

# 06

## Governance of the Basin water markets

This part comprises chapter 17, which reviews and evaluates the market governance arrangements in the Basin water markets. In particular, chapter 17 discusses specific market governance deficiencies identified by the ACCC and proposes specific solutions that aim to address them. Importantly, these solutions also provide institutional and procedural mechanisms to enhance the implementation of various solutions outlined in this final report.

# 17. Market governance

## Key points

- Market governance in the Basin water markets is currently fragmented and complex. While the water markets involve significant trade between regions and across state borders, responsibility for managing water resources and trade is dispersed across a large number of Basin State and Australian Government bodies.
- This fragmentation has contributed to complex and duplicative regulatory and administrative frameworks that are difficult for market participants to navigate.
- The ACCC has identified four key shortcomings of the existing market governance arrangements that are impeding the fair and efficient working of the Basin water markets. These are:
  - insufficient prioritisation of water markets policy to ensure that the water markets operate efficiently and work well for their participants
  - insufficient focus on delivering administrative functions in a manner that makes it simple and easy for participants to engage in water markets
  - differences in rule-making processes and consultation requirements by Basin governance bodies
  - insufficient transparency over existing intergovernmental processes and responsibilities, which is limiting market confidence and investment.
- The ACCC recommends that the Australian and Basin State governments create an independent Water Markets Agency to consolidate and carry out the new functions that have been identified throughout this inquiry, as well as combining functions that currently sit with other bodies. This will help to reduce fragmentation of water markets governance.
- The ACCC considers the Water Markets Agency would be best established through a cooperative legislative scheme involving the Australian and Basin State governments.
- The ACCC also recommends the following procedural reforms to market governance:
  - the Australian and Basin State governments should implement a consistent and transparent process for reviewing and amending water trading rules and other decisions with significant impacts on water markets
  - the Australian and Basin State governments should incorporate a legislative requirement to obtain and have regard to advice from the Water Markets Agency prior to changing or making new water markets policies, rules and decisions
  - the Ministerial Council and the Basin Officials Committee should publish annual policy documents that detail its strategic objectives and priorities relating to water markets policy.
- These governance reforms would increase market confidence, improve market participant decision-making and trade, allow better use of scarce water resources, encourage on-farm investment and improve overall economic output.

## 17.1 Introduction

Effective market governance is especially important for the Basin water markets because of its inter-jurisdictional nature, which creates the need for some level of harmonisation between Basin State and Commonwealth regulatory and administrative frameworks. This in turn requires coordination between Australian and Basin State government agencies and decision-makers to ensure that spill over effects are managed and that the infrastructure that support the water markets meet the needs of its participants.

As NSW Farmers outlines, '[m]arket governance is the foundation to an effective water market ... Market participants require a robust governance system in which they can have confidence in and ensures that

trading rules and regulations are developed with a Basin-wide perspective.<sup>1333</sup> The ACCC agrees with this view and believes that a robust, fit-for-purpose market governance framework is needed to support fair and efficient water markets.<sup>1334</sup>

However, the inquiry has identified significant shortcomings in the Basin's market governance arrangements and their relative importance within broader water management governance. In recent years, the Australian and Basin State governments have been occupied with important issues of broader water management, particularly the implementation of Sustainable Diversion Limits. As a consequence, the performance of water markets and their administration have not been sufficiently prioritised to deliver well-functioning water markets.

The existing market governance arrangements need reform to ensure due consideration is given to water markets issues, without overriding existing water management decision-making powers and processes.

In addition, decision-making and administrative roles relating to water markets policies are highly fragmented and rule-making processes differ across jurisdictions in ways that may be avoidable. This creates and heightens challenges for water users to understand, participate and have confidence in the Basin water markets, and in turn prevents the potential benefits of these markets from being fully realised.

This chapter details the key governance problems that are impeding the effective functioning of the Basin water markets and proposes solutions to resolve them, improve market confidence and deliver market benefits into the future.

## 17.2 Current market governance arrangements

### 17.2.1 Current frameworks are complex and fragmented

Market governance refers to the institutions, rules and processes through which decisions concerning the definition and trade of water products and associated services are made and implemented, and how the various actors in the system are held accountable.

Market governance in the Basin water markets is fragmented and complex. While the water markets involve significant trade between regions and across state borders, responsibility for managing water resources and trade is dispersed across various state and federal government bodies. This results in certain regulatory, administrative and governance differences and inconsistencies between state jurisdictions.

Basin States have primary responsibility for the management of water resources and trade within their respective jurisdictions. Their responsibilities generally include:

- water allocation decisions for state water users (e.g. allocation of state water shares)
- water accounting processes and systems (e.g. metering and water flow measurement)
- administrative functions to facilitate water trade (e.g. trade approvals, maintenance of trade registries)
- water management and planning activities (e.g. management of dams, locks, weirs and barrages and water saving projects)
- development and enforcement of local compliance with Water Resource Plans, including accounting for water taken from the river system
- enforcement and compliance activities (e.g. relating to water theft and meter tampering)

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<sup>1333</sup> NSW Farmers Association, *Submission to Murray-Darling Basin water inquiry interim report*, November 2020, p. 15.

<sup>1334</sup> The National Farmers' Federation articulated a similar view in its submission. See National Farmers' Federation, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 22: 'Without broader consideration of basin governance, the NFF is not convinced implementation of ACCC recommendations will resolve key issues. ... The NFF recommends basin governments assess whether existing governance arrangements are appropriate to oversee a functioning water market and address, existing, emerging and future challenges.'

The *Water Act 2007* (Cth), the Basin Plan and the Murray–Darling Basin Agreement establish an integrated framework, which aims to achieve a sustainable balance between environmental and consumptive uses, and efficiently manage water resources.<sup>1335</sup> The Basin Plan coordinates certain water trading and management activities by establishing the framework for setting Sustainable Diversion Limits and Water Resource Plans. It also includes Water Trading Rules that aim to reduce restrictions on trade and to improve transparency and access to information. The Basin Plan Water Trading Rules are designed to encourage consistency, promote freer trade (within hydrological limits) and provide a basic level of transparency. It is the responsibility of the Basin States to set trading rules governing trade within and between their jurisdictions.

The government agencies involved in water management include the MDBA, the Australian and Basin State Government water departments, the Basin State water authorities and resource managers, and various regulators and compliance agencies, including the ACCC. In addition, some private bodies, including IIOs, investors and intermediaries, have their own processes that impact how they or their customers interact with water markets.

Significant intergovernmental coordination and cooperation is needed to achieve consistency in Basin management policies and their administration. In this complex framework with multiple actors, it is often challenging to reconcile diverging interests to reach a consensus that delivers the most beneficial Basin-wide outcomes. It is also challenging for market participants to navigate arrangements and access information to support efficient trade.

### **17.2.2 Strategic Basin-wide policy-making is mainly situated in the Ministerial Council forum**

The Murray–Darling Basin Ministerial Council (Ministerial Council) and its various subordinate committees are intergovernmental forums for Basin State and Commonwealth Ministers and government officials to coordinate on policy issues of joint interest. While decision-making on specific Basin matters is dispersed across multiple institutions, strategic Basin-wide policy-making and implementation is mainly undertaken in these forums.

The Ministerial Council considers and determines outcomes and objectives on major policy issues of common interest to the Basin State governments. The Ministerial Council has policy-making and decision-making roles in water resource management, and comprises the relevant water policy Ministers from each Basin State and the Commonwealth.

The Basin Officials Committee (BOC) is composed of senior officials from each of the Australian and Basin State government water departments. BOC provides advice to the Ministerial Council and coordinates the implementation of their policy decisions. BOC is supported by a number of sub-committees which provide advice on particular aspects of Basin management, including river operations, interstate and inter-valley trade, and environmental water management.

## **17.3 The current market governance arrangements do not support fair and efficient water markets**

Effective market governance would enhance the efficiency of the water markets by increasing market confidence, allowing better decision-making by water users, prompting better use of scarce resources, and removing impediments to on-farm investment.

The ACCC has identified several key characteristics of the existing market governance arrangements that impede the fair and efficient working of water markets. These are:

- insufficient prioritisation of water markets policy to ensure that the water markets operate efficiently and work well for their participants
- insufficient focus on delivering administrative functions in a manner that makes it easier for participants to engage in water markets

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<sup>1335</sup> In the Northern Basin, the New South Wales–Queensland Border Rivers Intergovernmental Agreement (2008) established a role for the Border Rivers Commission to manage relevant water resources on behalf of NSW and Queensland.

- differences in rule-making processes and consultation requirements by Basin governance bodies, that cause confusion and an unequal playing field for market participants
- insufficient transparency over existing intergovernmental processes and responsibilities, which limits market confidence and investment.

These characteristics exacerbate the impacts of the fragmented nature of existing market governance arrangements. The ACCC recognises that some level of fragmentation is inevitable, and even desirable to the extent needed to ensure that localised conditions are appropriately accounted for. However, addressing the four identified governance issues listed above will mitigate the detrimental impacts of fragmentation, improve the fair and efficient working of water markets, and bring substantial benefits to market participants, regional communities and productivity.

### 17.3.1 Basin governance arrangements are not prioritising water markets issues

Market governance and broader water management governance are inherently and necessarily linked. Under current arrangements, critical water management issues are often prioritised. These water management issues are fundamentally important and should continue to receive significant attention. However, with the maturation of the Basin water markets, governance arrangements need to enable a focus on market issues in order to maximise their benefits, without detracting from existing water management decision-making powers and processes.

Insufficient prioritisation of water markets considerations at the intergovernmental level of policy-making is impacting the effectiveness of the Basin water markets. While the Ministerial Council has predominantly focused on important river operation matters, it has rarely addressed water markets issues.<sup>1336</sup> Indeed, even where water markets issues are considered, they are structurally overcrowded by broader water management considerations.<sup>1337</sup> This has contributed to a lack of strategic direction and consideration of water markets policy.

The prioritisation away from water markets considerations extends to the operational and administrative level. The MDBA's annual reporting of BOC's activities in recent years suggests that, at the operational level, BOC has had limited focus on water markets issues.<sup>1338</sup> The ACCC also understands that within some Basin State agencies, the areas responsible for water trade are often less resourced than those responsible for other water management matters.

A critical consequence of this limited prioritisation of market considerations in the existing Basin governance arrangements is an insufficient focus on market evaluation.<sup>1339</sup> As detailed throughout this Final Report, the Basin water markets are characterised by significant deficiencies, such as a perceived lack of market integrity (outlined in chapter 9) and inadequacies in certain types of market information (outlined in chapter 11). Market evaluation is important to proactively identify these issues and provide objective analysis of the impacts of specific policies, rules and conducts on the effectiveness of the Basin water markets. In turn, this analysis can help drive policy consensus that improves market confidence and broader economic welfare. Market evaluation also helps to ensure that water markets policies and reforms are informed by evidence. Without regular market evaluation, a feedback loop may

<sup>1336</sup> In a review of publicly available information on the Ministerial Council's activities since 2014–15, contained in various communiques (published on the MDBA 'Media Centre' webpage: <https://www.mdba.gov.au/media>) and the MDBA's annual reports (published on the MDBA's website: <https://www.mdba.gov.au/publications/mdba-reports/mdba-annual-report>), the ACCC did not find significant consideration of water markets issues by the Ministerial Council.

<sup>1337</sup> For instance, the ACCC notes that the sub-committee under BOC that is responsible for considering inter-jurisdictional trade matters, the Trade Working Group, is administratively a lower tier sub-committee. The ACCC has heard from some Basin State officials that trade matters are difficult to elevate to BOC's crowded agenda and that resources are generally not prioritised for consideration of trade matters in their day-to-day work.

<sup>1338</sup> In a review of publicly available information on the Basin Officials Council's activities since 2014–15, contained in the MDBA's annual reports (published on the MDBA's website: <https://www.mdba.gov.au/publications/mdba-reports/mdba-annual-report>), the ACCC did not find significant consideration of water markets issues by the Basin Officials Committee.

<sup>1339</sup> The Victorian Government commissioned a review of the effectiveness of the Victorian water markets, which was completed in 2018. See Aither, *Effectiveness of Victoria's water markets*, February 2018. However, while state-based reviews are useful, whole-of-market evaluation is still required to ensure that spill over effects are managed across the system, that there is a level playing field for market participants regardless of their location, and that overall efficiency and benefits to broader Australia are maximised.

be created where water markets considerations are not prioritised because there is insufficient evidence for them to be actioned confidently.

The ACCC does not seek to downplay the importance of critical water management issues. However, as water markets continue to mature, they will only operate efficiently if the governance arrangements enable market issues to be sufficiently prioritised. As Basin Plan implementation moves to its final stages, it is important to ensure that water markets issues and necessary market reforms receive appropriate attention. This will require market governance bodies to be resourced, structured and aligned with objectives that prioritise having the water markets operate efficiently.

### 17.3.2 Market administration does not prioritise making the market work for market participants

The Basin water markets are supported by a range of functions, including the processing of trade applications, maintenance of water registries and information portals, and enforcement of trading rules and market conduct laws. However, the current administration of these functions has not sufficiently prioritised improvements to ensure they work well for participants. For instance, trade approval processes in many circumstances can take several days or longer<sup>1340</sup> despite the practical urgency of timely water trade in times of peak seasonal demand. As a consequence, some water users may find the water markets bureaucratic and unfit for their needs.<sup>1341</sup> This hinders the extent and quality of participation in the water markets, and reduces competition and efficiency in not only the water markets but also in dependent markets, such as those in irrigated agriculture.

There has been particularly inadequate attention given to market accessibility. Information on water management infrastructure, water markets policy decisions, and information on trade administration processes either do not exist or are spread across the websites of a large number of Commonwealth and Basin State agencies. Water markets remain obscure for many market participants. The NSW Irrigators' Council noted that 'many market participants have limited knowledge of market operations and processes, particularly what options are available to them'.<sup>1342</sup> It further observed that '[t]he complexity of the system means that larger operators that are generally better resourced to have professional staff understanding the array of options, fare better than smaller operators without the same degree of knowledge'.<sup>1343</sup>

This complexity, both real and perceived, creates an unequal playing field where market participants generally need to operate at substantial scale to effectively navigate and take advantage of the water markets while still managing their primary lines of business. This deters new entrants to irrigated agriculture and puts pressure on existing smaller businesses, not because of their lack of competitiveness in their primary lines of business, but because they do not have the scale or knowledge to navigate the water markets. Greater market accessibility is needed to address this problem. This can be achieved by aggregating and delivering market information through a 'single source of truth' (such as through the proposed Water Market Information Platform, see recommendation 12) and by providing broader market education.<sup>1344</sup> These solutions would substantially increase the accessibility of the water

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1340 For example, while market participants can generally expect intra-state trades to be approved on the same business day or on the next business day in Victoria and NSW, they may need to wait several business days for trades to be approved in SA. However, in the case of inter-state trade approvals, market participants are likely to need to wait several business days regardless of the approving jurisdiction. See figure D.9 and figure D.10 of appendix D in this final report.

1341 See, for example, Murrumbidgee Valley Food and Fibre Association, *Submission to Murray-Darling Basin water inquiry interim report*, p. 2: '... many water users do not believe that the markets and key institutions are fair or working to the benefit of all water users.' SunRice Group and Ricegrowers' Association of Australia also note that '[t]he current system creates significant search costs for many growers, who depend on water markets but do not have the effort, time or ability to decipher complex water information from a range of fragmented sources'. See SunRice Group and Ricegrowers' Association of Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 29.

1342 NSW Irrigators' Council, *Submission to Murray-Darling Basin water inquiry interim report*, October 2020, p. 31.

1343 *ibid.*

1344 These views seem to be supported by many in the industry. For example, SunRice Group and the Ricegrowers' Association of Australia advocates that '[a]ll water users - regardless of their level of sophistication - should be able to easily understand the formula for determining allocation. For example, water users should have access to information on inflows (dam and tributary) and recent use so that they can estimate with a degree of certainty what the level of allocations are likely to be in the near future'. See SunRice Group and the Ricegrowers' Association of Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 22.

markets, and in turn, induce competition from new entrants and smaller market participants, improve their decision-making and therefore enhance overall market efficiency.

The current administration of regulatory functions has also restricted market confidence, which is highly influenced by the perceived integrity of the market. Harmful conduct should not only be addressed, but done so visibly to the broader market, so that such conduct is deterred, both in reality and perception. This is now being partly addressed, at least with respect to metering and water take, with the adoption of the Compliance Compact by Basin States and the creation of the Office of the Interim Inspector-General of Water Compliance. However, this Inquiry has found that there is a need for greater surveillance and regulation of market conduct.

The ingredients for water markets that work well for its participants require effective administration, with market considerations as a priority. They are unlikely to be achieved in a governance framework where market considerations are merely an adjunct to broader water management. Instead, it would be far more effective to have these functions administered by an independent market-focused body with a clear mandate to improve the efficiency of the water markets.

### 17.3.3 The processes for making and amending trading rules are inconsistent across the Basin, and lack transparency

The laws, rules, policies and arrangements that facilitate and govern the water markets (trading rules<sup>1345</sup>) are defined in a multitude of instruments. Most of these are statutory instruments, but also include regulations, policies and plans (e.g. Basin State water resource plans), rules and guidelines (e.g. IIO network rules), and intergovernmental agreements.

With trading rules contained in so many different instruments, each the responsibility of a different entity and each with its own process for making and changing the rules, the task for water users of accessing and understanding the trading rules is complex and onerous.

Currently, different rules may be developed for the same function in different jurisdictions, resulting in unnecessary complexity and duplication. This has resulted in differences in trading rules and rule-making processes, causing significant complexity and duplicating administrative costs for government agencies and market participants. As Citrus Australia submits, this 'creates twice as much work for growers who live in border regions and farm on both sides of the river, whereby they must understand the cumbersome water trading rules made up by not just one government, but two or sometimes three.'<sup>1346</sup> SunRice Group and the Ricegrowers' Association of Australia also noted that the fragmentation of trading rules across multiple documents makes it 'extremely challenging for growers to meaningfully decipher how water markets work.'<sup>1347</sup>

Chapter 13 (13.3.4) sets out the problems that arise when there are inconsistencies between states' rules and policies. For example, inconsistencies can undermine fairness and market confidence if some water users are subject to compliance obligations of different stringency. In addition, inconsistencies incentivise market participants to commit time to research and navigate them to make arbitrage gains, and this favours those who have the resources and scale to do so.

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1345 Section 26 of the *Water Act 2007* (Cth) provides a useful description of the matters that may be the subject of trading rules:

- the rules governing the trading or transfer of tradeable water rights
- the terms on which tradeable water rights are traded or transferred
- the processes by which tradeable water rights are traded or transferred
- the imposition or removal of restrictions on, and barriers to, the trading or transfer of tradeable water rights
- restrictions on taking or using water from a water resource as a result of the trading or transfer of tradeable water rights in relation to that water resource
- the manner in which particular kinds of trading or transfer of tradeable water rights is conducted
- the specification of areas within which particular tradeable water rights may be traded or transferred
- the availability of information to enable the trading or transfer of tradeable water rights
- the reporting of the trading or transfer of tradeable water rights
- any matter dealt with in the schedules or protocols to the Murray-Darling Basin Agreement pertaining to trade.

While this section deals with matters that may be the subject of the Basin Plan Water Trading Rules, it is a useful definition for identifying trading rules in other relevant instruments.

1346 Citrus Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 3.

1347 SunRice Group and Ricegrowers' Association of Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 29.

By no fault of the market participants, this is a problematic outcome because the resources they commit to arbitraging these inconsistencies is a net loss of resources for society. Rather than being committed to productive uses, these resources are instead committed to navigating an unnecessarily inconsistent and duplicative system. If the regulatory frameworks were consistent, such arbitrage opportunities would not exist, and these resources could have been committed to productive uses with benefits to broader Australia.

In addition, there is no systematic process for considering whether there are gaps in the trading rules and how to address these. Consistent oversight or input into rule design would promote increased harmonisation of trading rules over time (see proposed solution at 17.4.2).

There is no one clear process for making and changing rules. Many different entities are responsible for rule-making and rule-making processes can vary significantly depending on the entity making the rules. In many cases, the processes for making and changing market rules are slow, lack transparency and, as a result, undermine market outcomes.

Statutory rule-making processes are slow and inflexible, making it hard to change and adapt the rules over time. Many trading rules are contained in legislation rather than in subsidiary regulations, rules or guidelines. While this has advantages in terms of making rules well-defined and enforceable, it does mean they are more inflexible to change.

On the other end of the spectrum, rule-making processes for non-statutory instruments (especially those involving inter-governmental agreements) lack clearly defined processes or timeframes. There are often no clear requirements to consult with stakeholders or to have regard to formal advice from other government agencies.<sup>1348</sup>

Processes for stakeholder consultation are also inconsistent between governance bodies. Rule-makers achieve better outcomes when their decisions are informed by a genuine consultation process that consider the real world impacts of policy options. Currently, consultation does not occur consistently, and does not allow for the involvement of all market participants. This is particularly problematic for stakeholders living outside the geographical remit of the jurisdiction undertaking the rule change. This results in an unequal playing field where market participants affected by particular governance arrangements are advantaged because they are better able to understand and engage in certain rule-making processes, resulting in rules that are better suited for their needs.

If an objective of rule-making is to improve the benefits delivered by the water markets, then market and industry impacts are critical inputs to the rule-making process. Assessment of market and industry impacts should therefore be an ingrained consideration of Basin rulemaking processes. This can be achieved by requiring industry consultation and public scrutiny as part of the rule-making process (potential solutions are discussed at 17.4.2).

Problems also arise when consultation processes permit some stakeholder access to information that isn't generally available. Information obtained during consultation may give some stakeholders an advantage over other market participants, especially where that information provides insight into the likely direction of up-coming government decisions or rules changes.

Chapter 11 (11.6.2) discusses the need to expand the scope of current inside information provisions to cover 'market moving' announcements more generally, including announcements made by non-government entities, and has recommended implementing prescribed rules and processes for water announcements (see recommendation 9). This is especially relevant for information relating to making or changing trading rules.

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<sup>1348</sup> However, some stakeholders have submitted that similar problems around the transparency of Basin State deliberations exist. goFarm Australia noted that '[i]n New South Wales it remains difficult to access 'public' consultation documents or identify contact points at the multiple agencies (Department of Planning, Industry and Environment, WaterNSW) involved in water licencing and management. There remains ongoing regulatory uncertainty about how the New South Wales Water Minister will address future instances of groundwater over extraction in the Lachlan and Murrumbidgee Valleys, which risks undermining the confidence of irrigators to make long-term investment decisions. New WRPs do not clearly outline what steps will be taken by the Water Minister if extractions continue the historical trajectory and long-term average annual extraction limit (LTAAEL) thresholds are exceeded.' See goFarm Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 19 October 2020, p. 4.

### 17.3.4 The roles, strategic priorities and activities of the intergovernmental forums with respect to water markets policy are not transparent

The ACCC considers that there is insufficient transparency and accountability over how governance bodies approach and deal with water markets issues. While chapter 16 deals with this issue more broadly, this subsection focuses on the transparency over the decision-making processes of the Ministerial Council, BOC and its subcommittees.

At the most basic level, there is limited public transparency over the specific roles of the Ministerial Council, BOC and its various sub-committees with respect to water markets policy. The Claydon Review found a similar perspective among stakeholders in its consultation on water management:

All external stakeholders contacted were confused as to who has what roles and responsibilities, and 'who is in charge?', or 'is there no-one in charge?' They are especially concerned about the lack of inputs to, and the lack of transparency in, decision-making by the high level committees.<sup>1349</sup>

The ACCC also found there is limited public information on the activities of the intergovernmental forums, particularly with respect to water markets policy. The available information is mainly limited to communiqués detailing the outcomes of Ministerial Council meetings, and the summary overviews of the BOC's activities and current working agenda contained in the MDBA's annual reports.<sup>1350</sup> This information is likely to have limited value for water users given these documents are published after the relevant decisions and activities have already occurred. This means that affected parties are unlikely to be able to reliably plan ahead of such decisions and activities taking place. Where decisions have market impacts, this may prevent market participants from making informed and timely responses to these decisions.

Additionally, there is limited detail as to how intergovernmental forums deal with water markets issues and consider them in their broader water management decision-making. While the objectives and desired outcomes that govern how the MDBA deals with river operations matters are published and consistently updated,<sup>1351</sup> no equivalent publication exists for the intergovernmental bodies that deal with water markets matters. As a consequence, there is limited clarity as to how water markets policy is applied and is likely to develop in the future.

This is particularly concerning as public decisions can impact market conditions and result in market distortions that are significant and enduring.

The potential for such decisions, especially given the lack of clarity over water markets policy, impedes market certainty and confidence, and would likely reduce participation and investment in irrigated agriculture.<sup>1352</sup> Similar views were also voiced by market participants in their responses to the Interim Report. For example, Coleambally Irrigation Co-operative Limited advocated for greater transparency over BOC's decision-making process, noting that 'details of its deliberations are not available to industry and there is no transparency in their decision-making process'.<sup>1353</sup>

The ACCC recognises that BOC has responded to the Claydon Review and is undertaking a number of measures to address its findings and recommendations. However, the ACCC considers that greater transparency over the various roles, activities and strategic priorities of the intergovernmental forums relating to the water markets is urgently needed. Transparency is particularly important for the Ministerial Council and BOC, given their standing as the key intergovernmental forums for the setting

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1349 Greg Claydon, *Review of the Murray-Darling Basin joint governance arrangements: final report*, 18 March 2019, p. 2.

1350 However, such an overview was not provided in the MDBA's 2019-20 Annual Report, representing a move to even less transparency over BOC's activities since the Claydon Review.

1351 See MDBA, *Objectives and Outcomes for River Operations in the River Murray System*, 21 October 2020.

1352 Marianne Graham, in a submission highlighting the lack of transparency of governance agencies, noted a similar concern: 'If you are looking at the factors that create instability and issue in markets I don't believe you can leave out the non-transparency of the Govt entities which have a huge effect on prices in the market and recently are very unexpected.' See Marianne Graham, *Submission to Murray-Darling Basin water inquiry interim report*, 24 November 2020.

1353 Coleambally Irrigation Co-operative Limited, *Submission to Murray-Darling Basin water inquiry interim report*, 6 October 2020, p. 21.

and implementation of whole-of-Basin strategic policy. Transparency at this level would provide considerable benefits to certainty and confidence over the strategic direction of water markets policy.

## 17.4 Governance solutions

Complementary governance reforms are necessary to address the governance problems the ACCC has identified. These include both institutional and procedural reforms to:

1. Establish a Water Markets Agency to consolidate and carry out new and existing trade related roles and functions.
2. Increase the transparency of decision-making processes and to enable the proposed Water Markets Agency to provide independent and expert advice on market issues to decision-makers (sections 17.4.2 and 17.4.3). The ACCC is not proposing changes in terms of who the decision-makers are, but recommends increased clarity and transparency in relation to existing processes, and increased consideration of the market implications of decisions.

This section discusses these proposed reforms and their benefits.

### 17.4.1 Water Markets Agency

The ACCC recommends establishing an independent Water Markets Agency as an expert market-focused body with a mandate to establish and support efficient and well-functioning water markets. The proposed Water Markets Agency would elevate water markets considerations in Basin management policy and administration, and focus on ensuring that the water markets work well for its participants, are competitive and deliver efficient outcomes.

The proposed Water Markets Agency would perform new functions that have been identified in this inquiry, and a number of existing functions that currently sit with other bodies. This would reduce fragmentation of water markets governance.

► Recommendation 26

## Create a Water Markets Agency

The Australian and Basin State governments create an independent Basin-wide Water Markets Agency to consolidate and carry out new and existing trade-related roles and functions.

The ACCC considers the Water Markets Agency would be best established through a cooperative legislative scheme between the Australian and Basin State governments.

The key functions of the proposed Water Markets Agency would be:

- *Market regulation and surveillance functions* – ongoing monitoring of market activities and investigating allegations of potential market misconduct. This will address key regulatory gaps, such as in relation to water market intermediaries (see recommendations 1 to 3).
- *Market information functions* – provide a ‘one-stop-shop’ for water users to access market information, such as pricing and availability, water storage information, announced allocations and access to policy documents. (see recommendation 12).
- *Market evaluation function* – undertaking proactive whole-of-Basin market evaluation and reporting activities of trading market issues and cross-jurisdictional trade impacts. This would enable research and analysis in relation to market issues, including those set out in recommendation 25.
- *Advisory and advocacy functions* – providing expert and technical advice to the Australian and Basin State governments and advocate for the interests of water markets in broader policy discussions.

It is not proposed that any existing rule making functions be transferred to the proposed Water Markets Agency.

This will establish an organisation distinct from broader water management governance, so that there is a greater institutional focus on delivering important specific functions that support efficient markets. It would have a Basin-wide reach and a whole-of-Basin perspective.

The ACCC considers the Water Markets Agency would be best established through a cooperative legislative scheme between the Australian and Basin State governments. This would provide the needed mechanism for jurisdictions to work together to develop a harmonised regulatory framework and information data systems and standards to facilitate the efficient and fair operation water trading markets across jurisdictions.

The creation of the proposed Water Markets Agency would provide many immediate benefits. It would, for example, address regulatory gaps in relation to market conduct and provide market participants with easier accessibility to market information. However, the proposed Water Markets Agency would also deliver ongoing market review and evaluation functions that have not been prioritised by existing governance bodies. In doing so, it would equip Basin management policy-makers with a pathway to continue to develop and improve water markets policy into the future.

The ACCC considers that a long-term view must be taken to ensure that the supporting regulatory, governance and administrative frameworks are fit-for-purpose as the water markets continue to mature. Water markets currently lack much of the supporting regulatory infrastructure and informational services that exist in more mature markets, like the energy and financial markets. The ACCC considers that, given the water markets’ increasing maturity, this is a critical time to implement a comprehensive range of mechanisms to support water markets, and that the proposed Water Markets Agency is the appropriate vehicle to ensure they are delivered effectively.

The ACCC has considered some of the key issues relating to the implementation of this recommendation and reached the following views:

- The proposed Water Markets Agency should have mandatory information gathering powers for its enforcement and market surveillance functions. It should also be given discretion to self-initiate its

own reviews (with access to mandatory information gathering powers), subject to accountability safeguards such as consultation requirements.

- In terms of geographical scope, the roles and function of the Water Markets Agency should be, at a minimum, Basin-wide, although some of its functions will be focused on the Southern Connected Basin where risks of inaction are higher.
- A range of options exist for constituting the senior leadership of the proposed Water Markets Agency. Like other independent national agencies, the Commonwealth and the Basin States could play a role in the appointment of this senior leadership.

Overall, the ACCC believes that its proposal to create the Water Markets Agency as a market-focused independent body with regulatory and economic expertise would help to focus the existing market governance arrangements on developing water markets that work well for its users. The Water Markets Agency would do this by providing objective analysis that is informed by its markets expertise and understanding of industry perspectives. This analysis would not replace the decision-making of existing governance bodies but aim to improve and align them to a clear objective of facilitating well-functioning water markets. Therefore, the ACCC sees the creation of the Water Markets Agency as an important and necessary step to delivering meaningful and comprehensive reform to ensure the water markets meet the needs of its users, now and in the future.

### **The ACCC considers the proposed Water Markets Agency would deliver substantial benefits and efficiencies**

Some stakeholders raised concerns about the costs of undertaking structural water markets reforms, such as the creation of new regulator or governance body. For example, the NSW Independent Pricing and Regulatory Tribunal highlighted the importance of undertaking cost-benefit analysis, minimising costs and considering how costs will be funded.<sup>1354</sup> Other stakeholders highlighted the failed implementation of the National Water Market System.<sup>1355</sup>

The ACCC acknowledges these concerns and considered approaches for assigning the Water Markets Agency's proposed functions among existing agencies as an alternative option. However, the ACCC considers that the substantial benefits of having a dedicated expert body deal with issues specific to water markets would be lost under such an approach. Existing agencies do not have the necessary markets and industry expertise to deal with market concerns effectively. They would also be required to balance any additional water markets responsibilities against ongoing priorities and work programmes. This could result in water market issues not being prioritised to the extent they need to be if the water markets are to function well for its participants. It would also further add to fragmentation of roles, and increase regulatory and administrative confusion for market participants.

While the ACCC recognises that this recommendation may entail some upfront and ongoing costs, it firmly believes that the proposed Water Markets Agency would be far more effective and would deliver substantial cost efficiencies by undertaking its functions in combination. For instance, by assigning the Water Markets Agency with various market information functions, it would ensure that the Water Markets Agency has a focus on facilitating markets that work well for its users. It exposes the Water Markets Agency to industry and market participant perspectives that would add to its understanding of the water markets and their dependent industries, and ensures it has a balanced view from all such industries. This would then inform the Water Markets Agency's regulatory and market evaluation activities, including its prioritisation of activities to deliver the greatest benefits to market participants and broader Australia. Effective prioritisation is necessary given the scale and number of reforms needed for the water markets, as evidenced in this inquiry.

In addition, combining market surveillance and administration of data standards would allow the Water Markets Agency to collect market information and data that informs its regulatory, market evaluation and market information functions. This would remove duplicative administrative costs for the government agencies that collect this information and the market participants that provide it. Likewise,

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<sup>1354</sup> Independent Pricing and Regulatory Tribunal, *Submission to Murray–Darling Basin water inquiry interim report*, 30 October 2020, p. 1.

<sup>1355</sup> See, for example, Central Irrigation Trust, *Submission to Murray–Darling Basin water inquiry interim report*, 28 August 2020, p. 6.

the undertaking of regulatory, market evaluation and market information functions by the Water Markets Agency would equip it with the broad knowledge and perspectives needed to provide robust advice to decision-makers to help them shape water markets to work better for their users.

Overall, the ACCC believes the creation of the proposed Water Markets Agency would provide substantial upfront and ongoing benefits. However, should this recommendation be adopted, the ACCC believes the implementation process should involve stakeholder consultation, particularly to consider the views of existing and potential market participants, to ensure that benefits and costs are appropriately framed, and that benefits are maximised relative to costs.

### **The proposed consolidation of Water Markets Agency functions addresses the fragmentation problem in water markets governance**

The creation of the Water Markets Agency would also substantially address the coordination problem that exists in the current fragmented governance framework. Multiple governance bodies at the Commonwealth and Basin State level are currently responsible for aspects of market governance, but no single body has water markets as its core priority. Instead, not only do water markets considerations compete with other water management priorities within each governance body, these governance bodies must also coordinate with each other despite significant differences in their respective interests and resources. On top of this, there is a distinct absence of strategic direction at the inter-jurisdictional level on water markets policy, likely caused in part by a lack of market evaluation that could have otherwise helped to drive policy consensus.

This coordination problem has resulted in critical deficiencies in the water markets, as outlined in this chapter and elsewhere in this Final Report. In part this is because the market governance arrangements that support the water markets do not currently reflect the hydrological connectivity of the river system. However, this is needed if the Basin water markets are to operate efficiently and fairly. Therefore, to empower reforms that deliver water markets that work well for its users, the ACCC believes that some degree of centralisation and consolidation is necessary to alleviate this coordination problem.

Indeed, several stakeholders have expressed similar views. For example, SunRice Group and the Ricegrowers' Association of Australia submitted that '[o]ne of the key concerns is that no agency has centralised responsibility for water market reform, leading to a fragmented regulatory system with agencies unwilling to harmonise their water policies and rules. Without undertaking the crucial task of developing a strong water market governance framework where responsibilities are clearly delegated, it will be very difficult to engage in meaningful and comprehensive reform.'<sup>1356</sup> The ACCC agrees with this perspective and believes the proposed Water Markets Agency is necessary to support the ongoing development of the water markets and deliver key reforms.

### **Functions of the proposed Water Markets Agency**

In earlier chapters, the ACCC identified a number of key functions that are required to support the fair and efficient operation of water markets, but which are missing from the current system. The Water Markets Agency would administer these new functions, along with consolidating some existing roles that support improved market governance. Table 17.1 sets out whether these are new or existing functions.

The ACCC does not recommend that broader non-market compliance functions, such as those administered by the Inspector General's office, be integrated into the proposed Water Markets Agency. This is because these are not specifically market administration functions, and the core benefits of the Water Markets Agency are achieved through having a market-focused agency.

The ACCC proposes the following functions for the Water Markets Agency:

- **Market regulation and surveillance functions** – Monitor market activities, investigate allegations of potential market misconduct (such as market manipulation and insider trading), and undertake enforcement action as required. The Water Markets Agency would also publicly report outcomes

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<sup>1356</sup> See SunRice Group and Ricegrowers' Association of Australia, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 5.

of its surveillance and enforcement activities. This function would address existing regulatory gaps, such as those relating to intermediary conduct.

- *Benefits:* These functions would improve market integrity and create a more equal playing field for market participants, and thereby enhance market confidence. It would also enable the identification of any conduct that reduces market efficiency or causes harm.
- **Market information functions** – Provide a ‘one-stop-shop’ for water users to access market information, such as pricing and availability (timely historical data on approved trades as well as current bids and offers), water storage information, announced allocations and access to policy documents such as for carryover and trade allocation. In addition, it could provide water users with practical guidance on water trading matters, and undertake direct educational campaigns and community engagement.
  - *Benefits:* This would enhance the quality and accessibility of market information, which is critical to the efficient operation of markets as it enables participants to make informed decisions. This would improve market confidence, increase competition and encourage efficient allocation and use of water resources.
- **Market evaluation functions** – Undertake proactive whole-of-Basin market evaluation and reporting of trading market issues and cross-jurisdictional trade impacts. This would include researching complex trade issues and market design, with a focus on achieving greater cross-jurisdictional coordination and harmonisation. These functions would assist in identifying market issues and trends to inform the Water Markets Agency’s advisory, advocacy and regulatory functions.
  - *Benefits:* As water markets continue to develop, market evaluation would allow market problems to be identified, assessed and addressed before they lead to significant harm to markets or market participants. It would also enable the Water Markets Agency to identify opportunities to further improve how the water markets work for their users.
- **Advisory and advocacy functions** – Provide expert and technical advice to the Australian and Basin State governments to support and drive improvements to market architecture design and trade rules. The Water Markets Agency will also advocate for the interests of water markets in broader policy discussions.
  - *Benefits:* This is critical to ensure that water markets impacts are considered as part of the decision-making involving broader water management issues.

As highlighted earlier, these functions are interlinked, meaning the full benefit of one function can only be realised by combining it with other functions. For example, the proposed Water Markets Agency’s market evaluation functions would directly inform its advisory functions. Equally, the proposed Water Markets Agency’s information functions are necessary for taking regulatory actions where market misconduct arises.

The table below outlines the proposed and existing water market specific functions that the ACCC recommends should be carried out by the Water Markets Agency. The table specifies whether the function is new or whether it currently sits with an existing agency.

**Table 17.1: Proposed market specific functions of the Water Markets Agency**

| Market function   | Agency with current responsibility                   |
|---|--|
| <b>Market regulation and surveillance functions</b>   |  |
| <b>Market conduct enforcement:</b> Enforce new market conduct and integrity legislation to regulate behaviour of market participants in water trading markets (see chapter 9) | No agency is currently responsible for this function |
| <b>Market surveillance:</b> Monitor and report on market data trends and impacts of water trade from a Basin-wide perspective   | No agency is currently responsible for this function |
| <b>Data standards compliance:</b> Administer new data and information collection standards across relevant organisations (e.g. IIOs and registers)                            | No agency is currently responsible for this function |
| <b>Monitoring and enforcing regulated charges:</b> Monitor and report on regulated charges and compliance with the Water Market and Water Charge Rules                        | ACCC   |

| <b>Market function</b>  | <b>Agency with current responsibility</b>   |
|---|---|
| <b>Enforcement:</b> Enforce compliance with existing Water Market and Water Charge Rules  | ACCC  |
| <b>Basin Plan trading rules:</b> Ensure compliance with existing Basin Plan water trading rules (e.g. restrictions on trade are compliant, compliance by IIOs with their requirements etc)  | MDBA  |
| <b>Market information functions</b>   |   |
| <b>Information infrastructure:</b> Administer the proposed Digital Messaging Protocol (recommendation 10) and the proposed Backbone Platform (recommendation 11) to implement and enforce data collection, management and transfer standards across government and non-government water trade services providers (see chapter 12) | No agency is currently responsible for this function  |
| <b>Information platform:</b> Administer the proposed Water Market Information Platform consolidating disparate information and data in one place for water market participants (see chapter 12)   | Disparate information platforms at different State and Commonwealth levels  |
| <b>Data standards:</b> Administer central water market data standards to ensure data held by trade approval authorities, water registers and exchange platforms is comprehensive, captured in the correct format and shared real-time (see chapter 12)  | BOM has certain legislative powers to set mandatory National Water Information Standards, but have not issued any to date |
| <b>Water trade lodgement facility:</b> Administer the proposed Backbone Platform (recommendation 11), which intermediaries will connect to instead of establishing multiple links with different trade approval authorities (see chapter 12)  | No agency is currently responsible for this function  |
| <b>Education and stakeholder engagement:</b> Provide direct advice and guidance to the community and water users through education and engagement activities (see chapter 12)   | No single body tasked with role. Ad hoc and disparate advice can be provided by a range of different bodies               |
| <b>Market evaluation functions</b>  |   |
| <b>Evaluation:</b> Undertake proactive whole-of-Basin market evaluation and reporting activities of trading market issues and cross-jurisdictional trade impacts  | No agency currently reviews trade issues from a whole-of-market perspective   |
| <b>Initiate reviews/research:</b> Conduct whole-of Basin reviews and research into water management issues and behaviours that impact trade markets   | No agency is currently responsible for this function  |
| <b>Advisory and advocacy functions</b>  |   |
| <b>Trade rule advice:</b> Advise State and Commonwealth decision-makers on intra-state and inter-state water trading matters  | No single body tasked with role. Ad hoc and disparate advice is provided by a range of different bodies                   |
| <b>Water market rules advice:</b> Provide advice to the Commonwealth Minister responsible for water on the Water Market and Water Charge Rules  | ACCC  |
| <b>Progressing market architecture reforms:</b> Undertake technical research into market design to inform policy considerations   | No agency is currently responsible for this function. Can be undertaken by Basin States                                   |

## Market regulation and surveillance functions

In chapter 9, the ACCC set out its recommendations to introduce new Basin-wide legislation to address regulatory gaps relating to market integrity and conduct, and to have the Water Markets Agency be the centralised market regulator responsible for enforcing these new laws. The ACCC further proposes that the Water Markets Agency be given access to trade data from the Central Information Platform to proactively detect, investigate and prosecute any misconduct. As part of this function, the Water Markets Agency would administer standards on how data is reported and collected in the Basin States to ensure they are fit-for-purpose for the Water Markets Agency's regulatory role. Surveillance and enforcement outcomes would also be publicly reported.

These proposals aim to deliver multiple benefits to the Basin water markets. Centralising market regulation under the Water Markets Agency would ensure that regulatory scrutiny of misconduct is consistent between Basin States. Meanwhile, the Water Markets Agency's whole-of-market perspective would equip it to investigate and enforce rules against misconduct with inter-jurisdictional scope, so that both inter-state and intra-state conduct are appropriately prioritised. These outcomes would help ensure that there is a level playing field for all market participants regardless of their location in the

Basin, and would thereby protect the fairness and integrity of the water markets.<sup>1357</sup> As a consequence, by undertaking the proposed market regulation and surveillance functions and powers, the Water Markets Agency would deter unlawful and harmful conduct and help to promote fair competition among market participants. In turn, this can encourage further investment and voluntary participation in the water markets and irrigated agriculture and increase productive output.

### **Market information functions**

In chapter 12, the ACCC made several recommendations aimed at integrating multiple trade service and information portals into a single platform for market participants to easily access and use market information. The ACCC proposes that the Water Markets Agency would manage this single platform, and effectively provide a 'one-stop-shop' for key market information, such as on pricing and availability, water storage levels, announced allocations and access to policy documents (such as those concerning Basin State carryover and allocation policies). The ACCC also considers the Water Markets Agency could provide water users with practical guidance on water trading matters, and undertake educational campaigns and community engagement to improve broader water markets literacy among water users.

These functions would help to address information asymmetries and bring broader benefits to the water markets. By making information more accessible and better presented for water users, the Water Markets Agency could reduce the time and financial costs that water users incur to participate in the water markets. This can encourage additional participation and competition from existing and new market participants, and lead to more efficient water markets with greater liquidity on the demand and supply sides. Put another way, it would reduce the missed opportunities for mutually beneficial trades and beneficial investments that the prevailing confusion over how water markets work is likely to be causing.

Overall, by improving accessibility to market information and by improving broader water markets literacy, the Water Markets Agency would help ensure that market participants act on available information and behave more efficiently.

### **Market evaluation functions**

As subsection 17.3.1 outlines, there is need for market evaluation to understand the impacts of policies, rules and conducts on the water markets, to inform future policy-making and ensure that the functioning of the water markets continue to be improved. The ACCC proposes that the Water Markets Agency undertake this market evaluation role, by applying its markets expertise to the trade data and other information it collects through its surveillance functions and information gathering powers. The Water Markets Agency would also be informed by its activities and experience in administering market information functions that aim to ensure the water markets work well for its participants.

Having the Water Markets Agency undertake market evaluation functions is likely to bring substantial benefits. By conducting research into complex market architecture and cross-jurisdictional trade issues, the Water Markets Agency can produce well-evidenced analysis to inform future water markets policy and even broader water management policy. Most critically, the Water Markets Agency would be uniquely-placed, given its roles in market surveillance and provision of market information, to identify and analyse emerging issues of concern to market participants for policy-makers' consideration. This would help to ensure that the water markets are not only functional and efficient, but are also fit-for-purpose for their ultimate users.

### **Advisory and advocacy functions**

The ACCC considers that the Water Markets Agency, given its roles in market regulation, provision of market information, and market evaluation, would be uniquely placed to advise decision-makers on how the water markets can be improved for its users.

At a minimum, the ACCC considers that the Water Markets Agency could provide expert advice to Commonwealth, Basin State and intergovernmental decision-makers to support and drive reforms to

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<sup>1357</sup> The National Farmers' Federation highlights similar benefits of an independent whole-of-market regulator, noting that it would 'provide visibility and allow participants to have greater confidence in the water market'. However, it also notes the need to assess the costs of such a solution. See National Farmers' Federation, *Submission to Murray-Darling Basin water inquiry interim report*, 30 October 2020, p. 13.

market architecture and trade rule design. More broadly, the Water Markets Agency could contribute to water markets policy discourse by providing economic analysis, markets data and information, and an understanding of industry behaviour and perspectives.

The benefits this would bring are immense. It would increase visibility over water markets concerns at the highest levels of Basin management policy-making, and provide expert advice that, while is cognisant of industry perspectives, is nonetheless based on independent and impartial analysis of market data and information. This would help resolve the concerns of the agricultural sector that their perspectives are not understood within the existing governance framework<sup>1358</sup> while ensuring that ultimate decision-making is informed by objective analysis, rather than being dependent on the view of any particular stakeholder.

The ACCC believes that the Water Markets Agency's proposed advisory roles would significantly improve confidence in the water markets. In the short term, market participants may feel better assured that their concerns will be understood and considered, without any particular stakeholder group being favoured. Over the longer term, the Water Markets Agency could help influence and harmonise water markets policy so that the water markets work better for users.

## 17.4.2 The ACCC recommends improvements to processes for the making and amending of water trading rules

In response to the problems identified in subsection 17.3.3, the ACCC recommends adjustments to the existing Commonwealth and Basin States processes for reviewing, amending and making water trading rules.

In particular, the ACCC recommends that rule-making processes in the intergovernmental context be amended to give greater clarity over the roles and responsibilities for making and changing rules, and the processes and timeframes that are involved. These processes should also involve public consultation, including with market participants. In addition, a sufficient level of evidence should be published as part of the consultation and broader rule-making process so that stakeholders can understand the possible impacts of proposed rule changes. This would allow stakeholders to provide informed feedback on the proposed changes, and contribute to a more robust rule-making process that is fit-for-purpose for the water markets.

These changes could be made while largely retaining the existing framework of rule-making responsibilities, and with only minor changes to place an obligation on rule makers to follow a standardised rule making process. At a minimum, there should be a consistent rule making process defined for all Basin State and Commonwealth trading rules.

In addition, the ACCC proposes that for certain types of rule changes, Commonwealth, Basin State and intergovernmental rule makers should be required to obtain and have regard to the advice of the Water Markets Agency before changing or making new trading rules. The rule-maker would not be bound by this advice but should publish how this advice did or did not influence its decision-making. The Water Markets Agency's advisory function would supersede the ACCC's current role in providing advice to the MDBA on changes to the Basin Plan Water Trading Rules, and to the Commonwealth Minister for Water on changes to the Water Market Rules and Water Charge Rules.

The ACCC believes that these recommendations would bring greater transparency, accountability and robustness to the processes associated with the reviewing, amending and making of water trading rules. By introducing obligatory consultation with market participants, water user perspectives would have a direct and more significant input into the rule-making process, and bring a greater focus to designing and implementing trading rules that are fit-for-purpose for water users. By introducing a consistent rule making process with clear division of roles and responsibilities, water users and

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<sup>1358</sup> Many submissions to the interim report have noted the lack of industry expertise and input into current decision-making. See, for example, Coleambally Irrigation Co-operative Limited, *Submission to Murray-Darling Basin water inquiry interim report*, 6 October 2020, p. 21: 'CICL believes many of the issues which have caused interstate 'ad hoc' decisions are a result of the water market and where government policy makers have not anticipated industry's response to the market options available and have been slow to respond to the emerging problems. ... CICL believes the decision-making frameworks need to build a much better understanding of the implications of industry's behaviours on both the physical and third parties.'

the wider public would be better able to understand and contribute to consultation processes in a meaningful way.

Furthermore, requiring rule makers to obtain and have regard to advice from the Water Markets Agency prior to amending or making new trading rules, would ensure that the Water Markets Agency's institutional expertise on the water markets and whole-of-market perspective are considered in the rule-making process. This would improve the robustness and consistency of trading rules across the Basin, and ultimately make the water markets and the regulatory framework that supports them easier for market participants to understand.

Requiring rule-makers to undertake public consultation and publicly have regard to the Water Markets Agency's advice would not only improve the robustness of trading rules but also increase public accountability over the rule-making process. This accountability through transparency and consultation, would also increase confidence and trust that the water markets and their governing institutions work well for water users. This would in turn encourage greater financial and human capital investment in irrigated agriculture and water markets.

#### ► Recommendation 27

### **Implement better rule-making processes**

The Australian and Basin State governments should implement a consistent and transparent process for reviewing and amending water trading rules and other decisions with significant impacts on water markets.

Details about each review, including commencement of consultation, preliminary and final decisions, and any other stages in the process relevant to market participants should be published through the proposed water market announcements platform to be operated by the proposed Water Markets Agency (see recommendation 9).

This will improve transparency of decision making processes across the Basin and improve accountability and confidence in processes and outcomes.

It is not proposed that any existing rule making powers be transferred from their existing bodies.

#### ► Recommendation 28

### **Have regard to advice from the Water Markets Agency**

The Australian Government and Basin State governments should incorporate a requirement into applicable legislative frameworks to obtain and have regard to advice from the proposed Water Market Agency before making changes to trading rules and other decisions with significant impacts on water markets.

The proposed Water Markets Agency should also be given a mandate to provide advice in relation to broader reforms not subject to the proposed requirement, where it considers it necessary to highlight potential market impacts for decision makers.

This will ensure that policy makers understand the impact on markets of their decisions, and enable more adequate consideration of markets impacts in water policy.

## **17.4.3 The ACCC recommends the intergovernmental forums commit to greater clarity over their roles and strategic priorities in water markets policy**

The ACCC recommends the production of, and commitment to, procedural documents outlining the roles and strategic priorities of the Ministerial Council, BOC and various subcommittees with respect to water markets policy. The ACCC envisions these documents should be published or updated regularly, and may be partly modelled on the MDBA's policy document outlining its objectives and

desired outcomes for river operations<sup>1359</sup> or the ACCC's annual compliance and enforcement policy and priorities.<sup>1360</sup> The documents should convey a broad framework or guidelines for how market issues are escalated and decided on.

The ACCC considers the production of such documents would bring greater clarity over how policy-makers interpret and aim to apply their mandate in water markets policy. It would also signal commitment by policy-makers to their stated priorities. This would give market participants and other stakeholders some certainty around the strategic direction of water markets policy and how it will be applied. It may also coordinate future discourse on water markets policy with a focus on improving the effectiveness of the water markets.

The production of such documents would also improve the public accountability of water markets policy-making and governance. By outlining the objectives and desired outcomes of water markets policy, market participants will be better able to understand the rationale for specific decisions. This would reduce the level of perceived arbitrariness that some market participants have raised in respect to past decisions.<sup>1361</sup> This would also increase market confidence and encourage beneficial investment and participation in water markets and dependent industries, with corresponding economic efficiency gains.

► **Recommendation 29**

### **Increase transparency of roles and functions of intergovernmental committees**

The Murray–Darling Basin Ministerial Council and the Basin Officials Committee should publish procedural documents to improve the transparency of the roles, functions and strategic priorities of its intergovernmental committees, with particular regard to how water trade matters are escalated and decisions are made.

This will deliver important information to stakeholders about how these governance arrangements work.

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1359 See MDBA, *Objectives and Outcomes for River Operations in the River Murray System*, 21 October 2020.

1360 See ACCC, Compliance & enforcement policy & priorities, 25 February 2020, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>, viewed 28 January 2021.

1361 While not directly applying to the intergovernmental forums, Marianne Graham submitted an example of the perceived arbitrariness of water management decision-making. She noted that the greatest sources of opaqueness in the water markets are the 'unexpected announcements and non-transparency of the MDBA, WaterNSW, NSW DPIE and Victorian Water Authorities decision[s] ... These unexpected 'black swan' type events, cause massive jumps in the prices between markets and create a lot of instability and lack of integrity in the market. Whenever we try to engage with the MDBA or other entities, they seem to assume it's too complex and we have no transparency and it creates a lot of sudden changes for growers.' See Marianne Graham, *Submission to Murray–Darling Basin water inquiry interim report*, 24 November 2020.