



Australian
Competition &
Consumer
Commission

Water trading—a guide to your fair trading rights when using brokers and exchanges





Australian Competition and Consumer Commission
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Important notice

Please note that this publication is for general guidance only. The information contained in this publication is a summary designed to give you the basic information you need. The information does not cover all of the relevant legislation and general law principles, nor is it a substitute for professional legal advice. Moreover, because this publication avoids legal language wherever possible, there may be some generalisations about the application of legislation. Some of the provisions referred to in this booklet have exceptions or important qualifications. It is important to note that the particular circumstances of the conduct need to be taken into account when determining the application of the law to that conduct.

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Water trading—a guide to your fair trading rights when using brokers and exchanges

This guide sets out the things you should think about when you are looking for a water exchange or water broker and the fair trading laws that protect you when you use their services.

Water trading can help manage your water needs. However, finding a trading partner and organising a deal can be complex. As a result, irrigators often use the services of water brokers and water exchanges (sometimes called intermediaries).

The rights you have under fair trading laws are in addition to any contractual rights and obligations between you and your broker or exchange. Make sure you understand and agree to any contract before you sign it.

Tips

- **Ask around**—friends, family and neighbours may be able to recommend a good broker or exchange, or warn you about bad ones.
- **Shop around**—try your phone book or the internet to find out about which brokers and exchanges are available.
- **Do your homework**—find out exactly what service they can provide to you, what experience or qualifications they have, how long the trade is likely to take and the fees or commission you will be facing.
- **Payment**—make sure you know how much and when you need to pay. If you have to pay a deposit or even the full purchase price before a trade is approved, find out what happens if the trade is rejected.
- **Know where you stand**—do not assume that a broker will act in your best interests—make sure you know whether or not a broker is acting on your behalf (i.e. as your agent).
- **Get further advice**—ask a lawyer, accountant or other relevant professional to look at any contract you may be asked to sign. For trades of water entitlements, you may wish to engage a lawyer or conveyancer to act on your behalf as well.
- **Get it in writing**—make sure you take a note of your conversations with the broker or exchange and be sure to get a copy of any contract you sign.
- **Remember**—be wary of brokers or exchanges that are difficult to contact, avoid your questions, make promises that sound too good to be true or don't want to put anything in writing.

Legal rights

The Australian Competition and Consumer Commission (ACCC) enforces the *Competition and Consumer Act 2010* (the CCA). The CCA includes the Australian Consumer Law (ACL).¹

The ACL commenced on 1 January 2011 and applies nationally and in all states and territories, and to all Australian businesses. The ACL states that businesses and individuals—including water brokers and exchanges—**must not**:

- engage in misleading or deceptive conduct
- make false or misleading representations
- accept payment if they are unable to deliver
- engage in unconscionable conduct
- use harassment or coercion.

In some situations the ACL also gives you certain guarantees about the quality of services offered by brokers and exchanges.

There are various remedies that may be sought where a water broker or exchange fails to meet their fair trading obligations. These rights and remedies are discussed in the following pages.

¹ Where the products and services on offer are financial products or services (e.g. financial advice, a water derivative or an option), the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) would apply. Aspects of the ACL are reflected in these provisions, which are enforced by ASIC.

Misleading or deceptive conduct

It is illegal for a broker or exchange to make a claim that is misleading or deceptive, or is likely to mislead or deceive. A common meaning of 'mislead or deceive' is 'to lead into error'.

Misleading someone may include:

- lying to them
- leading them to a wrong conclusion
- creating a false impression
- leaving out (or hiding) important information
- making false or inaccurate claims.

Customers will have different levels of knowledge about water trading, so conduct that would not mislead some customers may mislead others and may still be illegal.

Advertising or marketing claims that are vague, or that cannot be easily substantiated, are more likely to be misleading or deceptive. Treat these kinds of claims with caution.

Example: a broker 'guarantees' a water trade, even though the trade has not yet been approved.

What a broker or exchange does **not** do or tell you may also be considered misleading or deceptive in some circumstances.

Example: a broker does not tell you they are buying or selling water on their own behalf, when you would want to know this.

False or misleading representations

It is illegal for a broker or exchange to make false representations about themselves, the services they offer or the water that is being traded. In particular, the law prohibits false representations about:

- the standard, quality, value or grade of the service they are offering or the water itself

Example: a claim that a water entitlement is as reliable as the 'high reliability' water entitlements you are familiar with when it actually has a lower reliability.

- a particular person agreeing to buy water or use the broker or exchange in question

Example: a broker falsely claims to already have someone lined up and ready to trade through the broker.

- the sponsorship, approval, performance characteristics, accessories, uses or benefits (of the water itself, or the service offered by the water broker or water exchange)

Example: a claim by an exchange or broker that they are accredited by a government agency or industry association if they are not.

Example: a claim that your money will held 'in trust' while the trade is finalised, when the broker does not use a genuine trust account.

- the price of the service or the water itself

Example: a false claim about the commission you will have to pay if a water trade takes place, or the price of the water.

- the need for the service or the water itself

Example: a claim that you have to trade through a particular exchange if this is not the case.

Accepting payment without being able to supply

A broker or exchange must not accept a payment (including a deposit) from you if they:

- do not intend to supply the service, or intend to supply a service that is materially different from the one you paid for; or
- should be aware that they will not be able to supply the service within the promised timeframe or (if no timeframe is offered) a reasonable time.

Example: a broker requires you to pay a deposit, when the broker knows that it is unlikely they would be able to arrange a suitable trade within the time they have specified (or if no time has been specified, a reasonable time).

Harassment and coercion

The ACL prohibits brokers or exchanges from using physical force, undue harassment or coercion to make you use their services, or to pressure you to pay for any services they have provided in certain circumstances. Undue harassment may occur when repeated approaches are made or repeated pressure is applied, going beyond what is acceptable or reasonable.

Example: a broker calls you several times a day, or very late at night to demand payment of their fees or to pressure you to trade water.

Generally this law will only apply if the amount involved is no greater than \$40 000 (for the services of the broker or exchange, not including the cost of the water itself).

While the ACL sets out limited circumstances where a trader may not harass or coerce a customer, customers have other rights even where the ACL does not apply. If you feel that you are being harassed by a water broker or exchange you should seek legal advice about your rights.

Unconscionable conduct

Unconscionable conduct occurs when a business engages in unreasonable conduct that goes against good conscience. It may involve conduct that is bullying, oppressive or otherwise lacking in good faith. The ACL prohibits any unconscionable conduct in connection with the supply or acquisition of goods or services.

Unconscionable conduct is not a static concept. The ACL does not define unconscionable conduct but lists a number of factors that the court may take into account when deciding if the conduct is unconscionable:

- the relative bargaining strength of the parties
- whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest
- the use of undue influence, pressure or unfair tactics
- whether the weaker party could obtain supply on better terms elsewhere
- whether the stronger party made adequate disclosure to the weaker party

- the willingness of the stronger party to negotiate
- the extent to which each party acted in good faith
- the requirements of any relevant industry code.

The ACL also gives the court the freedom to take into account any other matters it deems to be relevant.

Remember that the unconscionable conduct provisions will not apply to situations where one party has simply made a poor deal. You should always exercise a high level of care when making important financial or business decisions.

For more information on unconscionable conduct, see the ACCC's *Guide to unconscionable conduct* (available from the ACCC website and Infocentre).

Guarantees

In most cases, when you engage a broker or exchange the ACL provides you with an automatic guarantee that their service will be:

- carried out with 'due care and skill' and
- fit for purpose' —that is, the broker or exchange's service meets your needs.

Example: if a broker mishandles the paperwork for your trade, leading to delays or refusal, they may not be exercising 'due care and skill'.

Example: if you confirmed that the broker could arrange all the necessary approvals for a trade, but the broker failed to do so, the service may not be 'fit for purpose'.

These guarantees may not apply if you:

- did not make clear what you wanted done when this was not obvious to the broker or exchange
- insisted on having the service carried out in a particular way and did not like the result.

These guarantees apply where the value of a broker or exchange's service (excluding the cost of the water itself) is less than \$40 000. These guarantees cannot be cancelled by the broker or exchange or signed away. The guarantees apply whether or not you have a written contract. If a broker/exchange provides their own warranty or guarantee, they must honour it **and** the ACL guarantees.

If the broker or exchange does not meet these requirements, you may be able to take action to have the service performed again, or for payment of the cost of having the service performed again, and compensation for any related loss or damage.

Remedies and penalties

The ACCC or any other person can seek injunctions (for example, to stop certain conduct) or other court orders if they believe a breach of the ACL has occurred.

Any person suffering loss or damage as a result of this conduct can seek damages or other orders from a court.

A number of penalties may also be available depending on the offence. These include infringement notices up to \$6600 for companies (\$66 000 for listed companies) and \$1320 for individuals, and civil and criminal penalties up to \$1.1 million for businesses and \$220 000 for individuals

If you have a problem with a broker or exchange

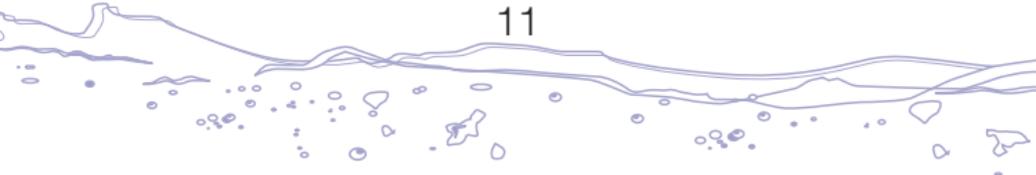
By knowing your rights under fair trading laws you can approach brokers or exchanges with more confidence. Use the steps set out below.

Step 1: Approach the broker or exchange with your concerns

Contact the broker or exchange to explain the problem and the outcome you want (e.g. to cancel the deal or get a refund). Be clear, persistent, calm and polite. Make a note of all phone calls and visits with the business, including the name of the person you spoke to. If this step does not work, move on to step 2.

Step 2: Make a written complaint

Write to the broker or exchange—address your letter or email to the manager or the company's head office. Set out what you are complaining about and the outcome you want (as in step 1). Ask for a response within two weeks, but



remember to date letters and include your contact details. Also include *copies* of any relevant supporting information (such as receipts or advertisements), but keep the originals. Also keep a copy of any letters or emails you send.

Step 3: Contact the ACCC – 1300 302 502

If steps 1 and 2 do not resolve your complaint, call the ACCC.

The ACCC is a national agency responsible for enforcing the ACL. Misconduct by some brokers and exchanges can reduce confidence in the market and cause significant hardship. Therefore, the ACCC will vigorously pursue water brokers and water exchanges that breach the ACL.

The ACCC can take legal action against a trader for breaches of the ACL. It particularly targets conduct that is widespread, blatant, occurring in more than one state or involving serious detriment to consumers.

The ACCC can provide information on the fair trading rights that you have, and the best way to go about resolving your concerns. Where appropriate, the ACCC Infocentre can refer you to the appropriate government department or dispute resolution scheme and provide contact details.

Some other possible options are:

State and territory offices of fair trading/ consumer affairs

Your local state or territory office of Fair Trading (sometimes called Consumer Affairs) can also provide information and suggestions about your rights and how to reach an agreement with the broker or exchange.

Small claims courts and tribunals

You can take your complaint to the small claims court or tribunal in your state or territory. A small fee may be charged and you should consider getting independent legal advice (for example, from your local office of fair trading, a community legal centre or legal aid office) about whether this option suits your circumstances. Please note that the maximum amount that you can claim at a small claims court or tribunal is usually \$10 000 or less, and you can only take action for matters under the relevant state or territory fair trading act.

Other private legal action

For disputes involving large amounts of money, you may be able to take private legal action under the ACL or other laws. However, legal action can be expensive and there is no guarantee that you will be successful, so you should consider other options first and make sure that you get independent legal advice.

Useful contacts

Australian Competition and Consumer Commission

You can call the ACCC Infocentre on 1300 302 502.

- For languages other than English call 13 1450 and ask for 1300 302 502.
- Speak and Listen users phone 1300 555 727 and ask for 1300 302 502
- Internet relay users connect to the NRS (see www.relayservice.com.au) and ask for 1300 302 502.

ACCC staff are available to answer your call during normal business hours.

Visit the ACCC website: **www.accc.gov.au** for more information, to place an order for or to download an electronic version of:

A guide to the water market rules 2009 and water delivery contracts

Permanently selling your water and terminating your deliver right—a guide for irrigators about the water market rules and rules on termination fees

Water charge (termination fees) rules 2009—Technical guideline for irrigation infrastructure operators

Other useful contacts

Offices of fair trading/consumer affairs

If you want more information about your obligations and how to negotiate a resolution to a customer dispute, contact your local office of fair trading/consumer affairs:

New South Wales

13 3220

www.fairtrading.nsw.gov.au

Victoria

1300 558 181

www.consumer.vic.gov.au

Queensland

13 1304

www.fairtrading.qld.gov.au

South Australia

13 1882

www.ocba.sa.gov.au

Western Australia

1300 304 054

www.docep.wa.gov.au

Tasmania

1300 654 499

www.consumer.tas.gov.au

Australian Capital Territory

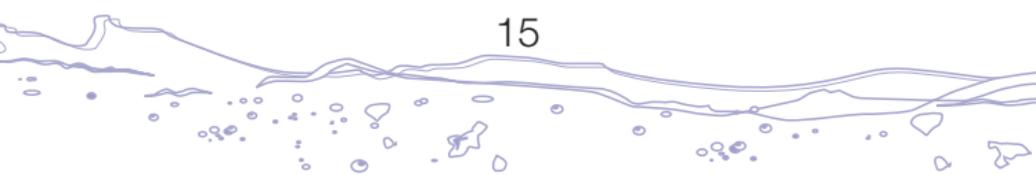
02 6207 0400

www.ors.act.gov.au/fairtrading

Northern Territory

1800 019 319

www.nt.gov.au/justice/consaffairs



State/territory water departments and authorities

If you have an inquiry about the trading process itself, contact your local water authority or the relevant department in your state or territory.

The Australian Securities and Investments Commission (ASIC)

ASIC enforces consumer protection laws for conduct in relation to financial products and services (which could include financial advice, water options products and water derivatives).

Telephone: 1300 300 630

Website: www.asic.gov.au

The Office of the Privacy Commissioner

If you have concerns that your personal information has been mishandled by a broker or exchange, you can contact the Office of the Privacy Commissioner to lodge a complaint or find out more about your privacy rights.

Telephone: 1300 363 992

Website: www.privacy.gov.au

