised data collection and processing flows, in order to provide more consistent market data to stakeholders.” (ACCC, 2020, p. 293).

In the longer term it may be a good aspirational goal to seek to have states combine their registers. In the meantime we would agree with harmonising data and looking at options to develop a single information portal (further comment on this below).

On specific elements of this point, NIC agrees with point (c) on zero dollar trades. Zero dollar trades cannot be prohibited and most are entirely legitimate, however to record a reason for the zero dollar trade would provide greater transparency. For Government controlled parts of the process that should be able to happen quickly. Government should work with IIOs about practicalities and costs of changing their systems to incorporate this and other relevant recommendations likely to come from the final report.

#### **ACCC position:**

***Practical changes need to be underpinned by clear and comprehensive mandates to provide efficient trade services and high quality information to market participants***

*There is a need to establish a clear and comprehensive trade processing and market reporting framework governing all entities who process trades—including brokers who provide matching services, exchanges, IIOs and Basin State approval authorities. The ACCC’s preliminary view is that the following suite of changes could be implemented over the medium term to achieve such a consistent and comprehensive framework.*

- (a) Each Basin State should be given a clear legislative mandate to keep a register to record all entitlement trades and all allocation trades.*
- (b) Each Basin State water register should be given a clear legislative mandate to provide information services based on registry data, and clear publication requirements should be specified (although detailed requirements should be specified in delegated legislation such that they can be changed from time to time as needed).*
- (c) IIOs should be required to establish and maintain comparable registers for both temporary and permanent trades, within, out and into their networks. This might occur in partnerships with state agencies.*
- (d) Update Water Regulations 2008 (Cth) to more clearly specify data reporting requirements for trades of irrigation rights.*
- (e) Create the ability to register contracts with water registers, and/or annotate allocation trades conducted under a contract, with an identifier such that all allocation trades arising under one contract can be identified together.*
- (f) Introduce standardised single party identifiers across the Basin, for example using ABNs.*
- (g) Standards and agreed processes for processing trade applications and recording and disseminating trade data should be mandated and consistent across jurisdictions. These should apply to all IIOs and Basin State approval*

*authorities. Further, there should be standardised record-keeping and continuous disclosure rules placed on exchanges and brokers.*

- (h) Basin States should work towards harmonising trade application fees for allocation trade in the Southern Connected Basin, while also recognising the NWI principles for cost recovery.*
- (i) Basin Plan trading rule 12.48 should be revised to require prices to be reported for all tradeable water rights; that is, including irrigation rights and water delivery rights, not only water access rights.*

### **NIC response**

NIC welcomes most of these reasonably specific interim – medium term - recommendations. Our earlier submission discussed the need to improve the market to ensure that market participants, regardless of their size, have equal access at reasonable costs and with the information they need, in a timely fashion, to make informed decisions.

It is surprising in a sense that point (a) is necessary, however it is supported. NIC assumes this point combines with point (c) around requiring IIOs to establish, and maintain, comparable registers (potentially in partnership with state agencies). This recommendation, and others in the report, would be challenging for IIOs. NIC strongly suggests a recommendation in the ACCC final report around providing the resourcing and assistance to IIOs to put consistent new arrangements in place.

NIC's IIO members would support improvement of information, however they are not-for-profit organisations, who have developed market related services, including in some (but not all) cases, exchanges as a service to their members. This is not their core business and it would not be reasonable to expect the IIO customer members to fund a significant capital investment in a new system.

NIC assumes from the discussion in the draft report around IIOs providing consistent data on trades would involve recording individual details of trades, including price, type and some type of identifier. NIC understands why, in an ideal world, this level of data is desirable. A couple of complications exist that should be considered:

- IIOs often trade in and out of their systems on the IIOs licence
- IIOs will sometimes aggregate a number of small parcels of water being offered for sale by customers into a single larger parcel
- The information provided on current forms for many IIOs does not include information like price and reason for zero dollar trades
- IIOs don't have a legal right or capacity to verify price data if it was put on a form.

The issues ACCC should consider in any recommendation for increased data collection and provision to a third party (in addition to the points on cost and admin) are:

- If detail on the individual owner is to be provided (ie with a unique identifier), how will duplication of recording of trades be avoided?
- How will any new requirement for individual identifiers to be recorded by IIOs work with current licencing and legal frameworks?
- Would any recommendation prevent, or make less attractive, the practice of

combining small parcels from customers into bulked up offers to the market? If it does will that be a disincentive to owners of small parcels putting them on the market (our feedback indicates it would be)?

- Ensuring that the onus to provide true information is on the parties involved in the trade, not on the IIO.

Again, NIC would urge the ACCC to recognise that IIOs are not large profit making private businesses or Government departments. They have limited staffing capacity and therefore extremely limited in their capacity to undertake additional administrative requirements.

NIC agrees with the recommendation for a single party identifier across the Basin. Subject to any practicalities around this the ABN does appear to be logical and in the interests of transparency. Final recommendations should deal with the fact that some market participants will not have ABNs (eg retired farmers) and will need to deal with the issues outlined above about consolidated trades and trades to and from an IIO.

NIC supports point (g) in principle but again with the proviso that the ACCC must recognise that IIOs do not have the same capacity as State Governments. The largest IIOs, as a rule, have a couple of staff dealing with water markets; some smaller IIOs would employ two or three staff in total (ie to run the whole scheme).

### **ACCC Position:**

***Digital technologies offer the opportunity to streamline trade services, at the same time as improving information quality and availability***

*The practical changes identified above could go a long way towards improving the quality, timeliness and transparency of information to market participants and streamlining trade processes. However, digital technologies offer the opportunity to make more substantial improvements, and at the same time enable increased market oversight to improve the integrity of Basin water markets. Options for using technological change to bring about these improvements include:*

- (a) *a comprehensive and open digital protocol to enhance interoperability between Basin State approval authorities and registers, IIOs and exchanges, with the ability to securely transmit data, seamlessly interface between private exchanges, IIOs, trade approval authorities and registers, execute instructions, and automate collection, cleaning and publishing of water market information.*
- (b) *a single information portal for publishing water availability and trade information, which collates data from multiple sources, but does not facilitate trade.*
- (c) *a spot market and real-time automated matching of buyer and seller offers, similar to the National Electricity Market.*
- (d) *a single exchange platform for posting and matching trade offers by creating a single mandatory online platform for matching buyers and sellers.*
- (e) *an ASX-like approach of a single clearinghouse for administering trading (but connecting via interoperability protocols to trading platforms as overlays and different Basin State registers underneath).*
- (f) *Distributed Ledger Technology which administers trade through smart contracts and also records all registry information.*

- (g) *a single common register in which all water accounting for both trade and delivery (use) would be accounted for in the same, single system.*

*The ACCC's preliminary view is that, while governance remains distributed between Basin States and other actors, options which deliver harmonisation and co-ordination are more suitable than options which deliver centralisation. In line with this, the ACCC's preliminary view is that the digital protocol option combined with a water market information platform, which brings together (but does not replace) diverse information sources, is the most appropriate pathway. If there were to be a more centralised approach to governance, this would open up options to centralise trade administration and technological solutions.*

### **NIC response**

As was clear from our initial submission, significant improvements in information are required. Clearer, simpler, more timely and more transparent market information will form the basis of building confidence in the market, and it should enable competition regulators to properly assess allegations of anti-competitive behaviour.

In response to point (b) – a **single information portal**, NIC notes the report released in March 2016 by the Australian Government, titled *Providing Water Information to the Commonwealth* and developed by an interagency working group (of which the ACCC was a part) on water information, identifying a number of measures to reduce the regulatory burden and costs of providing water information.

The Interagency Working Group on Commonwealth water information provision, led by the Bureau of Meteorology, was established in December 2014 following a recommendation of the [independent review of the Water Act 2007](#).

The working group comprised officials from the BoM, MDBA, ABS, ABARES, ACCC and the Department of Environment. The Interagency report recognised the differences in governance, institutional and administrative arrangements, and approaches to specifying entitlements and trading rules, and the fragmented and inaccurate price information.

The concept of a single portal for water information was examined from the perspective of streamlining the provision of data provided by IIOs to a variety of bodies including the ACCC, the BoM, MDBA, ABS and others. The objective was to reduce the regulatory burden on IIOs.

The report at the time noted that Governments recognised that water markets would benefit from more consistent approaches to these matters, and noted that the introduction of Basin Plan trading rules on 1 July 2014 was a significant step in the new phase of market reform. The rules were designed to standardise certain rights and conditions to ensure participants have fair and equal access to trade. The rules were also intended to reduce restrictions on trade and improve transparency of information.

There is a long history of – and significant expenditure on – attempting to develop a single portal. The final report needs to be very practical about this.

Is it realistic, possible and affordable? What would a new portal mean for the BOM and other platforms and how will we ensure market participants are not required to duplicate the information provision (and burden).

NIC agrees with the definition the ACCC has provided in box 10.1 “what is information transparency” (ACCC, 2020, p. 325). Noting, particularly, the reference to secondary information on supply and demand.

The interim report correctly points out that “the exact level of supply in the market will ultimately be determined by the approaches taken by the MDBA and state governments to assess and allocate available water resources. The historical decisions made by state governments when establishing their water entitlement frameworks continue to play a significant role in influencing supply in water markets” (ACCC, 2020, p. 399).

This is an important point to highlight. Lack of information and confusion about allocation decisions is one key reason there is insufficient information in the market, a key reason it does not reach the requirements for information transparency outlined by the ACCC in box 10.1.

NIC would like to see greater effort by allocation authorities to explain the basis of decisions, and the parameters, to make allocations more predictable and understandable.

In moving to put further detail around these recommendations on the use of digital technologies it is important to recognise that the water markets have very different levels of development, frequency of use and maturity around different parts of the Basin.

It is sensible to focus the drive to consistent digital information in the Southern Basin initially. The interim report has acknowledged this on page 293 with the comment that “the ACCC considers that where key functions of water markets exist or take place in other digital spaces, such as online exchanges or trading platforms, these platforms need to be able to digitally connect and receive information from the registers and vice versa. Similarly, where trade takes place in a more ‘manual’ way—for example in a small rural community using face-to-face negotiations and paper trading forms, traders still need to be able to submit trade applications for approval, and (at a minimum) receive notification of the outcome of their application” (ACCC, 2020, p. 293).

As noted previously, there are very different levels of capacity to undertake this work, particularly when IIOs are included.

In actioning any potential recommendation, it will be important to strike a balance between the urgency of improvement and the practicality of progressing improvements. Understanding that these draft recommendations are framed as being longer-term, NIC is torn between making the obvious point that they need to be pursued quite urgently, and the real world knowledge that nearly two decades of similar recommendations to, and even commitments by, Basin governments have failed to produce results.

The market is evolving and there have been improvements; NIC acknowledges that some states have reasonable online systems and some private providers have made positive steps towards improving information. However, it is clear we are still nowhere near the ideal outlined even in the original National Water Initiative 17 years ago.

NIC accepts the reality outlined above that it is more practical to move towards harmonisation and co-ordination rather than centralisation. As with all options, we would be

concerned about any costs being passed on to participants from these processes. We would like to be assured that 'harmonisation and co-ordination' actually means Governments doing the job once, not individually and certainly not putting expensive requirements on IIOs to develop their own systems.

NIC would like to see the final report include further recommendations around implementation, in particular on timing, responsibility and cost. The final report should also consider practical options for this. We have seen efforts by Government via the BOM and by the private sector (also funded by Government at times) to develop platforms.

There are a number of practical issues that need to be overcome around the way the water market works, ie purchase doesn't necessarily equal delivery, approval requirements on transfers etc. As outlined above, the characteristics of the product mean it is not as simple as electricity or shares for trading.

The final report should seriously consider whether or not the best option is for a Government driven system or whether the private sector can be more innovative and responsive. Our members have experience using the BOM system and other systems including Marsden Jacobs Waterflow (which was partly Government funded). Our members appreciate the valuable work the BOM does in the water information area but in terms of market information the anecdotal feedback seems to indicate that the waterflow app is providing better information.

Whatever solution is favoured, it must ensure that IIOs can integrate their information without requiring a large capital outlay or ongoing administrative cost to members.

## **Improving market architecture**

***The design of the southern connected Basin market architecture has not kept pace with increasing trade activity, and the ACCC is seeking to identify options for reform***

*Reform of the market architecture can build more robust frameworks for trade, and improve arrangements for addressing impacts on other water users and the environment. Market architecture that better integrates trade, operational requirements and the physical characteristics of the system, will improve the operation of water markets. This will help achieve a range of benefits, including properly pricing the costs of trade and protecting other water users and the environment.*

*The ACCC is seeking to identify appropriate market architecture reform options which might include:*

- (a) Improvements to policy transparency and consultation processes.*
- (b) Alternative approaches for allocation and carryover policies, such as continuous accounting and capacity sharing.*
- (c) The creation of formal markets for storage and delivery capacity*
- (d) Application of transmission loss factors to water deliveries in the southern connected Basin.*
- (e) Removal of the exemption for grandfathered tags or removing entitlement tagging altogether.*
- (f) Alternative and more dynamic mechanisms to manage inter-valley trades.*

- (g) *Changing all allocation trade to tagged allocation trade.*
- (h) *Improving consistency across Basin States' accounting and metering requirements.*

### **NIC response**

Overall NIC agrees there is a need for improvement in market architecture. And we would agree that the issues identified above are a reasonable starting point for further consideration. In each case they should be tested to show that they are responding to a proven market failure and that the change is equitable and practical (ie taking into account differing characteristics of systems).

Some which we would endorse quite readily include (a) improving transparency and consultation; (f) on more dynamic mechanisms to manage IVT; and (h) improving interstate consistency particularly in terminology and information collected.

An in-principle commitment to greater consistency should be balanced with recognition that there are quite significant differences between catchments that necessitate different rules.

We agree that rules need to be tested to see if they can be improved, given clarity and to ensure they work fairly. NIC suggests that for many of the elements of this section, there is discussion and further work undertaken on a catchment basis.

NIC notes the comment on potential to create formal markets for storage capacity. The need for this must be justified by ACCC showing how it would respond to an identified market failure or to enhance the operation of the market. It is noted current carryover entitlements have a value that is built into the asset value of an entitlement or an allocation, and any proposed change therefore has an impact on that asset value and this needs to be considered. In addition, some of the options proposed will fundamentally alter the planning and entitlement framework and property rights that form the basis of the current market. NIC does not believe irrigators are advocating for this type of overhaul.

If it can be shown that creating a market for storage capacity would enhance water markets operation, or rectify a demonstrated market failure and to whom, then it would need to be considered on a catchment by catchment basis with particular consideration of any 3<sup>rd</sup> party impacts.

Some of the options identified by the ACCC will add significant complexity to what is already a complex system, NIC expects adding complexity will advantage larger better resourced market participants and disadvantage smaller irrigation businesses. This outcome would be undesirable.

Transparency is a core point and it includes the need to provide far better information about allocation decision making processes along with whole operation of the market. NIC notes the ACCC's preliminary conclusion on this which states: "the ACCC's analysis revealed the crucial importance of clear and transparent communication of allocation decisions to stakeholders, the absence of which may damage market confidence. The ACCC preliminary assessment also found that while changes to inflows have been the primary driver of reduced allocations in recent years, unclear messaging and shifts in the relationship between storage volumes and allocations may have contributed to stakeholder concerns about other drivers. (ACCC, 2020, p. 432)"

NIC supports the analysis that transparent communication of allocation decisions to stakeholders is critical in maintaining market confidence, and underpins confidence in the role of authorities in decision making.

NIC notes the points made on p477: “The ACCC considers there are two components that require consideration in fixing these problems. These are:

- making current processes more transparent and further policy change more truly inclusive. This would involve:
  - better communicating the policy workings by improving transparency and ‘showing workings’ in a way that is easy to understand and find.
  - building users’ capability to estimate the outcomes of policies, and what variables they should be looking at, to help build information and policy literacy
  - adopting appropriately structured reform processes, with transparent and detailed timelines and robust consultation.
- where confidence issues point to a need to reassess past policy decisions or past policies are no longer fit for purpose, policy reform processes should demonstrate a focus on strategic, long-term decision making that builds sustainability and stewardship of resources over time” (ACCC, 2020, p. 477).

NIC notes the focus particularly on NSW allocation processes and communication. We would strongly agree. Allocation decisions are complex but there must be a fundamental shift away from the black box style of decision making to something that defaults to full information about process and expectations.

### **Carryover**

NIC is willing to look at the ‘alternative approaches’ on carryover. As far as practical, consistency on carryover would be positive. However, this needs to recognise that many carryover rules are particular to the catchment, including rainfall patterns and usage. They form the basis of the water entitlement property right. Differences in the treatment of losses for carryover in the Southern Basin should be explored and justification provided where loss is potentially socialised, however, there should not be an assumption that all valleys must have the same rules.

In our initial submission we noted some concerns raised regarding the use of carryover, and in particular the ability of investors to purchase allocation and carryover water, and whether or not that is being sold to a producer or utilised for crop production in a timely manner. It might be held to increase its value and show an annual capital increase for a fund manager, when it might well have been made available for consumption.

As we noted, it would also be reasonable to expect that a water investor, who has sold a forward product to a producer, would potentially need to buy allocation or own carryover to meet their guarantee to deliver water at a certain time.

NIC notes the ACCC’s continuing investigation on the use of carryover with a view to determining whether carryover is being used by ‘investors’ to increase prices by withholding supply (P. 443). We look forward to ACCC’s analysis on this matter.



The feedback from our members in NSW and Victoria is that they are comfortable with the way carryover currently works. Proposals for change would need to demonstrate that they are a proportionate response to a proven market failure. It must be noted that the value of a water entitlement builds in any provision for carryover and any proposal for change needs to account for any impact that might have on asset value as well as operational issues for irrigators and third party impacts.

In South Australia, the carryover system is quite different with allocations occurring with a delay of some months. This gives quite different characteristics to the way carryover operates in the rest of the southern system and can potentially interact negatively with the need to keep account balances positive. It may be worth looking specifically at this issue for South Australia.

NIC agrees with the conclusion in the interim report (p 450) that carryover has been beneficial for irrigation in the sense that it has allowed water to be used for its most productive purpose (as opposed to having an incentive to use as much as possible in a single year) and it has allowed valuable new products to be developed that have enhanced the ability for some producers to plan with more certainty about water supply. Options such as carryover parking allow water entitlement holders to make commercial decisions about their risk profile and add flexibility to those investment which do not hold sufficient water entitlements to meet their irrigation needs.

### ***Delivery shortfall***

The issue of delivery shortfall risks is an issue NIC has been attempting to get Basin governments and the MDBA to address for some years. NIC agrees with the ACCC comment under point 13.5.3 ‘delivery shortfall risk is increasing, though the information base on the relative impact of drivers is lacking (ACCC, 2020, p. 459).’

We emphasise that this issue has been a significant cause of frustration to NIC, where the work on this matter is essentially occurring behind closed doors (at the insistence of Basin Water Ministers) and that, while we have had briefings, to date there has been no industry engagement on solutions.

NIC agrees with the ACCC that: “Despite the information gaps, the observed apparent increase in risk does indicate flaws with the market architecture. There is also a threat that policy changes to address other interrelated issues, such as changes to inter-valley transfer rules to address environmental concerns, may exacerbate delivery risks (ACCC, 2020, p. 460)”.

In considering solutions for delivery risk issues, NIC has discussed, but not made a decision on the possibility of creating a system of tradeable delivery entitlements. Delivery entitlements exist within a number of irrigation districts providing a precedent for how they might work. This would be consistent with point (c) above on a market for delivery capacity.

More work would be needed, particularly around equitable introduction of the capacity entitlement. Industry would need to be, and would be willing to be, involved in consultation and design of a system for consideration.

The related issue that is not considered in the interim report is whether there are infrastructure solutions that might help relieve delivery pressure at peak times. There would

be sensitivities around this in terms of the interaction with constraints removal and concerns about negative impacts in other parts of the system. However, it is relevant to consider infrastructure solutions as well.

NIC, along with other irrigator groups, has also previously advocated a temporary freeze on new greenfields irrigation development in areas where delivery shortfall is a risk. We did this because our members could see that the shortfall risk was not being adequately addressed. NIC accepts that there is a market solution, which is to allow individuals and companies to make their own decisions and their own assessment of risk. This has the inevitable outcome that in the future, some owners of permanent plantings will not be able to get the water required to sustain their plantings.

Our concern about the 'market' solution is that it is a fairly brutal and an unfair way to deal with a problem which could be addressed through better planning and better rules in the first place.

### **Conveyance loss**

The issue raised in point (d) on conveyance loss factors is vexed.

The ACCC's comment here: "Conveyance loss factors for allocation trade could theoretically be applied to water trades which would increase conveyance losses (by changing the location of extraction), so that one megalitre of water sold from an upstream water user would be converted to less than one megalitre received by the downstream purchaser. The difference between the two amounts would reflect the proportion of water lost to conveyance as a result of the trade in the form of a conversion factor. Doing so would more effectively attribute the incremental increase in conveyance losses as a result of changing water use activity to those who are benefitting from this change—those involved in trading water downstream".

"Imposing conveyance loss factors for allocation trade in the Southern Connected Basin to incorporate changes in conveyance losses would be extremely challenging and face a number of practical impediments to implement. (ACCC, 2020, p. 465)"

NIC understands the very real concerns about the equity of a system where conveyance loss is effectively socialised and where it appears, at times, to be negatively impacting on general and low reliability allocations. Experience suggests that some water owners, particularly NSW Murray general security users, have borne more burden than others for transmission losses.

However, we also concur with the discussion outlined on pages 465 and 466 around the real practical difficulties of implementing a conveyance loss factor in water traded along the system.

The example of an existing system operating in St George is noted, as are the additional complexities of the Murray system. In addition to the practical issues outlined by the interim report, we would also raise the complexity of 'retrofitting' a system, determining an equitable way of adjusting existing entitlements which (in a system where creating new entitlements would presumably be unacceptable) would be likely to require compensation.

Philosophically we would agree with the statement on p 467 that “conveyance loss factors applied to allocation trade or the delivery/extraction of water in the Basin offer the potential to address flaws in the market architecture regarding the accounting and attribution of conveyance losses” (ACCC, 2020, p. 467), but would agree that the complications of doing so make it unlikely at this stage.

We welcome the indication that the ACCC will continue to explore the issue and “second best” outcomes.

As the peak body representing irrigators right along the system, it is inevitable that our individual members are likely to have different views on some of these points.

That is particularly the case with the question around socialising losses and potential application of a transmission loss factor. In principle, socialising a loss that is incurred because an owner has moved water from above a constraint to below, is not an equitable outcome for water users above that constraint.

NIC has welcomed the fact that the biggest water owner, the Commonwealth Environmental Water Holder, has acknowledged this with their recent practice of covering the estimated loss when movement of their entitlement has created one. We would hope this practice continues. It creates a precedent to consider for trades across zones. The challenge is to determine whether an equitable system could be put in place for future transfers where the owner in the originating area bears a loss allocation.

We acknowledge this would be difficult to put in place, but in general the principle of no negative 3<sup>rd</sup> party impacts, which is a key point of the National Water Initiative, needs to be considered in this area as well.

We are clear that we need:

- Greater transparency and engagement from authorities in how conveyance loss is calculated and apportioned.
- Fair apportionment of losses to ensure that an unfair burden does not fall on allocations to general and low security users;
- Consideration of impacts on third parties where losses are exacerbated by movement of entitlement and allocations, including particularly 3<sup>rd</sup> party impacts on the original entitlement holder’s area.

NIC cautiously supports further work on this issue. We recognise that water owners and users in some areas are potentially disadvantaged by the current system and in an ideal world they would not be. However, it is also clear that ‘fixing’ the disadvantage will result in real loss to users in other parts of the system. Finding an equitable solution is supported but will be difficult.

### ***Continuous accounting***

In principle NIC supports harmonising or increasing the frequency of water account reconciliation and reducing the ability to reconcile accounts by entering water markets. This is consistent with the principle outlined in our initial submission to the inquiry that

“Governments (should) move toward standardised requirements for positive account balances along the Southern connected system” (National Irrigators' Council, 2019, p. 3).

NIC notes that since our initial submission, South Australia has taken action to increase the frequency of account reconciliation in that state and remove the ability to carry a negative balance for a full year. Implementation of this has caused some difficulties for some users but it is supported if it is communicated and implemented effectively.

NIC does not have a view on whether continuous accounting will work for all parts of the system. Our view is that the key principle is positive account balances, and from there each catchment might consider how that is implemented. Decisions around continuous accounting, like carryover is best placed in the catchment based planning framework.

### ***Inter Valley Transfer limits and Tagging***

NIC notes P 479 “the ACCC’s preliminary view is that IVT limits are a blunt and inadequately effective mechanism which is unable to discern between beneficial and harmful trades, and a more direct mechanism is needed to govern access to on-river delivery capacity. The entitlement tagging mechanism also has unexpected costs and unintended negative impacts.

These mechanisms need to be enhanced or replaced to:

- be dynamic—that is, not designed for an assumed pattern of water availability, use or trade
- be equitable in terms of having a ‘level playing field’ for access to on-river delivery capacity
- aim to maximise opportunities to trade, subject to physical constraints and environmental limits
- allow users to more directly experience the costs and benefits of their own (trading and use) actions and not to shield them from shortfall risk, as occurs under current policies
- be robust:
  - not allowing some users to operate outside the mechanism, especially in ways which undermine the integrity of that mechanism
  - successfully manage environmental impacts through timely and responsive actions to limit damage.

The ACCC is considering what the options might be to replace or enhance these mechanisms. Options under consideration include:

- removing the exemption for grandfathered tags or getting rid of entitlement tagging altogether
- developing more dynamic IVT mechanisms (that is, timely and responsive tools to allocate access to limited delivery capacity and to manage impacts on other water users and the environment, as are being explored in the Victorian Government’s review of the Goulburn to Murray trade rule)
- make all allocation trade tagged allocation trade (so that water only moves between valley accounts when it is being delivered, and remains in the origin valley accounts at the time of trade and for carryover)

- developing markets for on-river delivery capacity, to better allocate and account for scarce capacity (see 13.5.1)
- developing non-market allocation mechanisms for on-river delivery capacity, that allocate capacity on a less than annual accounting period and are defined with respect to specific constraints.”

In principle the aims outlined by the ACCC seem reasonable. NIC has consistently supported the need for trade limits to reflect physical constraints and avoidance of third party impacts on water entitlement holders that are not party to the trade. We have previously raised concerns around the environmental damage caused by some aspects of river operation.

Those environmental concerns about damage to upper parts of the Murray and the Goulburn in particular are very real. We are seeing severe river bank erosion which is damaging the river environment. This is not an acceptable outcome of river operation. NIC recognises that IVTs are part of the solution as is the capacity to manage the system with a more natural flow pattern to avoid constantly running at bank level.

We do not support mechanisms that effectively become ‘protectionism’, or that give some market participants an advantage, either through unequal access to information or by being so complex that only a few people can take advantage of opportunities.

NIC notes points made in the section around confidence in metering. We agree that compliance is a key factor in market confidence as well as in building community trust around water users. NIC strongly supports activity over the past three years where there has been major progress in better resourcing of compliance activity, metering policies and in moving NSW floodplain harvesting from a property right to a fully measured volumetric entitlement consistent with the rest of the system.

NIC strongly welcome this progress and supports the continuing implementation. We would suggest that some of the continued public criticism is unwarranted or out of date.

The final ACCC report should make it clear that strong progress has been made and that full implementation of the various State and National metering arrangements needs to be allowed to continue to conclusion – it will then be appropriate to review and assess outcomes.

## Changes to market governance

### ACCC comment:

***There is a need to reconsider governance frameworks to enable independent and clear decisions on the development of market settings***

*The ACCC considers that improved governance will help to effectively resolve many of the issues identified throughout the inquiry, as well as strengthening the system so fewer problems emerge in the future. The ACCC is considering options to improve market governance. Broadly speaking, options may seek to:*

- *Establish clear, independent decision making structures*
- *Separate market governance roles from broader water management governance*

- *Consolidate or harmonise fragmented roles*
- *Reduce regulatory gaps by creating and assigning new roles or functions.*
- *Address conflicting roles.*

### **NIC response**

The principles around better governance are supported. Our key concern in this process however, is that a lack of commitment from States will mean that rather than harmonising and addressing conflicted roles – and thus reducing complexity, cost and red tape - the end result may well be additional layers.

NIC strongly supports effective, efficient and accountable governance of the water markets. We have never, however, supported referral of State powers on water to the Commonwealth, and do not see that as being practical in this case either.

We would like to see the final report provide evidence that recommendations will result in the efficiency outcomes we have advocated, and importantly, that there is a realistic prospect they will be implemented.

The history in this area is not good, and the report therefore may require pointing out an ideal but recommending an achievable outcome.

NIC is concerned about the ACCC's focus specifically on IIOs. We agree that it would be unacceptable if an IIO was to prioritise approval of internal trades, or trades facilitated by their own brokers, however, despite highlighting this possibility a number of times in the report, it is a concern that **there is no evidence provided to suggest that is happening or has happened.**

NIC is not aware of any IIO operating in this space that is not either customer/member owned or Government owned, and this lack of private profit motivation puts IIOs in a very different category to other participants in the system.

NIC's IIO members would be open to considering improvements to ensure there can be no question (justified or not) about conflict of interest, and they are certainly open to proposals to improve consistency, timeliness and transparency of market information. The key proviso in that - in a not for profit or benefit to member company - it would not be reasonable to expect that additional cost in achieving this be borne by the members/irrigators.

NIC generally supports preliminary findings throughout the interim report suggesting a need for major changes to information collection, consistency and transparency. This was very much the focus of our initial submission to the inquiry.

We would expect that IIOs operating trading platforms and other market services would be a part of this but suggest the process and impetus should start with Basin Governments bringing their information together.

As outlined above, the final report should consider whether a market's IT platform is best built by Government or the private sector. In doing so, a clear principle is needed around facilitating the capacity of IIOs to contribute information trades to the platform.

On the other points in this section, NIC continues to support the medium to longer term need to clarify the potentially conflicting roles in the MDBA. The recent announcement by Water Minister Pitt on this is noted and welcomed.

NIC agrees that action is justified to regulate water market intermediaries and we refer to our more detailed comments in our response to that section.

We also note the ACCC's interim conclusion that there is scant regulation to prevent market manipulation. This is unacceptable. In our initial submission one of the points we outlined was to suggest that the "ACCC takes a continuing role in monitoring and acting, if necessary, to ensure no anticompetitive behaviour or market manipulation in the water market, particularly focusing on periods of low supply".

NIC is somewhat surprised by the finding that "no particular body" has been given responsibility for monitoring the water market. Our view is that the ACCC, with its broad economy wide responsibility for competition, would and should be able to do that. Nevertheless, we note the report's discussion about setting up a dedicated body, as discussed above. NIC would consider that but only if it results in lower cost to industry by reducing rather than increasing duplication.

NIC is not attracted to the option of creating a body like the AER to oversee the water market.



## References

- ACCC. (2020, July 30). *Murray Darling Basin water markets inquiry - interim report*. Retrieved from [www.accc.gov.au](https://www.accc.gov.au/system/files/Murray-Darling%20Basin%20inquiry%20-%20interim%20report.pdf): <https://www.accc.gov.au/system/files/Murray-Darling%20Basin%20inquiry%20-%20interim%20report.pdf>
- Australian Taxation Office. (2020, March). *Register of Foreign Ownership of Water Entitlements - 30 June 2019*. Retrieved from [firb.gov.au](https://firb.gov.au/sites/firb.gov.au/files/2020-05/2019-rfo-water-entitlements.pdf): <https://firb.gov.au/sites/firb.gov.au/files/2020-05/2019-rfo-water-entitlements.pdf>
- Interim Inspector General of the Murray Darling Basin. (2020). *Impact of lower inflows on state shares under the Murray-Darling Basin agreement*. Canberra: Commonwealth of Australia.
- National Irrigators' Council. (2019, November). *Submission to ACCC Water Markets Inquiry*. Retrieved from [Irrigators.org.au](https://www.irrigators.org.au/wp-content/uploads/2019/12/NIC_Submission_ACCC_Water_Markets_inquiry.pdf): [https://www.irrigators.org.au/wp-content/uploads/2019/12/NIC\\_Submission\\_ACCC\\_Water\\_Markets\\_inquiry.pdf](https://www.irrigators.org.au/wp-content/uploads/2019/12/NIC_Submission_ACCC_Water_Markets_inquiry.pdf)