



Australian  
Competition &  
Consumer  
Commission

## **Water trading rules**

### **Draft advice**

December 2009

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# How to make a submission

The Australian Competition and Consumer Commission (ACCC) welcomes submissions on the water trading rules draft advice. Responses should be supported with evidence and data wherever possible.

When making a submission, please title your document, ‘Public submission to water trading rules draft advice by [INSERT NAME] on [INSERT DATE]’.

Where submissions address one or more of the specific positions in this paper (in chapters 3 to 9 and repeated in appendix 1), the relevant position number(s) should be noted. Specific matters for stakeholder consultation are explained in section 1.2.

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The document containing confidential information should have a title such as ‘Confidential annexure to submission by [INSERT NAME] on [INSERT DATE]’. (Information on the treatment of confidentiality is discussed in section 1.3)

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Or by mail to the following address:

Water Branch: water trading rules draft advice  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne Vic 3001

General inquiries may be directed to the ACCC using the contact details on p. 263 of this paper.



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# Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ADIC & DA	Australian Dairy Industry Council and Dairy Australia
AWRIS	Australian Water Rights Information Service
BOM	Bureau of Meteorology
CIT	Central Irrigation Trust
COAG	Council of Australian Governments
DERM	Department of Environment and Resource Management (Queensland)
DEWHA	Department of Environment, Water, Heritage and the Arts
DOL	Department of Land
DSE	Department of Sustainability and Environment (Victoria)
DWBLC	Department of Water, Land and Biodiversity Conservation
FIRB	Foreign Investment Review Board
GL	gigalitre
GMU	groundwater management unit
GVIA	Gwydir Valley Irrigators Association
IGA	intergovernmental agreement
IIO	irrigation infrastructure operator
JWSS	joint water supply scheme
MDB	Murray–Darling Basin
MDB Agreement	Murray–Darling Basin Agreement
MDBA	Murray–Darling Basin Authority
MIL	Murray Irrigation Limited
ML	megalitre
MOU	memorandum of understanding
NFF	National Farmers’ Federation
NIC	National Irrigators Council
NOW	New South Wales Office of Water
NRMMC	Natural Resource Management Ministerial Council
NSW	New South Wales
NSWIC	New South Wales Irrigators Council
NWC	National Water Commission
NWI	National Water Initiative
NWMS	National Water Market System

QFF	Queensland Farmers' Federation
SAFF	South Australian Farmers Federation
SDL	sustainable diversion limit
VFF	Victorian Farmers Federation
WAE	water access entitlement
WMEG	Water Metering Experts Group
WMI	Western Murray Irrigation Limited
WRP	water resource plan

# Glossary

This glossary endeavours to provide practical meanings of terms; however, readers may need to consider the legal meaning of some terms under the *Water Act 2007* (the Act) and obtain legal advice on these definitions, if required.

Basin state	New South Wales, Victoria, Queensland, South Australia or the Australian Capital Territory.
Basin water resources	all water resources within, or beneath, the Murray–Darling Basin, but not including: <ul style="list-style-type: none"><li>(a) water resources within, or beneath, the Murray–Darling Basin that are prescribed by the regulations.</li><li>(b) groundwater that forms part of the Great Artesian Basin.</li></ul>
conveyance loss	water lost from irrigation networks through evaporation, seepage etc. The loss is likely to be made up of both fixed and variable components, and can vary substantially between networks and between seasons. See also <b>transmission loss</b> .
exit fee	a fee levied by an irrigation infrastructure operator on the transfer of a water entitlement out of the operator’s network or irrigation district (excluding any fee associated with the costs of processing that transfer).
groundwater	<ul style="list-style-type: none"><li>(a) water occurring naturally below ground level (whether in an aquifer or otherwise), or</li><li>(b) water occurring at a place below ground that has been pumped, diverted or released to that place for the purpose of being stored there,</li></ul> but does not include water held in underground tanks, pipes or other works.
irrigation right	a right that a person has against an irrigation infrastructure operator to receive water that is not a water access right or a water delivery right.
irrigation infrastructure operator	an infrastructure operator that operates water service infrastructure for the purposes of delivering water for the primary purpose of being used for irrigation.
infrastructure operator	a person who owns or operates infrastructure for the storage; delivery; or drainage of water (water service infrastructure) for the purpose of providing a service to another person.
minister	Minister for Climate Change and Water (federal)
National Water Initiative	the inter-governmental agreement on a national water initiative between the Australian Government and the governments of New South Wales, Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

overallocation	there is an overallocation for a water resource plan area if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights at a given time exceeds the environmentally sustainable level of take for those water resources.
overuse	there is an overuse for a water resource plan area if the total volume of water actually taken for consumptive use from the water resources of the area at a given time exceeds the environmentally sustainable level of take for those water resources.
surface water	includes water in a watercourse, lake or wetland, and any water flowing over or lying on land after it has precipitated naturally or has risen to the surface naturally from underground.
the Act	<i>Water Act 2007</i>
tradeable water rights	water access rights, water delivery rights or irrigation rights.
transmission loss	water lost to evaporation, seepage, over bank flow etc. along the length of natural water courses. Losses vary with in-stream flow volumes and individual water course characteristics. See also conveyance loss
termination fee	a fee levied by an irrigation infrastructure operator when a delivery entitlement or delivery right is surrendered to the operator to terminate any rights or obligations associated with that delivery entitlement or delivery right (including any requirement to pay an access fee).
water access entitlement	a perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area.
water access right	any right by or under the law of a state or territory to hold water from a water resource and/or take water from a water resource.
water allocation	the specific volume of water allocated to water access entitlements in a given water accounting period.
water delivery right	a right to have water delivered by an infrastructure operator.

# Summary

Under the *Water Act 2007*<sup>1</sup> (the Act) the Australian Competition and Consumer Commission (ACCC) has a role advising the Murray–Darling Basin Authority (MDBA) about the development of the water trading rules component of the Basin Plan.

This document sets out the ACCC’s draft advice on a range of matters related to water trading. This draft advice is the third stage in the ACCC’s public consultation process informing the development of its water trading rules advice, following its March 2009 issues paper and September 2009 position paper. The ACCC anticipates providing its final advice to the MDBA in March 2010.

The ACCC has prepared its draft advice after considering submissions received in response to the issues and position papers.

The ACCC has either made ‘rule advice’ or other recommendations. It has made rule advice where it considers that a Basin Plan water trading rule should and can be made, and would facilitate the development of an efficient water trading regime across the MDB. It has made recommendations where it considers that some action and/or investigation should be taken but the matter cannot be addressed in the water trading rules or would be more appropriately dealt with through another instrument.

The ACCC’s rule advices are **not** draft rules. Rather, they are a view that the ACCC considers should be turned into a Basin Plan water trading rule. The MDBA will draft the Basin Plan water trading rules having regard to the ACCC’s advice.

To inform its final advice to the MDBA, the ACCC is seeking stakeholder views on the its rule advice and recommendations.

The ACCC advice is being developed within the legislative framework set out in the Act. In particular, the ACCC has considered the way in which the water trading rules can contribute to the achievement of the Basin water market and trading objectives and principles contained in Schedule 3 of the Act. The objectives and principles have informed the ACCC’s analysis in this draft advice. The ACCC also recognises the ongoing role for water resource plans to deal with issues specific to particular water resources.

Chapter 2 of this draft advice discusses the context and scope of the draft advice, including the available instruments to address water trading issues and the framework for an efficient water trading regime. This chapter also explains the ACCC’s key deliberations when considering whether a position should take the form of rule advice or a recommendation

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<sup>1</sup> Unless otherwise described, all legislation referred to in this document is Commonwealth legislation.

Consistent with the structure of the ACCC issues paper and position paper, this draft advice then discusses water trading issues relating to three broad types of tradeable water rights:

- water access rights (chapters 3 to 6)
- water delivery rights (chapter 7)
- irrigation rights (chapter 8).

The ACCC is also interested in the development of well-informed markets that, in turn, can contribute to lower transaction costs through reporting and the availability of information (chapter 9).

The following section summarises the ACCC's draft advice on water trading rules. Appendix 1 collates the full set of rule proposals and recommendations reached in this draft advice.

## **Water access rights**

The ACCC has considered a range of issues relating to the trade of water access rights, including water allocations and water access entitlements.

### **General matters**

Chapter 3 of this draft advice discusses general matters relating to water access rights. The ACCC makes rule advice and recommendations concerning a number of these matters. Among the issues considered, and rule advice and recommendations reached, by the ACCC are the following:

- Ownership restrictions—restrictions on the ownership of water access rights by particular classes of entities impose barriers to trade, distort the market for trade in water access rights and can prevent water moving to its highest value use. The ACCC's rule proposal is that the Basin Plan water trading rules should prevent specific restrictions on the ownership of water access rights based on the characteristic of a particular class of entity.
- Co-held water access rights—the ACCC remains concerned about the potential for barriers to trade in water access rights arising from arrangements for subdivision and exit of co-holdings. The ACCC recommends that Basin state governments review existing arrangements.
- Unbundling—the unbundling of water access rights can increase trading opportunities and potentially speed up trade approvals where trades in a particular right are not conditional on processes or approvals involving other separate instruments or processes. The ACCC considers that Basin Plan water trading rules should specify that approval of an application to trade a water access right should not be conditional on delivery, works or use approvals, or on the holding of land where unbundling has taken place.

- Use of water access rights—where a water access right is tradeable, the trade of that right should not depend upon the purpose for which the water has been, is currently or will be used. Restrictions based on use would limit the benefits and efficiencies that can be achieved through trade. The ACCC’s rule advice is that the water trading rules should provide that there are no restrictions on trade based on use. The ACCC also recommends that environmental water holders should be treated the same as other water market participants.
- Stock and domestic rights—there is the potential for reform in the approach to stock and domestic rights. The ACCC recommends that these rights could be made into tradeable volumetric rights under certain circumstances, but does not consider it appropriate to require this to occur through the Basin Plan water trading rules. The ACCC recommends that, in fully allocated systems, new stock and domestic needs should be sourced through the market.
- Trade into and out of the MDB—the ACCC’s rule advice is that trade to allow extraction of water for use inside or outside the MDB should be treated no differently to other trades.
- Environmental impacts from trade—the ACCC recommends that environmental water requirements are best dealt with through the water planning process and use approvals rather than by trading restrictions.
- Overallocation—overallocation and overuse of water are best dealt with by mechanisms such as sustainable diversion limits (SDLs) rather than by trading restrictions. The ACCC’s rule advice is that the trade of water access rights should not be conditional on adjustments to address overallocation or be restricted because of overallocation.
- Conversion between priority classes—allowing conversion between priority classes can have significant third party impacts and the benefits of conversion can instead be obtained through the market. The ACCC recommends against allowing for conversion between priority classes of water access rights.
- Carryover—carryover allows irrigators to manage variability in water availability between water seasons. The ACCC’s rule advice is that there should not be any specific restrictions on trade that relate to carryover. The ACCC recommends the use of measures such as continuous accounting, capacity sharing and spillable water accounts to increase access to carryover arrangements.
- Metering—accurate metering of water extractions is important for market function and managing third party interests. As metering is more appropriately a function of use, the ACCC has not made rule advice, but recommends that jurisdictions should ensure that metering takes place.

## **The 4 per cent limit**

The 4 per cent limit on the permanent trade of water out of irrigation areas is considered in chapter 4 of this draft advice. In recent times this issue has been highly contentious, particularly on the application of the limit in Victoria. The ACCC notes that New South Wales is considering a new implementation of the 4 per cent limit.

The ACCC remains of the view that the 4 per cent limit has a number of negative effects, including:

- preventing water moving to its highest value use
- artificially segmenting the water market
- leading to efficiency losses, especially long-term dynamic efficiency losses, and preventing the efficient operation of water markets.
- preventing irrigators experiencing financial distress from realising the value of their water access rights and restricting purchases of water for the environment.

The ACCC agrees that a ‘level playing field’ in water trade is important, but considers that the preferable situation is where all Basin states have removed the 4 per cent limit.

The ACCC also remains of the view that the 4 per cent limit is a poorly targeted mechanism for managing the two main justifications for the limit—namely, stranded asset risks and managing community structural adjustment. Both these issues are better dealt with by alternative mechanisms.

Overall, the ACCC recommends that the 4 per cent limit should be removed immediately across the MDB. However, if the limit is not already removed, the ACCC’s rule advice is that, at a minimum:

- implementations of the 4 per cent limit should be consistent with the limit as envisaged in the National Water Initiative (NWI)
- the limit should be required to be lifted according to the following minimum transition path:
  - 1 July 2011 (start of Basin Plan)—6 per cent
  - 1 July 2012—9 per cent
  - 1 July 2013—12 per cent
  - 1 July 2014—full and open trade.

## **Approval processes**

The approval processes for trades in water access rights are considered in chapter 5 of this draft advice. The ACCC notes that the time taken and processes for approval of applications for trade may be affecting water markets.

The ACCC does not consider that mandating maximum approval times is a matter for the Basin Plan water trading rules at this time. However, the ACCC recommends that Basin states should report information on approval times to the MDBA and that this information should be published. It also recommends that existing Council of Australian Governments (COAG) and the Natural Resource Management Ministerial Council (NRMMC) service standards will need to be subject to ongoing review, monitoring and public reporting. Where this does not occur or where service standards are consistently not met, the ACCC recommends that the MDBA should reconsider the potential for mandated service standards.

Another ACCC recommendation is that consideration should be given to cross-delegation between approval authorities and consolidation of approval authorities' functions over time. It also recommends that jurisdictions continue to prioritise work towards the National Water Market System (NWMS) and complementary interstate information sharing arrangements, which may also improve trade approval times and processes.

The ACCC notes that timeliness and convenience of lodgement are important to the trade of water and accordingly advises for a rule that would require approval authorities to accept lodgement by email; the ACCC also recommends that the use of web-based forms be considered.

Given that actual or perceived conflicts of interest by approval authorities may undermine confidence in the water market, the ACCC has advised for rules requiring approval authorities to disclose direct interests in trades.

Given the limited application of Basin Plan water trading rules, the ACCC recommends against the Basin Plan water trading rules that seek to directly regulate the conduct of water market intermediaries, but notes that industry-specific legislation is a matter for governments (state and Commonwealth) to consider.

## **Location matters**

Chapter 6 of this draft advice addresses matters relating to the change in the location of a water access right resulting from trade. These issues depend significantly on the types of system—such as regulated systems, unregulated systems or groundwater—involved in the change of location.

The issues considered, and rule advice and recommendations reached, by the ACCC include the following:

- Trading zones are an appropriate way to define the ability to trade between different geographic areas. The ACCC's rule advice is that the Basin Plan water trading rules should provide that trade between regulated system trading zones should only be restricted based on environmental constraints, physical constraints or hydrologic connection and water supply considerations. The ACCC also recommends the consideration of water resource plan (WRP) requirements in relation to trading zones, including definition of zones. The ACCC has also

recommended that further study be undertaken into river transmission losses.

- Exchange rate trading has the potential for significant third party impacts. As such, the ACCC's rule advice is that exchange rates should not be used to manage the trade of water access entitlements between trading zones in regulated systems, except for certain specific cases.
- The ACCC also considered the approach to tagging water access entitlements and its rule advice is that establishing a tag should not be a guarantee of delivery in all cases. The ACCC also recommends that further consideration be given to improving current tagging administrative processes.
- The ACCC recommends that options for improving the clarity and excludability of water access rights in unregulated systems should be considered, to better facilitate trade in such systems. It also recommends that trading zones be established in unregulated systems if the likely benefits outweigh the costs, and that the MDBA should consider requiring WRPs to assess the potential for water to be traded along intermittently connected rivers.
- There are a number of difficulties with facilitating trade between regulated and unregulated systems, related to the differences in the rights between the types of system and administrative complexities. The ACCC recommends such trade should not be allowed unless a number of these issues are resolved. The ACCC also recommends that the options to manage such trade should be further considered.
- Trade of groundwater rights is a complex area. The ACCC's rule advice is that groundwater trade should be allowed within appropriately set trading zones, but not at all where there is low or no hydraulic connectivity. It further recommends that the MDBA consider requiring WRPs to restrict groundwater trade unless a number of prerequisites are met. The ACCC also recommends that unbundling of extractions rights be considered by Basin states.
- The ACCC similarly makes rule advice that trade between surface water and groundwater systems should not be allowed where there is low or no connectivity. It recommends that trade between highly or moderately connected surface water and groundwater systems only be permitted if a number of broader conditions are met.
- Farm dam trade has a number of definitional and administrative issues to overcome. The ACCC recommends that trade between farm dams or between farm dams and surface water systems should only be permitted where a number of broader conditions are met.

## **Water delivery rights**

Water delivery rights—the rights to have water delivered by an infrastructure operator—may be tradeable. Chapter 7 considers the potential effects of facilitating

trade of water delivery rights held against irrigation infrastructure operators (IIOs) for delivery relating to irrigation networks.

The ACCC considers that there are a number of benefits to having specific and separately defined water delivery rights, including providing a basis for charging, management of delivery constraints and facilitating trade in those rights. This could benefit both an IIO and the irrigators served by that network. The ACCC's rule advice is that IIOs should be required to clearly specify the volume and/or unit share of their customers' and/or members' access to the irrigation network under a water delivery right, and that trade in water access or irrigation rights should not be related to the amount of delivery right held.

The ACCC also considers that the trade in water delivery rights would have significant benefits. Trade would give irrigators increased flexibility to manage their delivery needs and would provide better signalling to IIOs on capacity management and investment. The ACCC considers there would be benefit in a water trading rule requiring trade in a manner that is relatively less prescriptive. As such, the ACCC's rule advice is that IIOs should not be allowed to unreasonably prevent, deter or delay the trade of water delivery rights within their irrigation network. The ACCC also identifies a number of factors, such as capacity constraints and security, which would inform an assessment of reasonableness.

## **Irrigation rights**

Chapter 8 considers issues relating to the trade of irrigation rights—the rights that a person has against an IIO to receive water that is not a water access right or a water delivery right. The ACCC considers it would be beneficial if irrigation rights were clearly defined. Accordingly, its rule advice is that IIOs should clearly define such rights in writing for member irrigators.

Given that IIOs have considerable incentives not to restrict the trade of irrigation rights and the operation of the water market rules, the ACCC does not consider there is a need for the Basin Plan water trading rules to specifically address the trade of irrigation rights.

## **Reporting and information**

Access to timely and accurate information is critical to a well-functioning water market because it allows participants to make informed decisions about managing their water access and delivery needs. Chapter 9 considers information and reporting issues and reaches a number of rule proposals and recommendations:

- The ACCC considers that the provision of more accessible information about the characteristics of water access entitlements would help to facilitate trade. The ACCC's rule advice is that Basin state governments should provide information about the characteristics of water access entitlements in a standard template to be available at a centralised location.

- There would be benefits from a more centralised source of information about trading rules and processes, given the current potential for significant uncertainty to impede trade. The ACCC's rule advice is that governments should provide trading rules in a compiled form to a centralised location. The ACCC also makes rule advice that IIOs should also have to provide their trading rules to the same central location (for larger IIOs), publish them on their website and/or make them available on request.
- Accurate and timely pricing information is fundamental to allow water market participants to make informed decisions and for the functioning of an efficient market. The ACCC's rule advice is that trading parties should be required to accurately report prices to approval authorities or registers (who would then need to provide such information centrally to the Bureau of Meteorology), and that approval authorities and registers must require such pricing information to be provided.
- Allocation and policy announcements can significantly affect water markets. The ACCC's rule advice is twofold: allocation announcements and announcements of market-sensitive policy changes or information should be made to the entire market at the same time, and parties privy to significant announcements should be prohibited from trade until such announcements are made to the entire market.



# 1. Introduction

The *Water Act 2007* (the Act) provides for the development of a Basin Plan—a strategic plan for water resources in the Murray–Darling Basin (MDB).<sup>2</sup> Water trading rules are a key component of the Basin Plan to be prepared by the Murray–Darling Basin Authority (MDBA).

The Act requires the MDBA to obtain ACCC advice on the water trading rules component of the Basin Plan.<sup>3</sup> The MDBA has formally requested ACCC advice on the development of water trading rules.

This draft advice is the third stage in the ACCC’s public consultation process. The ACCC released a position paper in September 2009 that outlined preliminary positions on a range of water trading issues. The draft advice further develops these positions into either advice on the development of Basin Plan water trading rules (‘rule advice’) or recommendations for further consideration by relevant parties.<sup>4</sup>

This paper initially discusses the scope and context of the ACCC’s draft advice in chapter 2. Matters relating to water access rights are considered in chapters 3 to 6. Chapters 7 and 8 focus on water delivery rights and irrigation rights, respectively, while information and reporting matters are considered in chapter 9.

## 1.1. Consultation processes

Consulting with stakeholders is an important part of the ACCC’s process in developing its water trading rules advice for the MDBA. In response to the position paper, the ACCC received 18 submissions. This draft advice continues that consultation process by seeking submissions from stakeholders, including:

- Basin state governments
- infrastructure operators
- irrigators and other water users
- water market intermediaries
- other interested parties.

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<sup>2</sup> A map of the MDB is contained in appendix 2.

<sup>3</sup> The framework for the water trading rules and the role of the ACCC is set out in more detail in chapter 3 of the ACCC’s *Water trading rules—Issues paper*, available on the ACCC website, [www.accc.gov.au](http://www.accc.gov.au).

<sup>4</sup> See section 2.2.2 of this paper for further information about ‘rule advices’ and ‘recommendations’, and the factors relevant to the ACCC’s deliberations for each.

The ACCC is interested in hearing from all stakeholders on the draft advice outlined in this paper. Matters for stakeholder consideration are explained in more detail in section 1.2.

Submissions need to be provided to the ACCC no later than **Monday, 1 February 2010**. Details for lodging submissions are located at the beginning of this publication (see **How to make a submission**).

Submissions received in response to this draft advice will inform the ACCC's final advice to the MDBA, which will be provided in March 2010 (as outlined in table 1.1).

**Table 1.1 Proposed times for the ACCC's consultation process**

Date	Item
March 2009	Issues paper released for consultation
September 2009	Position paper released for consultation
December 2009	Draft advice provided to the MDBA and released for consultation
March 2010	Final advice provided to the MDBA

The MDBA will also consult with relevant stakeholders during this period regarding the other components of the Basin Plan.

After the ACCC has provided its final advice, the MDBA will undertake a separate formal consultation process on the Basin Plan as a whole, including the water trading rules component.<sup>5</sup>

The ACCC has commissioned several consultancies<sup>6</sup> to inform its development of this draft advice. These papers are available on the ACCC website or upon request (see p. 263 for contact details).

## 1.2. Matters for stakeholder consideration

This paper details the ACCC's draft advice on a range of matters related to water trading. To inform the development of the ACCC's final advice to the MDBA, the ACCC is seeking stakeholder views on the ACCC's draft advice, including:

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<sup>5</sup> See section 3.2 of the ACCC's [Water trading rules—Issues paper](#) for more details about this process.

<sup>6</sup> In preparing its position paper, the ACCC commissioned a number of consultancies in the preparation of its earlier position paper. See section 1.1 of the ACCC *Water trading rules—Position paper*. The ACCC also commissioned Frontier Economics to review tagging and other arrangements for changing extraction location between water systems. See *Changing extraction location between water systems—'tagging' and alternatives*, Frontier Economics, November 2009.

- the appropriateness of a Basin Plan water trading rule where the ACCC has advised that one be made (i.e. the appropriateness of the ‘rule advice’)
- the appropriateness of or need for exemptions or conditions attached to such a rule
- the appropriateness of the ACCC’s ‘recommendations’.

Where submissions address one or more of the rule advices or recommendations identified in this paper (in chapters 3 to 9 and repeated in appendix 1), the relevant rule advice number(s) and/or recommendation number(s) should be noted.

Chapter 2 outlines the scope and context of the ACCC’s advice to the MDBA.

### 1.3. Treatment of confidential information

The ACCC prefers that all written submissions be publicly available to foster an informed, robust and consultative process. Accordingly, submissions will be considered to be public and will be posted on the ACCC website, [www.accc.gov.au](http://www.accc.gov.au), unless confidentiality is sought and obtained from the ACCC.

The general policy of the ACCC on the collection, use and disclosure of information, including the treatment of claims for confidentiality in respect of information, is set out in the [\*ACCC–AER information policy: the collection, use and disclosure of information\*](#) (October 2008), which is available on the ACCC website.<sup>7</sup>

### 1.4. Terminology used in the draft advice

The terminology used to describe tradeable water rights (and water management and trading more generally) varies considerably between jurisdictions.

For the purposes of this draft advice, the terminology and associated definitions contained in the Act will be used wherever possible. These terms are broadly similar—although not identical—to the terms used in the National Water Initiative (NWI).<sup>8</sup> Where other terminology is used in this draft advice (e.g. on the specific rights or dealings within a particular jurisdiction), this will be noted.

The term **water access right** can include a range of rights to take and/or use water. The draft advice will refer to specific types of water access right—in particular to **water access entitlements** and **water allocation**—wherever necessary. However,

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<sup>7</sup> Available at [www.accc.gov.au](http://www.accc.gov.au).

<sup>8</sup> For example, the NWI and Water Act definitions of ‘water access entitlement’ differ. The NWI defines it as ‘a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool as defined in a water plan’. See the [\*Intergovernmental agreement on a national water initiative\*](#), Schedule B(i), National Water Commission, [www.nwc.gov.au](http://www.nwc.gov.au); viewed 12 January 2009.

references to a water access right should be read as referring to **all** water access rights, including water access entitlements and water allocations, unless otherwise indicated.

The terms **trade** and **transfer** are not defined in the Act. For simplicity, references to a 'trade' in this draft advice should be read as meaning trade or transfer. The ACCC recognises that trade can involve a change of ownership or a change in the location pertinent to the right.

The term **Basin state** as defined by the Act, and as used in this draft advice, means New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.

## 2. Context and scope of the ACCC's draft advice

The ACCC's advice will inform the MDBA's development of the water trading rules component of the Basin Plan. The Basin Plan will provide an overarching planning tool for Basin-wide issues, including requirements for WRPs to be developed for particular water resources (see section 2.1.2).

This paper does **not** contain drafted Basin Plan water trading rules. Rather, the ACCC's draft advice proposes the development of Basin Plan water trading rules on a variety of trading matters, as well as recommending other actions where the ACCC considers that a Basin Plan water trading rule is not the most appropriate option.<sup>9</sup> These are generally recommendations for further investigation into issues relevant to water trading or recommendations for the MDBA's consideration when developing requirements for water resource plans.<sup>10</sup>

The ACCC recognises the ongoing debate regarding the appropriate role and form of water management in general, and water markets and trading in particular. The ACCC considers that discussion of the broader architecture of water markets is important. This draft advice necessarily focuses on the development of Basin Plan water trading rules to improve the efficiency of water markets, given current legislation and broader water management arrangements. Relevant provisions of the Act<sup>11</sup> inform the scope of the ACCC's draft advice.

While the ACCC notes the importance of broader water management considerations that may affect the development of an efficient water market, its advice has focused on the development of potential Basin Plan water trading rules.

This chapter seeks to provide stakeholders with a summary of the context within which the ACCC's advice is being developed.

Section 2.1 considers the range of instruments that may contain trading rules (in particular the Basin Plan and water resource plans) as well as the interactions between them.

Section 2.2 discusses broader issues relevant to the development of an efficient trading regime.

Section 2.3 outlines key factors in the ACCC's decision on whether particular matters could justify advice to make rules or whether other recommendations were more appropriate.

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<sup>9</sup> See section 2.3.2.

<sup>10</sup> Item 11 of the Basin Plan will contain requirements for water resource plans that must be met before a water resource plan can be accredited.

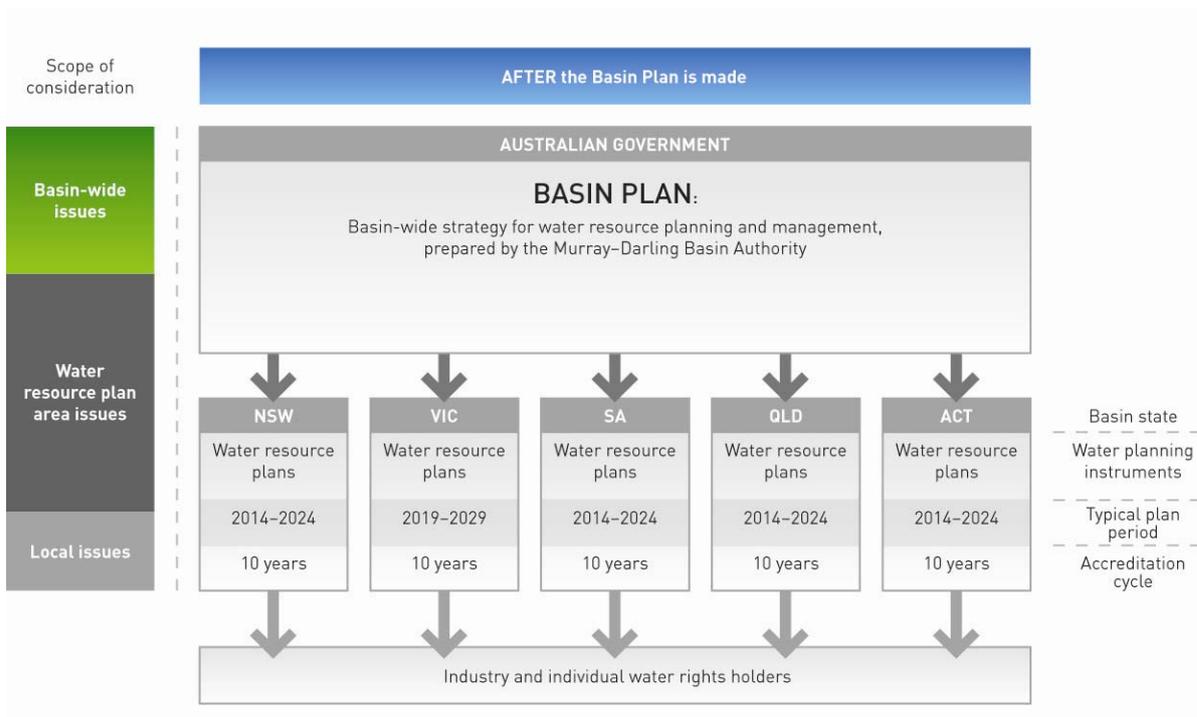
<sup>11</sup> Section 26 of the Act specifies matters the water trading rules can deal with. See section 2.1.1 and appendix 3 of this paper.

## 2.1. Trading rule instruments

The ACCC recognises that the Basin Plan is not the only instrument that will govern water trading in the MDB. Trading rules will continue to exist in a number of different instruments, including WRPs prepared by Basin states and in the processes and procedures of IIOs, as well as the Basin Plan.

The Basin Plan water trading rules will apply across the MDB. The ACCC considers that local trading matters should be dealt with in the water resource plans, subject to the Basin Plan water trading rules and the Basin Plan as a whole. This is in line with the MDBA’s proposed interaction between WRPs and the Basin Plan as set out in its Basin Plan concept statement.<sup>12</sup>

**Figure 2.1 Interaction between WRPs and the Basin Plan**



Source: Reproduced in part with permission of the MDBA.<sup>13</sup>

Stakeholder submissions on the ACCC’s position paper mostly supported this approach and considered it important that trading rules specific to particular water resources are developed through state planning processes.

<sup>12</sup> MDBA, *The Basin Plan: a concept statement*, Canberra, 2009.

<sup>13</sup> *ibid.*, p. 18.

The Victorian Department of Sustainability and Environment (DSE) submitted:

DSE has not considered in detail which of the ACCC's positions should or should not become formal trading rules under the Basin Plan. However, this should be decided by recognising the need for a hierarchical approach. Only the most fundamental principles should be embedded in the Basin Plan, with the detailed rules remaining a State responsibility.<sup>14</sup>

The National Farmers' Federation (NFF) submitted:

Moreover, as a high level principle, the NFF supports the inclusion of Trading Rules that can be shown to be appropriate across most jurisdictions. Where particular issues relate to only one or two jurisdictions, it is more appropriate that these issues are dealt with via state governments.<sup>15</sup>

The following section outlines the role and scope of the Basin Plan water trading rules. This is followed by an overview of the role of WRPs in the context of trading and then a discussion of the interaction between these and the Basin Plan.

### **2.1.1. The Basin Plan water trading rules**

The Basin Plan water trading rules will form part of the Basin Plan. The Basin Plan will be a strategic plan for water resources in the MDB prepared by the MDBA. It will provide an overarching planning tool for Basin-wide issues, including requirements for water resource plans.

#### **Why the Basin Plan water trading rules are needed**

The purpose of the Basin Plan is to provide for the integrated management of the Basin water resources, including providing for:

- (e) water to reach its most productive use through the development of an efficient water trading regime across the Murray–Darling Basin.<sup>16</sup>

The development of an efficient water trading regime across the MDB would be best served by the development of water trading rules that are consistent across the MDB. The Basin Plan water trading rules will contribute to the achievement of the Basin water market and trading objectives and principles contained in Schedule 3 of the Act. The objectives are:

- (a) to facilitate the operation of efficient water markets and the opportunities for trading, within and between Basin States, where water resources are physically shared or hydrologic connections and water supply considerations will permit water trading; and

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<sup>14</sup> DSE, position paper submission, p. 2.

<sup>15</sup> NFF, position paper submission, p. 4.

<sup>16</sup> Section 20(e) of the Act; for more information on the purposes of the Basin Plan, see appendix C.

- (b) to minimise transaction cost on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions; and
- (c) to enable the appropriate mix of water products to develop based on water access entitlements which can be traded either in whole or in part, and either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time; and
- (d) to recognise and protect the needs of the environment; and
- (e) to provide appropriate protection of third-party interests.<sup>17</sup>

The Basin water market and trading principles are set out in appendix 3.

The ACCC has formulated its advice to contribute to the achievement of these objectives and principles, and refers to them where they are particularly relevant to the discussion.

### **The matters the Basin Plan water trading rules can deal with**

The Basin Plan water trading rules may deal with the trading or transfer<sup>18</sup> of tradeable water rights between Basin states in relation to Basin water resources. This includes:

- the terms on which tradeable water rights are traded
- the processes by which tradeable water rights are traded
- the imposition or removal of restrictions on, and barriers to, the trading of tradeable water rights
- restrictions on taking or using water from a water resource as a result of the trading of tradeable water rights in relation to that water resource
- the specification of areas within which particular tradeable water rights may be traded
- the availability of information to enable the trading of tradeable water rights
- the reporting of the trading of tradeable water rights.

However, the water trading rules are not able to deal with all matters relevant to the development of an efficient trading regime.<sup>19</sup> Section 2.2 discusses aspects of water management that will influence the operation of markets but do not directly constitute trading issues.

The ACCC has developed this draft advice on the basis that the Basin Plan water trading rules can relate both to changes in the ownership of a tradeable water right and changes in the location pertaining to a tradeable water right.

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<sup>17</sup> These are set out in clause 3 of schedule 3 of the Act.

<sup>18</sup> As noted in section 1.4, for simplicity, references to a ‘trade’ in this paper should be read as meaning trade **or** transfer.

<sup>19</sup> For information about the requirements of an efficient trading regime, see section 2.2.

The South Australian Government submitted:

In a number of areas in the position paper there seems to be confusion over the definition and application of water rights in an unbundled regime. The water trade market in the southern connected Murray Darling Basin is connected. This means that consideration on trade is based on change of ownership of a water access entitlement or water allocation, not the subsequent user or location of extraction of the water.<sup>20</sup>

However, where a water access right is held independently of land, it still needs to be linked to a trading zone or water source (i.e. a water access right is not a right to extract water from any location). As such, changes in location (whether to a different trading zone or water source) of a water access right are inherently relevant to consideration of whether a trade should be permitted.

### **Rights the Basin Plan water trading rules will apply to**

The water trading rules are rules for the trade of tradeable water rights in relation to Basin water resources.<sup>21</sup> Tradeable water rights are:

- Water access rights—any right conferred by or under a law of a state to hold and/or take water from a water resource (see below)
- Water delivery rights—a right to have water delivered by an infrastructure operator
- Irrigation rights—a right that a person has against an irrigation infrastructure operator<sup>22</sup> to receive water that is not a water access right or a water delivery right.<sup>23</sup>

The term ‘water access rights’ is a broad term that includes the following types of rights:

- Water access entitlement—a perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area
- Water allocation—means the specific volume of water allocated to water access entitlements in a given water accounting period

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<sup>20</sup> South Australian Government, position paper submission, p. 5.

<sup>21</sup> Item 12, ss. 22(1) and 26 of the Act: under s. 4, the term **water resource** is defined as:

- (a) surface water or groundwater; or
- (b) a watercourse, lake, wetland or aquifer (whether or not it currently has water in it) and includes all aspects of the water resource (including water organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).

<sup>22</sup> For an explanation of this term, see chapter 8.

<sup>23</sup> Note that the transformation of irrigation rights into individually held water access entitlements is a matter for water market rules (see section 2.2.1 for more information).

- Stock and domestic rights—this term is not defined in the Act but generally refers to a right to capture or extract water for domestic and (non-intensive) stock purposes<sup>24</sup>
- Riparian rights<sup>25</sup>
- Any other right in relation to the taking or use of water that is prescribed by the regulations.<sup>26</sup>

Water access rights can relate to different types of water resources—for example, groundwater or surface water (including both water resources in regulated and unregulated systems).<sup>27</sup> Where necessary, this advice draws these distinctions.

The ACCC also notes that water access rights are rights conferred by or under a law of a state<sup>28</sup>, and that some are not of a type that are currently inherently tradeable (e.g. certain stock and domestic rights).<sup>29</sup>

The Gwydir Valley Irrigators Association (GVIA) submitted:

GVIA is disappointed that after it raised the issue of trade in storage rights in its submission to the ACCC’s Issues Paper, the ACCC has failed to address this matter in its position paper.

...

In the Gwydir, that storage right is an implied right to a Water Access Licence, and defined in the Gwydir Regulated Water Sharing Plan.<sup>30</sup>

The ACCC notes that ‘storage rights’ are not included in the definition of tradeable water rights under the Act. Similarly, a right to use water on land would not generally fall within the definition of a tradeable water right. As such, the trade of these types of rights can not be directly addressed through Basin Plan water trading rules.

### **Who the Basin Plan water trading rules will apply to**

The Basin Plan water trading rules will apply to the MDBA and other agencies of the Commonwealth that

must perform their functions, and exercise their powers consistently with, and in a manner that gives effect to, the Basin Plan.<sup>31</sup>

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<sup>24</sup> See appendix 3 of the ACCC, *Water trading rules—Position paper*, September 2009

<sup>25</sup> The ACCC notes that **riparian rights** are not defined in Act. However, they are discussed in section 3.5.

<sup>26</sup> No additional rights have yet been prescribed by regulations for the purposes of the definition of water access rights.

<sup>27</sup> See section 6.1 of this paper for an explanation of these terms.

<sup>28</sup> See s. 4 of the Act.

<sup>29</sup> See section 3.5.

<sup>30</sup> GVIA, position paper submission, p. 3.

<sup>31</sup> Section 34 of the Act.

The Basin Plan water trading rules will also apply to:

- the Basin Officials Committee<sup>32</sup>
- an agency of a Basin state
- an operating authority<sup>33</sup>
- an infrastructure operator
- the holder of a water access right

who must not:

- (a) do an act in relation to Basin water resources if the act is inconsistent with the Basin Plan; or
- (b) fail to act in relation to Basin water resources if the failure to act is inconsistent with the Basin Plan.<sup>34</sup>

The same obligations are imposed on the same parties in relation to water resource plans.<sup>35</sup>

The ACCC notes that the Basin Plan water trading rules cannot, therefore, directly regulate the conduct of some entities involved in the water market, for example water market intermediaries.<sup>36</sup>

### **Enforcement of the Basin Plan water trading rules**

The MDBA can enforce the Basin Plan water trading rules by:<sup>37</sup>

- applying to a Court<sup>38</sup> for an injunction where a person has engaged, is engaging or is proposing to engage in conduct that would constitute a contravention.<sup>39</sup>

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<sup>32</sup> The Basin Officials Committee is established under clause 18 of the MDB Agreement and consists of a chair and five other members, each of whom represents a different state contracting government (i.e. any of the governments of New South Wales, Victoria, South Australia, Queensland or the Australian Capital Territory).

<sup>33</sup> An operating authority is:

- (a) an agency of a Basin state that has the function of managing a river flow control work or a salinity work (whether or not the function is carried by another person under a licence, contract or other arrangement with the agency); or
- (b) a person who has the function of managing of managing a river flow control work or a salinity work (whether or not the function is carried out by another person under a licence, contract or other arrangement with the person).

<sup>34</sup> Section 35 of the Act.

<sup>35</sup> *ibid.*, ss. 58 and 59.

<sup>36</sup> For a discussion on the role of water market intermediaries, see section 5.5 of this paper.

<sup>37</sup> Sections 136 and 137 of the Act. The Act designates the MDBA as the 'appropriate enforcement agency' for contraventions of Part 2 (which includes ss. 34 and 35) or regulations made for the purposes of Part 2.

- applying to a Court for declarations that a person has committed a contravention<sup>40</sup>
- accepting an undertaking which can be enforced through a Court, where the appropriate enforcement agency considers conduct constituted a contravention.<sup>41</sup>

The MDBA may also issue an enforcement notice where it is satisfied that a person has contravened, is contravening or is likely to contravene the Basin Plan.

Enforcement notices may also be given where the MDBA is satisfied that a person has, will or is likely to engage in conduct (or omit to perform an act) that was, is or would:

- be inconsistent with the Basin Plan or a WRP
- prejudice the effectiveness of the implementation of the Basin Plan or a WRP
- have an adverse effect on the effectiveness of the implementation of the Basin Plan or a WRP.<sup>42</sup>

The MDBA may, through an enforcement notice, direct a person to take action for the purposes of ensuring the conduct or omission of the kind giving rise to the enforcement notice is not repeated in the future.<sup>43</sup> The MDBA may also direct a person to remedy any adverse consequences of the conduct or omission on the health or availability of

<sup>38</sup> **Court** is defined as the Federal Court of Australia, the Federal Magistrates Court (except for proceedings against a State) or a ‘court of a State or Territory that has jurisdiction in relation matters arising under this Act’ (see ss. 138 and 139).

<sup>39</sup> Under ss. 140 to 143 of the Act, injunctions can:

- be **prohibitory** (restraining a person from engaging in such conduct) in which case the court can also order that the person do something (e.g. repair damage to Basin water resources)
- be **mandatory** (requiring a person to do something where failure to do this thing would be a contravention)
- require the implementation of a program for compliance with the Act, the regulations, the water charge rules or the water market rules
- disclose information to correct or counter the effect of a contravention
- require corrective advertising to correct or counter the effect of a contravention.

The court may grant an interim injunction before deciding on an application for any of the above injunctions restraining a person from engaging in conduct, or requiring a person to do an act or thing.

<sup>40</sup> Sections 144 and 145 of the Act.

<sup>41</sup> See s. 163 of the Act—note, that there is no requirement to keep a public register of these undertakings although the undertaking may be published on the MDBA website, [www.mdba.gov.au](http://www.mdba.gov.au).

<sup>42</sup> Section 165 of the Act.

<sup>43</sup> Section 165(2) of the Act.

Basin water resources, including through a direction to a person not to exercise their water access right, irrigation right or delivery right.<sup>44</sup>

A person who fails to comply with an enforcement notice may be subject to a civil penalty of 600 penalty units.<sup>45</sup> A penalty unit is currently \$110, which equates to a maximum pecuniary penalty of \$66 000 for individuals and otherwise \$330 000.<sup>46</sup> The MDBA would be required to apply to a Court for an order that the person pay the pecuniary penalty.<sup>47</sup>

The water trading rules can provide that a person who suffers loss or damage as a result of a contravention of the rules may recover this amount by an action against the person contravening the rules or involved in the contravention.<sup>48</sup> The ACCC considers that such provisions may be appropriate in many cases where Basin Plan water trading rules are developed to implement its rule advice. In particular, where a rule would directly affect the consideration of an application to trade a tradeable water right (as opposed to a more general indirect information or reporting requirement), such a right of private action may be appropriate.

As such, the ACCC considers that Basin Plan water trading rules should include provisions for affected persons to recover damages or loss where there are contraventions of rules made reflecting the ACCC's rule advice in chapters 3 to 8 (but not 9). However, the ACCC notes that the appropriateness of such provisions will depend upon the precise drafting of the substantive Basin Plan water trading rule.

The ACCC's advice will not address the issue of the enforcement of the Basin Plan as this is the role of the MDBA under the Act. However, in proposing that a rule should be included in the Basin Plan water trading rules, the ACCC has considered the likelihood that such a rule could be enforced (see section 2.3).

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<sup>44</sup> Section 165(3) of the Act. For example, where a person has acted inconsistently with a water resource plan by extracting more water than they are entitled to, the MDBA may direct them to not extract or sell an equivalent amount of water in a subsequent season, which they would otherwise be entitled to.

<sup>45</sup> Section 166 of the Act.

<sup>46</sup> Through the operation of s. 147(3) of the Act.

<sup>47</sup> Note that such pecuniary penalty orders **cannot** be sought in relation to 'Ministers, officers/employees of the Crown and Commonwealth or State agencies'—see ss. 12 and 147(note) of the Act. Section 4 of the Act contains an expansive definition for an agency of a state and/or the Commonwealth. All entities included in the s. 4 definition are shielded from pecuniary penalty orders, with the exception of:

- a company in which the state/Commonwealth (or a state/Commonwealth body corporate) has a controlling interest
- a body established or appointed for a public purpose by or under a law of a State (including local government) which operates primarily on a commercial basis.

<sup>48</sup> Section 26(5) of the Act.

### 2.1.2. The role of WRPs in water trading

Water resource plans, developed by Basin states and accredited by the Minister,<sup>49</sup> are intended to give effect to the Basin Plan.<sup>50</sup> This should not, however, be interpreted as implying that the Basin Plan only has effect as implemented by WRPs. The Basin Plan will have effect as an instrument in its own right. As noted in section 2.1.1, a range of entities are required to act consistently with the Basin Plan.

The Basin Plan will set out the requirements that a WRP must comply with if it is to be accredited or adopted under the Act.<sup>51</sup> This part of the Basin Plan must include requirements relating to a number of matters, including:

- (g) the circumstances in which tradeable water rights in relation to the water resource plan area may be traded, or transferred, and the conditions applicable to such trades or transfers.<sup>52</sup>

[...]

The requirements in relation to the matters referred to in paragraph (g) must contribute to achieving the Basin water market and objectives and principles that are set out in Schedule 3.<sup>53</sup>

It is clear that the Act provides for water trading matters to be addressed through WRPs (as well as the Basin Plan itself).<sup>54</sup>

The ACCC considers that WRPs should include water trading rules that deal with matters specific to particular water resources. By contrast, the Basin Plan water trading rules will apply across the MDB.

For these reasons, the ACCC's draft advice relating to water access right location matters (chapter 6) is mostly in the form of recommendations to the MDBA to consider incorporating particular approaches into the Basin Plan requirements for water resource plans, rather than proposing the development of Basin Plan water trading rules.

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<sup>49</sup> The minister may accredit a water resource plan prepared by a Basin state under the procedures set out in s. 63. If a Basin state does not give the MDBA a water resource plan for an area located in that Basin state under s. 63, or the MDBA decides not to accredit a water resource plan given to the MDBA by a Basin state because it is not consistent with the Basin Plan, the minister may request the MDBA to prepare a water resource plan under s. 68 of the Act. A water resource plan developed by the MDBA under s. 68 may be adopted by minister under s. 69 of the Act.

<sup>50</sup> Parliament of Australia, Water Bill 2007, revised explanatory memorandum, paragraph 103, clause 55.

<sup>51</sup> Section 22, item 11 of the Act.

<sup>52</sup> *ibid.*, s. 22(3)(g).

<sup>53</sup> *ibid.*, s. 22(3). The Basin Plan must include requirements in relation to the circumstances outlined in s. 22(3)(g), not simply a requirement that the water resource plan deal with these matters.

<sup>54</sup> See s. 22(1), item 11, and s. 22(3) of the Act. The ACCC does not have a formal role in advising on these requirements, which will be included in item 11 of the Basin Plan.

### **Flexibility of WRP trading rules and Basin Plan water trading rules**

The MDBA must review the Basin Plan every 10 years. The MDBA must also review the Basin Plan if the minister or all Basin states request the MDBA to do so.

In response to the ACCC's position paper, DSE submitted that:

We understand that any trading rules established by the Basin Plan will be very hard to amend. This a problem, except at the highest level, as day-to-day operations may require flexibility to allow change quickly and easily in response to emerging issues. For example, if a loophole is found in a rule, that inadvertently allows trade which is not hydrologically possible or has unacceptable impacts, it needs to be closed quickly and without wide advertisement prior to closure.<sup>55</sup>

The Act also sets out detailed consultation requirements where an amendment to the Basin Plan is proposed, including allowing eight weeks for submissions on proposed amendments.<sup>56</sup>

The ACCC recognises that amendments to Basin Plan water trading rules must comply with the requirements set out in the Act. In contrast, accrediting a substantive amendment to a WRP requires only an application from the relevant Basin state and a decision from the minister on the advice of the MDBA.<sup>57</sup> For this reason, the ACCC considers that many aspects of water trading, particularly in relation location matters or areas where knowledge is developing rapidly, are better suited to WRPs.<sup>58</sup>

### **2.1.3. Consistency of trading rules throughout the MDB**

#### **Interaction between Commonwealth water legislation and state laws**

Basin states have recognised the primacy of the Basin Plan in relation to the matters it covers as provided for in the Act.<sup>59</sup>

However, the NFF submitted:

Of concern is that a number of preliminary positions of the ACCC are not about the Trading Rules but about State Governments being required to take actions. NFF are concerned about the ability for this to occur and whether this should rightly sit within the Trading Rules or outside via an Intergovernmental Agreement.<sup>60</sup>

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<sup>55</sup> DSE, position paper submission, p. 2

<sup>56</sup> See subdivision F, Division 1, Part 2 of the Act.

<sup>57</sup> See s. 65 of the Act.

<sup>58</sup> The ACCC notes that proposed amendments to s. 33 of the Act, under the Australian Capital Territory and Other Legislation Amendment (Water Management) Bill 2009 would, if enacted, provide that the Basin Plan (and therefore the water trading rules), and water resource plans prepared by the Authority and adopted by the minister, may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as it is in force from time to time.

<sup>59</sup> COAG, *Agreement on Murray–Darling Basin Reform*, 3 July 2008, clause 3.2.1, available at [www.coag.gov.au](http://www.coag.gov.au), viewed 14 January 2009.

<sup>60</sup> NFF, position paper submission, p. 10.

The ACCC notes that its draft advice refers specifically to Basin State governments in the context of both potential Basin Plan water trading rules and other recommendations.<sup>61</sup>

DSE also submitted that the position paper omitted coverage of important matters such as:

- Inclusion of a process whereby the ACCC assess State rules for consistency with the principles [Basin Plan water trading rules]
- Inclusion of a dispute or appeal process that provide an avenue for parties to challenge State rules should they believe that certain State rules were inconsistent with the principles.<sup>62</sup>

The ACCC notes that the Act does not provide for the ACCC to assess state rules for consistency with the Basin Plan water trading rules. However, the Basin Plan water trading rules will operate concurrently with trading rules in water resource plans. Furthermore, a WRP will only be accredited if it is consistent with the relevant Basin Plan (including the Basin Plan water trading rules) and if it meets the requirements for accreditation set out in the Basin Plan.<sup>63</sup> The minister accredits water resource plans on the advice of the MDBA. The ACCC also notes that when made, the Basin Plan (including its trading rules) will be a legislative instrument<sup>64</sup> and will therefore also be Commonwealth water legislation.<sup>65</sup>

The ACCC also notes that the Act does not provide for a dedicated dispute or appeal process for challenging Basin state rules as proposed by DSE. However the Commonwealth water legislation is not intended to exclude or limit the concurrent operation of any law of a Basin state.<sup>66</sup> However, where there is a direct inconsistency between a provision of the Commonwealth water legislation (such as the water trading rules in the Basin Plan) and a provision of a law of a referring state,<sup>67</sup> the Commonwealth provision will generally prevail.<sup>68</sup>

### **Transitional and interim WRPs**

While any new WRPs must be consistent with the relevant Basin Plan and accredited, the Act provides for the continued application of transitional and interim WRPs following the commencement of the Basin Plan. The implications of this are that initially even the Basin Plan water trading rules will not apply uniformly throughout the

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<sup>61</sup> See section 2.3 of this draft advice.

<sup>62</sup> DSE, position paper submission, p. 2.

<sup>63</sup> These requirements form part of the mandatory content of the Basin Plan: see item 11, s. 22(1) of the Act. See also section 2.3.2 of this paper.

<sup>64</sup> Section 33(1)(a) of the Act.

<sup>65</sup> Section 250A of the Act.

<sup>66</sup> Section 250B(1) of the Act.

<sup>67</sup> As defined in s. 18B of the Act.

<sup>68</sup> Commonwealth water legislation will not apply to matters declared by a state law to be excluded matters unless overriding Commonwealth regulations are made. See Part 11A of the Act.

MDB because the Act will allow interim and transitional WRPs to operate until their prescribed expiry date (as late as 2017).<sup>69</sup>

Existing WRPs listed in Schedule 4 of the Act (along with any instruments made under or for the purposes of these plans) are taken to be accredited by the minister, even if they are not consistent with the Basin Plan. These are termed ‘transitional water resource plans’. They are only considered transitional WRPs under the Act to the extent that they deal with the matters listed in s. 22(1) (the mandatory content of the Basin Plan), which includes rules for the trade of tradeable water rights. Transitional WRPs cover a significant percentage of the MDB’s water rights (by volume) and are due to expire in various stages from 2012 to 2017.

WRPs developed by a state on or after 25 January 2007, and before the Basin Plan first takes effect, are also taken to be accredited by the minister, even if they are not consistent with the Basin Plan. These are termed ‘interim water resource plans’. Again, they are only considered interim WRPs under the Act to the extent that they deal with the matters listed in s. 22(1) (the mandatory content of the Basin Plan). Interim plans cease to apply at the end of 2014 or five years after they are made, whichever is later. Both transitional and interim WRPs have a unique status and should be considered distinct from WRPs developed after the commencement of the Basin Plan.

As such, any restrictions on, or barriers to, the trade or transfer of tradeable water rights set out in an interim or transitional WRP will be taken to be accredited by the minister and will prevail, even if they are inconsistent with the water trading rules incorporated into the Basin Plan.

The ACCC notes that the New South Wales Irrigators’ Council (NSWIC) submitted:

... with the timeframe provided for the Water Trading Rules (March 2010), it is entirely possible—and, in our submission, probable—that Victoria will refrain from providing transitional water resource plans *until such time as it has seen and considered the Rules*.

The practical implication is that Victoria can—and, in our submission, probably will—then design Water Trading Rules to the advantage of that state *even if they are contrary to the Rules provided by the ACCC* which can be inserted into transitional water resource plans thereby by providing protection until at least 2019.

Even aside the issue of transitional water resource plans, Victoria has the capacity to maintain barriers indefinitely through referral to Section 250C and D of the *Water Act*. That State may declare its trade restrictions on excluded matters to which the Commonwealth legislation—including the Basin Plan containing the Water Trading Rules—is displaced. That is, the capacity exists for Victoria to sit entirely outside the Water Trading Rules.<sup>70</sup>

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<sup>69</sup> See s. 241(3) and Schedule 4 of the Act. Transitional water resource plans for water resource plan areas in Victoria may be prescribed by regulations made for the purposes of s. 241(1)(b), and may have an expiry date later than 2017.

<sup>70</sup> NSWIC, position paper submission, p. 5.

Similarly, the GVIA submitted:

GVIA is very concerned about how water trading rules may not be uniformly applied across the Murray–Darling Basin due to the transitional arrangements included in the Commonwealth Water Act, which will allow the application of the rules only when the transitional water sharing plans expire. GVIA understands those plans identified in the Water Act Schedule expire at various times from 2012 through to 2017, with uncertainty surrounding the expiration of Victorian plans which may expire in 2019, or may persist beyond that year.

GVIA believes it should be a priority of the Australian Government to ensure uniform application of th[ese] water trading rules.<sup>71</sup>

The National Irrigators Council (NIC) submitted:

To some degree it is understood that Bulk Entitlements represent the Victorian water resource plans but this is by no means clear. NIC is aware of attempts to have either the Commonwealth or Victorian Governments identify exactly what constitutes the Victorian water resource plans but none of these attempts have so far been successful.

Given the lack of clarity surrounding the Victorian arrangements, it is possible that Victoria may end up with trading rules (under whatever water resource plans it eventually submits) that are contradictory to the rules operating under the Basin Plan. This could lead to rules being implemented in Victoria which are more favourable for Victorian market participants to the detriment of other states, or which are less favourable to Victorian irrigators—neither situation would be acceptable to NIC.<sup>72</sup>

Western Murray Irrigation Ltd (WMI) submitted:

As a general comment WMI supports the statements on the trading rules application made by both the National Irrigators Council and NSW Irrigators Council. The suggested solution of identification of the Victorian water resource plans before the trading rules are finalised is a sensible one. The MDBA by incorporating the rules in the Basin Plan must seek a binding commitment from each State including Victoria to comply with the trading rules.<sup>73</sup>

The ACCC notes that the status of interim and transitional WRPs is a function of the Act. The ACCC's advice on the development of Basin Plan water trading rules is made in light of the framework established by the Act. The ACCC considers that there is merit in applying Basin Plan water trading rules wherever possible in the MDB, even if they are not initially operating throughout the whole MDB.<sup>74</sup> The ACCC also notes that issues relating to transitional and interim WRPs also apply to other parts of the Basin Plan, including SDLs.

The ACCC considers it unnecessary to obtain further commitment from Victoria to comply with the trading rules since they will apply to all Basin state agencies<sup>75</sup> unless inconsistent with an interim or transitional water resource plan. In situations where

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<sup>71</sup> GVIA, position paper submission, p. 3

<sup>72</sup> NIC, position paper submission, pp.2–3

<sup>73</sup> WMI, position paper submission, p. 2.

<sup>74</sup> A further discussion on this point is contained in chapter 4, in relation to the application of the 4 per cent limit in Victoria.

<sup>75</sup> Section 35 of the Act.

trading rules in the Basin Plan and an interim or transitional WRP are inconsistent, the provision of the interim or transitional WRP that will prevail.<sup>76</sup>

## 2.2. Framework for an efficient trading regime

The Basin Plan water trading rules will not apply to all entities involved in water trading<sup>77</sup> or to all matters relevant to the development of an efficient water trading regime across the MDB.

The ACCC acknowledges that the ability to effectively manage trade is therefore influenced by matters other than the water trading rules. The following is an overview of other key water management considerations relevant to the development of an efficient water trading regime, with references where relevant to more specific considerations in later chapters.

This section discusses a framework for the development of an efficient trading regime. In particular, this section highlights five key aspects of such a framework:

- clearly defined property rights
- a resource cap or limit
- addressing externalities and third party interests
- appropriate transaction costs and charges
- availability of information

### 2.2.1. Clearly defined property rights

Clearly defined property rights are critical to an efficient trading regime and to water management more generally. Water poses particular challenges in this regard due to the difficulty in ensuring the excludability<sup>78</sup> of rights. Clearly defined and excludable property rights are also critical to the ability to ensure appropriate protection of third party interests. The ACCC recognises a number of issues that could be addressed, other than through Basin Plan water trading rules, to improve the clarity and excludability of property rights.

#### Unbundling of water rights

A key feature of water reform to date has been the commitment to separate water access from land<sup>79</sup> and, more recently, from water use approvals, works approvals and water delivery rights.<sup>80</sup>

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<sup>76</sup> Section 245(3) of the Act.

<sup>77</sup> Sections 34 and 35 of the Act.

<sup>78</sup> A good or service is said to be excludable when it is possible to prevent people who have not paid for it from having access to it.

<sup>79</sup> Council of Australian Governments, *Water reform framework*, 1994, attachment A, cl. 4(a).

Where unbundling has occurred (particularly in regulated surface water systems and for use approvals), significant gains have been made in trading opportunities and in providing water users with greater flexibility to manage their water access, water use, delivery and landholding needs. Section 0 considers how to avoid trading restrictions jeopardising these gains by unnecessarily linking the ability to trade an unbundled water access right to a separate nominally unbundled right. Similarly, where water access rights are tied to a specific purpose, water markets may be unnecessarily fragmented (see section 3.4).

As noted elsewhere<sup>81</sup>, further unbundling of water-related rights could potentially expand trading opportunities and/or provide more appropriate protection for third party interests when trade takes place. Chapter 6 discusses some of these unbundling possibilities, particularly for trade in systems other than regulated surface water systems.

The ACCC acknowledges, however, that unbundling is not without cost. While unbundling can greatly simplify the assessment of trade applications, it may also increase the complexity of transactions involving more than one unbundled right. Therefore, the likely benefits of further unbundling (which can be substantial) must be assessed against the likely costs.

The ACCC also notes the NWC's recommendation in its 2009 biennial assessment:

The Commission recommends that the feasibility and benefits of further unbundling including in unregulated surface water and groundwater systems, should be considered in all states, and where jurisdictions decide against further unbundling the reasons for that decision should be published.<sup>82</sup>

### **Water market rules**

The Basin Plan water trading rules are part of a broader package of reforms under the Act aimed at improving water market outcomes. As part of this package of reforms, the ACCC recently provided advice to the minister on the water market rules.<sup>83</sup>

The purpose of the water market rules is to free up the trade of water access rights within the MDB. The rules allow this by enabling irrigators to 'transform' their share of the water entitlements held on their behalf by operators into separately held (clearly defined) water access entitlements.<sup>84</sup>

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<sup>80</sup> As discussed in chapter 7, water delivery rights are employed by infrastructure operators as a vehicle for the collection of infrastructure access charges independently of water availability, more so than to manage delivery constraints.

<sup>81</sup> Price Waterhouse Coopers, *National Water Initiative Water trading study*, Department of the Prime Minister and Cabinet, Canberra, 2006, pp. 53–63.

<sup>82</sup> NWC, position paper submission, p. 2; *2009 Biennial assessment*, recommendation 7.2.

<sup>83</sup> See the ACCC publication, *Water market rules—ACCC advice to the Minister for Climate Change and Water*, available on the Department of the Environment, Water, Heritage and the Arts website ([www.environment.gov.au](http://www.environment.gov.au)); viewed 24 February 2009. For information on the ACCC's advice on the water charge rules, see section 2.2.4.

<sup>84</sup> The trade of water entitlements under 'irrigation rights' is considered in chapter 8.

### **Adequate monitoring of compliance with extraction conditions**

The integrity of property rights partly depends on the ability to monitor and check compliance against the right.

Water access right holders can have the security of their right eroded through the unauthorised extraction of water by others. Unmetered or inaccurately metered extraction can obviously lead to negative third party impacts for other water users, as well as for the environment. Section 3.11 discusses the potential role of water trading rules relating to metering, while recognising that the monitoring of extraction can be resource-intensive.

Extraction in excess of prescribed pumping rates, or outside prescribed pumping times, can also significantly affect third parties and make it very difficult to give effect to particular types of water trades. This is particularly relevant for unregulated systems (see section 6.2) and groundwater systems (see section 6.4).<sup>85</sup>

### **Taking of water other than through a volumetric water access right**

To the extent that water extraction or interception can take place without a water access right with a volumetric limit (e.g. for stock and domestic purposes—see section 3.6), water markets could be considered to be incomplete and water access rights less secure.

The ACCC notes that, all else being equal, the creation of additional water access rights for a particular water resource necessarily reduces the reliability of existing water access rights of the same or lower priority class, with a corresponding effect on the market value of those rights.<sup>86</sup> The ACCC considers that wherever possible new water requirements in fully allocated systems should be sourced from the existing market (i.e. by purchasing water from existing right holders). This ensures that the price of water more accurately reflects its true value and that opportunities for trading are expanded.

## **2.2.2. Addressing externalities and third party interests**

Minimising externalities and providing appropriate protection for third party interests is underpinned by the clear definition of property rights (section 2.2.1) and the establishment of a resource cap (section 2.2.3).

However, a number of specific cases of externalities warrant further discussion.

### **Potential for environmental impacts**

The ACCC considers that water trading should operate within environment and physical bounds (see section 3.4 and chapter 6). Where there are potential environmental impacts arising from the use of water on land, these are generally addressed through water use approvals (see section 0).

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<sup>85</sup> For information on metering, see section 3.11.

<sup>86</sup> Similar concerns arise with the conversion of water access rights from one priority class to another. See section 3.9.

For other potential environmental impacts from water trading (and water use more generally) the ACCC notes there are a number of mechanisms available to ensure environmental water requirements are provided.

First, there is ‘planned environmental water’ or ‘rules-based water’, which establishes minimum flows and capacity constraints to ensure that the Murray–Darling system is operated within these environmental constraints.

Second, environmental managers are now entering the market to purchase water to provide environmental flows.<sup>87</sup> The ACCC believes that environmental water managers and the water access rights that they hold should be treated no differently by water trading rules than other water users and their water access rights (see section 3.4). These processes combine to ensure that the environment’s needs are appropriately provided for.

The ACCC notes that water quality and pollution issues are addressed through other aspects of the Basin Plan and Basin state legislation, rather than being directly regulated by water trading rules.

### **Structural adjustment**

Some stakeholders raised concerns about the broader socio-economic impacts of water trade. The Victorian Farmers Federation (VFF) submitted:

The VFF believes that the [Basin water market and trading] objectives<sup>88</sup> do not adequately address the concerns of rural water users. The socio-economic impact of water in production should be recognized and addressed through market rules to achieve the Basin objectives. While the listed objectives mention the need to recognise the needs of the environment, it does not seem to adequately reflect the importance of social and economic impacts on the transfer of water.

The VFF believe water trading will lead to structural adjustments such as a contraction in the demand for complementary agricultural services and output from districts. This may result in significant and rapid changes to the demographics population and sustainability of communities.

The VFF believes that the impact on ‘third parties’ in terms of regional effects must be accorded sufficient consideration when determining water market trading rules.<sup>89</sup>

The ACCC does not consider the imposition of trading restrictions as an appropriate mechanism to address structural adjustment concerns (refer to chapter 4 for a more detailed discussion in the context of the 4 per cent limit).

DSE submitted that the position paper did not state a position on Government purchases in the water market and that:

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<sup>87</sup> The issue of government water purchases is considered below.

<sup>88</sup> In clause 3 to schedule 3 to the Act. See section 2.1.1.

<sup>89</sup> VFF, position paper submission, p. 5.

this overshadows other possible refinements to the water market that the water trading rules will give effect to, and ignoring the issue will prevent the trading rules from meeting their objectives.<sup>90</sup>

The ACCC notes that there is some concern regarding the scale of government water purchases and the potential for these to contribute to rapid structural adjustment. Government participation in the market should—in the opinion of the ACCC—be governed by the same water trading rules as other participants. In particular, the ACCC considers that the water trading rules should prevent specific restrictions on the ownership of water access rights based on the characteristic of a particular class of entity, including environmental water-holders (see section 3.1).

The ACCC also notes that issues associated with the Australian Government’s purchase of water for the environment are being considered as part of the Productivity Commission’s inquiry into market mechanisms for recovering water in the MDB.<sup>91</sup>

### **Operation of storages and other river flow operations**

The operation of storages and other infrastructure can influence not only the ability to trade and/or carry over water, but also the ability for water (traded or not) to be delivered.

For systems served by multiple storages, operators face the task of managing the allocation of water between storages with different efficiencies (in terms of losses to evaporation and seepage), to ensure environmental requirements are met while taking into account likely demand patterns, inflow levels and the risk of spills. For example, operators can release water through the Barmah Choke to hold in downstream storages to mitigate capacity constraint problems later in the season.

Infrastructure operators manage storages to minimise losses and maximise allocations and delivery possibilities. Trade of water access rights has the potential to require a change in the way a system is operated due to, for example, changed delivery location or demand patterns. This may cause increased losses or changes to the ability to deliver water to other users. However, this issue is not isolated to traded water, but relates to any changes in on-farm operation that would require changed delivery patterns.

Infrastructure operators must also consider the balance between providing water for extractive use today versus storing water to ensure there are adequate reserves (for both extraction and delivery purposes) in future seasons. These considerations are relevant to carryover (discussed in section 3.10) and the treatment of transmission losses (discussed in section 6.1).

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<sup>90</sup> DSE, position paper submission, p. 2.

<sup>91</sup> See [Market mechanisms for recovering water in the Murray–Darling Basin](#), Productivity Commission; viewed 24 November 2009.

### 2.2.3. Resource cap / limit

The Act requires that the Basin Plan must include:

The maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from:

- the Basin water resources as a whole; and
- the water resources, or particular parts of the water resources, of each water resource plan area.<sup>92</sup>

The sustainable diversion limit (SDL) will limit the volume of water that can be taken from Basin resources. Setting a limit or cap on take is critical to ensuring the integrity of water access rights and trading of these rights in the longer term.

The MDBA recently released an issues paper on the development of SDLs for the MDB.<sup>93</sup> The SDL issues paper outlined possible approaches to establishing SDLs across the MDB.

#### **The resource cap in the context of trade**

The approach to setting a resource cap (the SDL) will require consideration of implications for water trading. These two aspects of the Basin Plan are inherently linked. Due to the short timeline available in developing the Basin Plan, the process of developing water trading rules advice and determining the SDL are running concurrently. While the ACCC's advice to the MDBA does not extend to advice on determining the SDL, the ACCC notes there are a number of considerations relevant to water trade.

The ACCC considers that SDLs and other government policy programs, rather than trading restrictions, are the most appropriate tool to address overuse and overallocation<sup>94</sup> (refer to section 3.8 for a more detailed discussion).

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<sup>92</sup> Section 22, item 6, of the Act

<sup>93</sup> MDBA, *Issues Paper – Development of Sustainable Diversion Limits for the Murray–Darling Basin*, November 2009.

<sup>94</sup> Section 4 of the Act states:

overallocation: there is an overallocation for a water resource plan area if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights at a given time exceeds the environmentally sustainable level of take for those water resources.

overuse: there is an overuse for a water resource plan area if the total volume of water actually taken for consumptive use from the water resources of the area at a given time exceeds the environmentally sustainable level of take for those water resources.

Note: An overuse may arise for a water resource plan area if the area is overallocated, or if the planned allocation for the area is exceeded due to inadequate monitoring or accounting.

Depending on how SDLs are set (both the approach used and the spatial and temporal scale), they may need to be adjusted to reflect trades from one area to another where these two areas are subject to different SDLs. In the regulated surface water system, this may be very similar to the current accounting against the Basin Cap (which applies to usage from surface water resources). However, it may be more complicated when considering trade between water sources (such as groundwater to surface water).

This will especially be the case if the SDL is expressed in different ways for the two water sources. The ACCC considers it essential that the SDL is implemented to allow accounting for trade across different water systems, to avoid creating an unnecessary barrier to trade (refer to sections 6.4 and 6.5 for a discussion of this issue as it relates to groundwater trade and trade between groundwater and surface water).

### **The resource cap and environmental water purchases**

The SDL issues paper indicates that held environmental water (such as water access entitlements held by the Commonwealth Environmental Water Holder, or CEWH) used to contribute to the Basin Plan's environmental watering plan will not be confined by the SDL:

SDLs are required to limit the take from water resources to a level that does not compromise the 'environmentally sustainable level of take characteristics' of those resources. Because the use of environmental water in accordance with the environmental watering plan will not compromise the 'environmentally sustainable level of take characteristics' of a water resource, it will not be take that is limited by the SDL. The Commonwealth Environmental Water Holder is an example of an entity that must use its water holdings in accordance with the environmental watering plan ...

There are likely to be entities other than the Commonwealth that hold environmental entitlements (e.g. Basin States), and they may be required to use those entitlements in accordance with the environmental watering plan....and [such use] would not be take limited by the SDLs.

While the exact method for establishing and implementing SDLs is not yet settled, the ACCC notes in particular the discussions in sections 3.4 and 3.8 of this paper as relevant.

The ACCC also notes the potential for ongoing environmental water purchases to impact on other water access rights in a given WRP area depending upon how usage against water access rights held for environmental purposes is treated in the SDL.

The ACCC considers it important in the context of SDLs to ensure that any ongoing trade between environmental and consumptive users is managed to ensure appropriate protection of third party interests. If, for example, an environmental water holder chooses to sell (or buy) water access rights,<sup>95</sup> the mechanism for adjusting SDL(s) to

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<sup>95</sup> The Australian Government has committed \$3.1 billion over 10 years to purchase water in the MDB. The ACCC notes that CEWH purchases will therefore extend well past the inception of the Basin Plan and establishment of the SDL. Section 106, Part 6, Division 1 of the Act, while specifying particular conditions that must be fulfilled, allows the CEWH to 'dispose of water or Commonwealth environmental water holdings.'

reflect a trade would need to be carefully considered. This is because such a trade would increase (decrease) the volume of water access rights for which take is limited by the SDL and the reliability of other users' water access rights may be negatively impacted.

### **Overallocation and 'sleeper' / 'dozer' water access rights**

There is some concern among stakeholders that enabling trade or removing restrictions on the trade of 'sleeper' or 'dozer' licences<sup>96</sup> will result in greater utilisation of these rights, with negative impacts on water availability for more frequently used water access rights. In the ACCC's view, preventing trade in areas with sleeper and dozer licences would not be an appropriate protection of these third party interests. The ACCC considers that water trading rules should not distinguish between water access rights based solely on their historical use.

Concerns regarding overuse and overallocation are a matter for SDLs and other policy tools. Water trading rules must recognise the rights on issue as they currently are.

The ACCC draft advice does not seek to limit Basin states from issuing new water access rights,<sup>97</sup> nor from acquiring or cancelling rights, if they seek to address over-allocation or 're-scale' broad categories of water access rights. The ACCC believes that the Basin Plan water trading rules should relate to the trade of water access rights on issue, and that trading restrictions should not be employed to address overallocation (refer to section 3.8 for a discussion of overuse and overallocation).

## **2.2.4. Appropriate transaction costs and charges**

### **Administrative costs of enabling trade**

The administrative processes involved in maintaining a functional market can be substantial. The ACCC recognises that the complexity of the trading processes (and costs incurred) needs to be assessed against the likely benefits. For example, in regulated surface water systems, where the number and volume of trade is high, a more complex trading system can be justified. However, in a small tributary with few water users, the administrative costs of running a complex market may not be justified.

In the latter case, individual assessments of trade may be more appropriate. The ACCC draft advice has considered the likely administrative costs when deciding on the appropriateness of a Basin Plan water trading rule in a particular matter. This is particularly relevant to discussions in chapter 5 (trade approval processes) and chapter 6 (trade in unregulated surface water systems, groundwater systems and farm dam water access rights).

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<sup>96</sup> A **sleeper right** (or licence) is a right that is not in use, while a **dozer right** (or licence) has only been used intermittently.

<sup>97</sup> Note that issuing new water access rights, all else being equal, decreases the reliability of existing rights for the same water source, but where Basin states have formed the view that a resource is not yet fully allocated (and thus could ensure compliance against an SDL), they may elect to issue new water access rights.

## Charges and fees as a disincentive to trade

To the extent that charges and fees are too high or do not reflect the cost of the service they relate to, they may act as a disincentive to trade and prevent the market from operating efficiently. The ACCC notes that State Water submitted:

... the inability to recover usage based charges on water allocation trades interstate has led to State Water potentially losing over \$2 million in 2008/09 water charge revenues. State Water has endeavoured to recover these charges from interstate parties, namely Goulburn Murray Water, Lower Murray Water and the South Australian Department of Land, Water and Biodiversity Conservation. The issue of these outstanding accounts has not yet been resolved.

...

Pending permanent resolution of this usage charge matter at an inter-jurisdictional level State Water amended its billing practices from 1 July 2009. State Water now recovers the usage charge from the seller at the point of transaction, when the purchaser does not have an account with State Water. State Water believes this is an equitable, transparent and administratively simple solution to the current loss of revenue ... due [to] interstate trade.

In the absence of any guidance from the ACCC or the MDBA on how better to address this issue, State Water will be seeking to maintain this new arrangement indefinitely.<sup>98</sup>

The ACCC also notes the submission from the South Australian Farmers Federation (SAFF), in which it:

... fully supports the need to reduce constraints on water trade, including government taxes and charges, which have the potential to artificially distort the market and impede the most efficient use of water.<sup>99</sup>

The ACCC is concerned by any charges that unreasonably restrict or distort trade.

In response to State Water's comments, to the extent that a charge on water allocation trade does not represent the cost to State Water of giving effect to that trade, then the charge may be viewed as distorting water markets.

However, the Act specifically provides for the regulation of charges through the creation and application of water charge rules. The ACCC recently provided advice to the minister on a range of water charge rules (as discussed below).

The issue to which State Water is referring may relate to costs associated with its bulk water supply activities. As a result, the ACCC considers this a part of State Water's current state regulatory arrangements<sup>100</sup> and, when they are given effect, the water charge (infrastructure) rules.

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<sup>98</sup> State Water, position paper submission, p. 2.

<sup>99</sup> SAFF, position paper submission, p. 2.

<sup>100</sup> IPART are currently conducting a review of bulk water prices that State Water can charge from July 2010. IPART states that it intends to release a draft report in March 2010. See: IPART, *Review of prices for State Water Corporation from July 2010—Water issues paper*, July 2010 and IPART, *Review of Bulk Water Prices to be charged by State Water*  
*Footnote continues on next page.*

### **Water charge (termination fees) rules**

When imposed in relation to the sale of water access rights, termination fees can deter otherwise efficient trades and/or transfers. The ACCC has recently provided advice to the minister about water charge (termination fees) rules.<sup>101</sup> The rules have been made by the minister and commenced in their entirety on 1 September 2009. The rules cap the termination fee (at a multiple of 10 times the total network access charge) that can apply when an irrigator terminates access to an IIO's irrigation network, including where they surrender a delivery right in relation to an irrigation network.<sup>102</sup>

### **Water (infrastructure) charge rules**

Water (infrastructure) charge rules relate to charges levied by irrigation infrastructure operators and bulk water operators.

On 26 June 2009 the ACCC provided its final advice on the water infrastructure charge rules to the minister.<sup>103</sup> On 14 September 2009 the minister wrote to the ACCC requesting further advice, including draft rules, in relation to the accreditation of state agencies by the ACCC under the water infrastructure charge rules.

The water infrastructure charge rules contribute to achieving the Basin water charging objectives and principles, including the efficient and sustainable use of water resources and water infrastructure assets, efficient water markets and consistency in charging practices across regions where water can be traded.

### **Water charge (planning and management information) rules**

The ACCC provided its final advice on the water charge (planning and management information) rules on 10 July 2009.<sup>104</sup> It recommended that state and territory government departments and agencies publish details of water planning and management charges. The ACCC also proposed the establishment of a voluntary reporting framework to report more broadly on water planning and water management activities, costs and charges.

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*Corporation from 1 July 2010*, available at [http://www.ipart.nsw.gov.au/investigation\\_content.asp?industry=3&sector=6&inquiry=197](http://www.ipart.nsw.gov.au/investigation_content.asp?industry=3&sector=6&inquiry=197), viewed 16 December 2009.

<sup>101</sup> See the ACCC publication, [Water Charge \(Termination Fees\) Rules—Final advice](#), available on the Department of the Environment, Water, Heritage and the Arts website ([www.environment.gov.au](http://www.environment.gov.au)); viewed 24 February 2009.

<sup>102</sup> Under the Water Charge (Termination Fees) Rules, an additional fee can be approved by the ACCC in certain circumstances.

<sup>103</sup> See ACCC, [Water infrastructure charge rules—Advice to the Minister for Climate Change and Water](#) (June 2009), available on the Department of the Environment, Water, Heritage and the Arts website ([www.environment.gov.au](http://www.environment.gov.au)); viewed 23 August 2009.

<sup>104</sup> See ACCC, [Water planning and management charge rules—final advice](#), available on the Department of the Environment, Water, Heritage and the Arts website, [www.environment.gov.au](http://www.environment.gov.au); viewed 15 August 2009.

### 2.2.5. Availability of information

Access to timely and accurate information is critical to a well-functioning water market because it allows participants to make informed decisions about managing their water access and delivery needs. A lack of information can inhibit otherwise beneficial trades from occurring and raise transaction costs for market participants.

The ACCC notes that the water trading rules may deal with the availability of information to enable the trading or transfer of tradeable water rights, and the reporting of trades and transfers.<sup>105</sup> Chapter 9 includes a number of rule proposals relating to reporting and the availability of water trading information. The ACCC's advice has been informed by parallel developments, in particular the development of a NWMS and complementary interstate information exchange enhancements, as well as the role of the Bureau of Meteorology under the Water Regulations 2008.

The ACCC also notes the VFF's submission that:

VFF supports a national exchange model similar to the stock exchange model. This represents a transparent system where temp and perm trades are listed in the daily paper similar to the stock exchange. e.g. water systems are listed, high-low prices, average for the year, no of ML traded for the day and daily price, etc.<sup>106</sup>

The ACCC considers that the introduction of a national exchange model is not a water trading rules issue, although it may affect certain aspects of water trade, and notes the work being done on a NWMS.<sup>107</sup>

## 2.3. Rule advice and recommendations

The ACCC's position paper contained a number of preliminary positions. These positions were not proposed water trading rules but were rather an expression of the ACCC's general position on water trading matters. Following further consultation (including consideration of stakeholder submissions to the position paper) and analysis, these positions have been refined and developed.

The ACCC's draft advice indicates the positions the ACCC considers should be incorporated into the Basin Plan water trading rules. These are contained in shaded boxes and are referred to as '**Rule advice**'. For other positions—where the ACCC does not consider a Basin Plan water trading rule is the most appropriate mechanism—'**Recommendations**' are made. These are contained in unshaded boxes.

A complete list of rule advice and recommendations appearing in chapters 3 to 9 of this paper is provided in appendix 1.

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<sup>105</sup> See ss. 26(1)(h) and (i) of the Act.

<sup>106</sup> VFF, position paper submission, p. 13.

<sup>107</sup> See chapter 5.3.

### 2.3.1. Rule advice

For a number of matters considered in this draft advice, the ACCC considers that a Basin Plan water trading rule would facilitate the development of an efficient water trading regime across the MDB. When considering whether to propose the development of a Basin Plan water trading rule (**rule advice**), the ACCC has considered the extent to which:

- a Basin Plan water trading rule is necessary or desirable to facilitate the development of an efficient water trading regime across the MDB;
- a Basin Plan water trading rule would contribute to the achievement of the Basin water market and trading objectives and principles;
- the ACCC's position could be given effect within the scope for the water trading rules set out in the Act (particularly s. 26);
- current technical knowledge, and legal and institutional arrangements throughout the MDB, allow a water trading rule to be developed as part of the Basin Plan (e.g. whether relevant tradeable water rights are sufficiently well defined or unbundled for a water trading rule to be feasible);
- it is appropriate for a trading rule to apply across the MDB (i.e. it is not specific to a particular water resource); and
- it is unlikely that such a rule would need to be substantively amended on a frequent basis.<sup>108</sup>

It is important to note that—should the MDBA accept the ACCC's rule advice—the MDBA will draft water trading rules to reflect this advice (as well as drafting the remainder of the proposed Basin Plan).<sup>109</sup>

This paper does **not** contain drafted Basin Plan water trading rules. The MDBA will draft the water trading rules having regard to the ACCC's advice.<sup>110</sup>

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<sup>108</sup> The ACCC notes that proposed amendments to s. 33 of the Act, under the Australian Capital Territory and Other Legislation Amendment (Water Management) Bill 2009 would, if enacted, provide that the Basin Plan (and therefore the water trading rules), and water resource plans prepared by the Authority and adopted by the minister, may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as it is in force from time to time.

<sup>109</sup> As discussed in section 2.1.1, the Basin Plan water trading rules may provide for a right of action.

<sup>110</sup> Under ss. 42(1) of the Act, the MDBA must also consult with the Basin states; the Basin Officials Committee the Basin Community Committee in preparing the Basin Plan (including the water trading rules). In preparing the Basin Plan, the MDBA may also undertake such other consultation, and publish such information to facilitate consultation, as it considers appropriate.

### 2.3.2. Recommendations

The ACCC considers that a Basin Plan water trading rule may not currently be the most appropriate mechanism to address many of the water trading issues in this paper. However, the ACCC considers that many of these issues are worthy of further action and/or investigation.

As such, this advice makes a number of **recommendations**. Generally, the ACCC has made a recommendation rather than rule advice, where:

- necessary legal and institutional arrangements are not yet in place to support a particular position as a Basin Plan water trading rule
- further study is required to develop the technical understanding necessary to assess the appropriateness of a rule and/or the content of a rule—in particular, several recommendations call for further investigation by the MDBA and/or Basin states on matters relevant to water trading
- the issue may be more appropriately dealt with at a local level and/or through a more flexible instrument than the Basin Plan—in particular, there are a number of recommendations for the MDBA to consider the incorporation of positions into the requirements for water resource plans.<sup>111</sup>

This draft advice also notes where other components of the Basin Plan or concurrent processes (e.g. the development of the NWMS or service standards for the state approval authorities) may be relevant to the operation of efficient water markets.

### 2.3.3. MDBA consideration of the ACCC's advice

As previously noted, the rule advices in this paper are neither drafted rules nor are they drafting instructions. Rather the MDBA will have regard to the ACCC's advice when drafting the water trading rules component of the Basin Plan.<sup>112</sup>

The ACCC notes DSE's submission that DSE:

... has some concerns about the lack of any requirement for transparency around the treatment of ACCC advice to the Murray–Darling Basin Authority. It is our understanding that the Authority has complete discretion as to whether or not to accept the ACCC's advice. It is our view, to aid transparency, the Murray–Darling Basin

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<sup>111</sup> The ACCC recognises that the MDBA is only required to obtain and have regard to the ACCC's advice when developing the Basin Plan water trading rules, and that water resource plan requirements are to be contained in a separate component of the Basin Plan. The ACCC nevertheless considers that these recommendations (to consider incorporating certain positions into the Basin Plan requirements for water resource plans) are integral to the provision of robust advice on the development of Basin Plan water trading rules.

<sup>112</sup> Subsection 42(2) of the Act.

Authority should be required to publicly justify and defend any rejection or alteration of the ACCC's advice from that provided.<sup>113</sup>

The ACCC's draft advice is publicly available and stakeholder submissions are welcome.<sup>114</sup> Following consideration of these submissions, the ACCC will provide its advice to the MDBA and this will be made public along with the MDBA's proposed Basin Plan.

The proposed Basin Plan—including the water trading rules component—will be subject to an extensive consultation process before presentation to the minister for accreditation.<sup>115</sup>

The Act requires the MDBA to have regard to the advice of the ACCC when developing Basin Plan water trading rules, including during the statutory consultation period.

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<sup>113</sup> DSE, position paper submission, p. 1.

<sup>114</sup> See How to make a submission at the beginning of this publication for information on making a submission.

<sup>115</sup> See section 3.2.3 of the ACCC water trading rules issues paper for a summary of the statutory consultation process.

## 3. Water access rights—general matters

### 3.1. Ownership restrictions

#### 3.1.1. Background

Certain trading rules may limit the ownership of water based on the identity or characteristics of the buyer. Most notably, restrictions may be in place to address concerns about the ownership of water by non-landholders or environmental water holders.

The ACCC considered in its position paper two recent examples of restrictions on the trade of water access rights based on the identity of the purchaser. These were the Victorian 10 per cent limit on the proportion of water access entitlements that could be owned by non-landholders, which was revoked on 16 September 2009, and the New South Wales embargo on trades of water access rights to environmental water holders, which was replaced with a memorandum of understanding (MOU) between the New South Wales Government and the Australian Government on 24 September 2009.

The ACCC considered in its position paper that the identity of the purchaser should not typically be a factor in a trade. It considered that ownership restrictions will be inherently distorting and that trade of water access rights should occur on a level playing field.

In its position paper the ACCC noted that ownership restrictions:

- can prevent wider participation in the water market by certain participants (such as environmental, interstate and urban buyers, or even irrigators in a different system), restricting the efficient operation of water markets and opportunities for trade, and prevent water from reaching its highest value use
- would also potentially prevent intermediaries developing more innovative water-related products
- hinder the ability of environmental water holders to purchase water access rights (directly in the case of the New South Wales embargo and indirectly in the case of the 10 per cent limit)
- prevent irrigators from realising the full value of their water by segmenting the market, which may particularly affect irrigators in financial distress
- does not assist reforms and investment activities as it blocks reconfiguration activity and prevents environmental purchasing of water.

In its position paper the ACCC considered that the justifications for ownership restrictions generally did not appear to be well-founded. In particular, there was little

evidence of the ‘water baron’ behaviour that the 10 per cent limit was originally introduced to address.

The ACCC also considered issues relating to foreign ownership of water in its position paper but, in light of arrangements already in place to cover foreign investment in Australian assets, did not consider there was sufficient justification for additional restrictions.

However the ACCC did consider that there may be appropriate restrictions where they relate to a purchaser’s actions under relevant water legislation rather than on the identity of the purchaser or their membership of a particular class of entity.

Given the above, the ACCC reached the following preliminary positions on ownership restrictions:

- There should not be specific restrictions on the ownership of water access rights by particular classes of entities such as non-landholders, environmental water holders and urban water authorities.<sup>116</sup>
- Basin states should be able to restrict the ability of an individual to own a water access right on the basis that the individual has been in breach of water legislation or owes money for water charges.<sup>117</sup>

### 3.1.2. Summary of submissions

The GVIA, SAFF, the South Australian Government, WMI and the Queensland Farmers’ Federation (QFF) all stated they agreed with the ACCC’s preliminary positions that there should not be ownership restrictions on particular classes of entities.<sup>118</sup> However, the South Australian Government noted that certain water for environmental purposes was not tradeable in South Australia, and also submitted that the MDB Agreement stated that South Australia’s metropolitan water was not tradeable.

WMI did, however, suggest that there was a need to address the specific situation of non-landholder members of IIOs:

However, for infrastructure operators a choice needs to be provided in terms of allowing non-landholders to purchase part of the bulk entitlement or to request non-landholders purchase a statutory entitlement or zero water access licence entitlement and transform or trade their share of the operator’s entitlement to the statutory entitlement. WMI as an infrastructure operator is concerned that it will be forced to have a number of water entitlement only account holders who have no land, do not intend to irrigate and trade

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<sup>116</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 18, preliminary position 3–A.

<sup>117</sup> *ibid.*, preliminary position 3–B.

<sup>118</sup> GVIA, position paper submission, p. 4; SAFF, position paper submission, p. 2; South Australian Government, position paper submission, p. 2; WMI, position paper submission, p. 2; QFF, position paper submission, p. 3.

their entitlement annually. There is no benefit to members of water entitlement only accounts and trading figures are skewed by these non-irrigators.<sup>119</sup>

SunWater stated that it agreed with the ACCC's preliminary positions about ownership restrictions. However, it submitted that there should be an allowable restriction that water access entitlement holders must have a water supply contract with an infrastructure owner, which is currently a requirement in Queensland.<sup>120</sup>

The NSWIC raised concerns about foreign ownership of water:

NSWIC notes the ACCC's assurance that asset holdings in excess of \$100m are subject to FIRB review, yet maintains its submission that water rights ought be treated identically to other property rights in respect of foreign investment. That is, the same FIRB criteria applying to real property purchase ought be applied to purchases (and holdings) of water entitlements.

The capacity for a foreign entity to exert control over commodity markets through control of water as a secondary market ought be seriously considered by the ACCC.<sup>121</sup>

The NFF also submitted in relation to foreign ownership, stating:

... it may be prudent to apply similar restrictions that apply to companies, i.e. if more than 15% of the shares in a company are acquired by foreign investors, FIRB approval is required. This may also be a relevant trigger for water, i.e. where more than 15% of water in a water resource area is acquired by foreign investors that further sales ought to be approved or rejected by FIRB.<sup>122</sup>

In contrast to the above submissions, the VFF supported some ownership restrictions:

VFF does not support Government and/or urban water authorities entering the water market to secure additional water for the environment.<sup>123</sup>

The VFF did not consider it appropriate that trade could be restricted where an individual has been in breach of water legislation or owes money for water charges, submitting that compliance should be ensured separately from the trade rules. The NFF similarly submitted that:

...there may be alternative mechanisms that could apply. The remedy would depend on the act that has resulted in non-compliance with legislation. If for example, the offence relates to theft of water, options may include locking the pump/meter and/or refusing to deliver water and/or fines and/or the requirement to forego X times the water stolen. For unpaid water charges, it is the usual practice of Governments to withhold the supply of water until such time as these charges have been paid. This should suffice rather than further restricting trade.

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<sup>119</sup> WML, position paper submission, p. 2.

<sup>120</sup> SunWater, position paper submission, p. 2.

<sup>121</sup> NSWIC, position paper submission, p. 6.

<sup>122</sup> NFF, position paper submission, p. 4.

<sup>123</sup> VFF, position paper submission, p. 6.

It is the position of NFF that such issues are perhaps best dealt with via state management of water rather than included in the Basin Plan Trading Rules.<sup>124</sup>

WMI also submitted, on ACCC preliminary position 3–B, that the definition of breaches in water legislation would need to be clearly defined to ensure that trade was not inappropriately restricted.<sup>125</sup>

DSE suggested that preventing trades being restricted based on landholding status would cause two problems—first, for take-and-use licences in unregulated streams or groundwater, and, second, because Victorian legislation prevents allocation being traded to a non-landholder to prevent market manipulation.<sup>126</sup>

### 3.1.3. Discussion

Submissions received on the topic of ownership restrictions generally agreed with the ACCC preliminary positions, but raised a number of more specific concerns about how a Basin Plan water trading rule to that effect would operate. The ACCC considers each of these in turn.

#### **Appropriateness of ownership restrictions**

The ACCC firstly notes that the VFF supported the use of certain ownership restrictions and specifically stated that it did not support government and/or urban users participating in the water market to secure additional water for the environment. The VFF noted that the movement of water is a movement of economic activity.

The ACCC considers that having a restriction on government and/or urban water authorities participating in the water market would negatively affect the water market. As noted above, the ACCC considers that the identity of the purchaser should not typically be a factor in a trade. Ownership restrictions can create distortions because they prevent wider participation in the water market and therefore potentially restrict the ability of water market participants to sell their water access rights to buyers who value the water most highly.

The ACCC agrees with the VFF that the movement of water will also move economic activity, but considers that such movement is one of the goals of trade—moving water to its highest value use. Overall, the ACCC does not agree with the VFF’s submission, and considers that governments and urban water authorities should be able to participate in the water market.

The ACCC considers that, given the effects of ownership restrictions, it would be appropriate to define a Basin Plan water trading rule that prevents specific restrictions on the ownership of water access rights by particular classes of entities.

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<sup>124</sup> NFF, position paper submission, p. 4.

<sup>125</sup> WMI, position paper submission, p. 2.

<sup>126</sup> DSE, position paper submission, p. 3.

### **Rules-based water**

The South Australian Government submitted that certain environmental and urban water should be treated differently and should not be permitted to be traded. As noted above, the ACCC considers that trade of a water access right should not be restricted on the basis of the identity of the purchaser.

However, the ACCC recognises that not all physical water in water systems could be considered to be subject to a water access right (if it is not ‘held’ or ‘taken’). For example, some water is used as conveyance water or for base environmental minimum passing flows. Such water is typically accounted for as rules-based water, determined through the water resource planning process, that ensures a certain amount of flow in the system under different operating conditions. The ACCC is not proposing that rules-based water should be tradeable. Restrictions based on the purpose for which water has previously, is currently or is intended to be used are discussed in section 3.4, along with the South Australian Government’s submission noted above.

In relation to urban water, the ACCC understands that there may be a concern that an urban water authority may sell its water access rights on the market and then find that it has insufficient water supplies to supply its customers. The ACCC acknowledges this as a government issue and considers that trading restrictions to prevent the trade of water access rights held by urban authorities is not an appropriate way to manage this risk. Instead, the ACCC considers that such behaviour could be addressed through more specific governance arrangements.

### **Non-landholders**

Two submissions were made about the treatment of non-landholders: WMI submitted on non-landholders within IIO areas, while DSE made a submission on non-landholders more generally.

WMI submitted that infrastructure operators needed the option of requesting non-landholders holding water on the IIO’s bulk entitlement to move their right to water under an irrigation right onto a separate statutory water access entitlement. WMI expressed concern in its submission that it would be required to have a number of water entitlement-only account holders, and that such non-landholders were not of benefit to member irrigators and skewed trading figures by annually trading water out.

The ACCC does not consider that a water trading rule preventing ownership restrictions would prevent IIOs from *requesting* that non-landholders transfer their right to water under an irrigation right off the licence. To that extent, the ACCC does not consider that WMI’s concern is valid, and notes that this is essentially a trade in relation to irrigation rights. This issue is considered further in section 8.2. This section, however, relates to restrictions in relation to water access rights (which do not include irrigation rights).

DSE also submitted that water allocations should not be able to be traded to an ordinary person who is not an owner or occupier of land. It submitted that this was necessary in order to prevent market manipulation, especially in small systems. The ACCC does not consider that there is a compelling argument to require such a restriction. In particular,

the ACCC notes again its conclusions from the position paper that there is little evidence of water market baron behaviour.

The ACCC also notes that not all purchasers of allocation will necessarily want to use the available water on land. The ACCC therefore remains of the view that, where water rights are separated into access, use, works etc., they should be governed separately. It is also unclear why a non-landholder would be more likely to engage in market manipulation. The ACCC discusses unbundling further in section 0.

DSE also submitted that take-and-use licences are necessarily limited to landholders. The ACCC notes that these rights bundle the water access right and the use of that water access right, and therefore have different characteristics to fully unbundled water access rights. These rights are inherently linked to land through the presence of the use component. The ACCC accordingly has refined its position so that it applies where water access rights have been unbundled from land.

### **Water supply contracts issue**

SunWater submitted that it should be possible to require that a water access entitlement holder have a contract with an infrastructure owner, reflecting current Queensland requirements. This contract sets out, among other things, the terms and conditions under which SunWater or another operator will supply water to a water access entitlement holder and the charges that will apply.

The ACCC would have concerns with this requirement to the extent that it relates to delivery of water (as opposed to ongoing obligations for the recovery of bulk water charges and billing arrangements etc.).

The ACCC understands that the particular contract referred to by SunWater is between a water access entitlement holder and the bulk storage operator (in most cases, SunWater) and relates to the release of water, and to charging and billing arrangements relating to the possession of the water access entitlement (rather than delivery of water in relation to an irrigation network). To that extent, the existing approach may be acceptable. However, to the extent that a water access entitlement trade may be contingent on the buyer having a water delivery right contract, the ACCC considers that these arrangements would not be appropriate.

In the ACCC's view, there is little reason to require a water access entitlement holder to have a delivery contract, given that the entitlement and delivery have been split into separate instruments. The ACCC notes that a water access entitlement holder may not wish to have water delivered within an IIO's area at that time for a number of reasons—they may wish to use the water at some later time, trade the water on or use it for environmental purposes.

As such, the ACCC considers that any requirement for a water access entitlement holder to have a contract with an IIO as a condition of a trade of that water access entitlement should not extend to a contract for delivery of the water in relation to an irrigation network. The ACCC view is that such a requirement will effectively undo benefits of unbundling. The ACCC discusses unbundling further in section 0.

## **Foreign ownership**

The NSWIC and NFF both submitted that greater restrictions on foreign ownership were needed than the existing Foreign Investment Review Board (FIRB) requirements. NSWIC submitted that, while water asset acquisitions were subject to general rules on foreign acquisitions, they ought to be subject to the same criteria applying to real property. NFF submitted that, if more than 15 per cent of water is acquired by foreign investors, the FIRB should have a role.

The ACCC view in its position paper was that there is insufficient justification for additional restrictions on purchases of water by foreign parties over and above existing FIRB requirements. Water may be captured by the business investment provisions when the value of the gross assets is over \$219 million, but is not otherwise subject to any water specific requirements.<sup>127</sup> Only a limited number of specific assets, such as real estate, are subject to specific FIRB requirements.

The ACCC remains of the view that it should not specify further restrictions on foreign ownership above those already contained in the FIRB legislation. In particular, the ACCC does not consider it is clear that there are particular characteristics of water that would require greater restrictions on foreign investment. There is little benefit from simply holding water—the benefit of water largely derives from its use, which must occur within Australia. The ACCC also notes again that there is little evidence of a water baron problem. In any case, there would not appear to be any greater likelihood that foreign interests would be more likely to engage in such behaviour.

## **Restrictions for breaches of water legislation**

The VFF and NFF both queried the appropriateness of the ACCC's preliminary position 3–B, noting that there were alternative mechanisms to address a failure to address breaches of water legislation or money owing for water charges. WMI also suggested that the definition of breaches in water legislation would need to be carefully defined. The ACCC has further considered the appropriateness of this exemption, both as a position and as a specific Basin Plan water trading rule.

The ACCC considers that restricting trade to individuals who have breached relevant water legislation remains an appropriate enforcement tool for state agencies. However, given that other mechanisms are available, as noted by the VFF and NFF, the ACCC considers that restrictions on trade should not be considered the only, or best, option.

However, the ACCC does not consider that there is a need for a specific Basin Plan water trading rule—or exemption to a rule—permitting such restrictions. This is because the ACCC's proposal is for a Basin Plan water trading rule that forbids ownership being restricted based on a characteristic of the class of entity, rather than of the individual. As such, restrictions based on the actions of the individual would remain permitted under such a Basin Plan water trading rule.

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<sup>127</sup> The threshold amounts for such acquisitions were recently increased from the \$100 million identified in the ACCC's position paper to \$219 million. See *Reforming Australia's Foreign Investment Framework*, media release no. 089 from the Hon. Wayne Swan (Treasurer), 4 August 2009.

### 3.1.4. Draft advice

#### Rule advice (3–A)

The Basin Plan water trading rules should provide that there are no specific restrictions on the ownership of water access rights based on the characteristic of a particular class of entity such as non-landholders (unless use has not been unbundled from water access rights), environmental water-holders and urban water authorities.

## 3.2. Co-held water access rights

### 3.2.1. Background

A water access right may be held jointly by two or more parties. While this may often be family co-holdings, examples of such arrangements also include joint water supply schemes (JWSS) and syndicates, where one water access right (usually a water access entitlement) is held by a number of irrigators. The existence of co-holders may have implications for the manner in which the water may be traded. This is because trades and other dealings in water access rights are usually subject to requirements to obtain the approval of parties with an interest in the water access right.

Relevantly, the ACCC has previously noted that the existence of co-holdings may have implications for the operation of the water market rules.<sup>128</sup> Where this is the case, the ACCC noted that some participants in, for example, a JWSS, may not be able to take advantage of transformation should they wish to sell their part of a water access right.

The JWSS arrangement only exists in New South Wales and is essentially a product of historical New South Wales water legislation. JWSSs are not practically different from corporations or trusts in the way that water is diverted from rivers or delivered to irrigators; instead, they are essentially alternative arrangements that differently manage the sharing of water under a water access right.

The ACCC considered in its position paper that there was a potential issue with the need for co-holder approval to subdivide a water access right. Subdivision would be necessary to enable an individual to separate their share of a co-held water access right and have the ability to trade this independently of the remainder of the co-held right.

Generally, co-owner approval is required by the Basin states for trades or subdivision of co-held water access rights to take place.<sup>129</sup> The ACCC considered in its position paper that this would generally be an appropriate step before subdivision of a water

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<sup>128</sup> ACCC, *Water market rules—Advice to the Minister for Climate Change and Water*, December 2008, available on the ACCC website, [www.accc.gov.au](http://www.accc.gov.au), p. 13.

<sup>129</sup> South Australian Government, issues paper submission no. 2, p. 1; New South Wales Government, issues paper submission no. 21, p. 1; Department of Environment and Resource Management (Qld), issues paper submission no. 20, p. 2; *Water Management Act 2000* (NSW), s. 72A, although note the discussion later in this section; *Water Act 1989* (Victoria), ss. 33S(2)(b) and 33U(2), although note s. 33S(2)(a).

access right because it would provide certainty to co-holders about the nature of dealings with their co-held property right.

However, the ACCC also noted that obtaining such approval may require agreement from a large number of co-holders in larger JWSSs or similar schemes. This could be difficult (e.g. certain JWSSs can have 50 to 100 members) and hinder the ability of co-holders to trade their share of a water access right (including trade of a water allocation from a co-held water access entitlement) and may constitute a barrier to trade.

Such a barrier would be similar to the barrier caused by IIOs not allowing transformation of rights to water under irrigation rights. In that case, the water market rules make provision for parties to transform irrigation rights without the agreement of other irrigation right holders (subject to certain conditions and protections).

The ACCC noted in its position paper that there would be a disparity between different IIO structures if members of a co-holding (which includes most JWSSs) did not have similar exit options to those of IIO members who hold irrigation rights against the IIO and are therefore protected under the water market rules against the prevention or unreasonable delay of transformation and trade.

To the extent that the water market rules do not apply to particular JWSSs or other joint holdings, individuals would be required to rely on any mechanism available in state or territory legislation. Existing New South Wales legislation allows for subdivision of an individual's part of a co-held licence where the applicant has the consent in writing of at least a majority share of the co-holders under the licence, or where ordered by the New South Wales Supreme Court. However, given these options may not necessarily be realistic for some individuals, the ACCC considered in its position paper that Basin state governments should review the existing arrangements for trade or subdivision of a co-held water access right.

The ACCC noted in its position paper that any amendments to existing arrangements should not necessarily be applied to all co-holdings (e.g. existing arrangements may be sufficient where water access rights are co-held by related entities).

Given the above considerations, the ACCC reached the following preliminary positions about co-held water access rights:

- The ACCC considers that there may be barriers to trade generated by:
  - an individual who is a co-holder of a water access right having to obtain the approval of other co-holders and
  - the administrative process of obtaining the approval of other co-holders before subdivision or trade of the jointly held water access right.<sup>130</sup>

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<sup>130</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 23, preliminary position 3–C.

- The ACCC considers that Basin state governments should review the existing arrangements for trade or subdivision of co-held water access rights by members of a co-holding that are not related entities.<sup>131</sup>

### 3.2.2. Summary of submissions

The South Australian Government and the VFF both stated that they supported a revision of co-held water rights arrangements.<sup>132</sup> The GVIA also concurred with the ACCC’s preliminary positions, but submitted that this was an area in which a lot more thought and consultation were required.<sup>133</sup> The QFF similarly agreed with the ACCC’s preliminary positions but stated that ‘implications for state regulations should be checked’.<sup>134</sup>

The NSWIC submitted that the ACCC needs to address the issue of co-held water access rights in the water trading rules.<sup>135</sup> It submitted that the issues discussed by the ACCC in its position paper in relation to JWSSs also related to partnership and potentially trusts. NSWIC further submitted that:

It is the submission of NSWIC that a failure to deal with this issue will result in a clearly and inappropriately segmented market.

The ACCC must create Basin-wide rules that allow co-holders to remove their individual right, without third party impacts and must require other holders to provide consent unless it can be reasonably withheld. In creating these rules, the ACCC must consult—particularly with Treasury—to ensure that Capital Gains Tax events are not triggered on the remaining members of a partnership or partnership-like organisation.<sup>136</sup>

WMI similarly submitted that it was disappointing that the water market rules have limited scope and that the trading rules should address co-holdings:

The ACCC considers the State Governments should review existing arrangements for members of a co-holding that are not related entities. Many of these structures are complex, have small numbers of holders, have been in existence for many years and require significant legal advice. WMI suggests the trading rules must set down the rules where compliance is required and assistance must be provided to co-holders not the States to comply with the trading rules as determined.<sup>137</sup>

Conversely, DERM submitted that the water trading rules should not address the issue of co-holdings:

As a general principle governments should not interfere with how water access entitlements (WAEs) are held. Specific cases of large institutional holdings requiring reform should not be addressed via a broad trading rule in the Murray-Darling Basin

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<sup>131</sup> *ibid.*, preliminary position 3–D.

<sup>132</sup> South Australian Government, position paper submission, p. 3.

<sup>133</sup> GVIA, position paper submission, p. 4.

<sup>134</sup> QFF, position paper submission, p. 3.

<sup>135</sup> NSWIC, position paper submission, p. 6; VFF, position paper submission, p. 6.

<sup>136</sup> NSWIC, position paper submission, p. 6.

<sup>137</sup> WMI, position paper submission, p. 3.

Plan which could affect broader titling and trading arrangements of co-held entitlements.<sup>138</sup>

### 3.2.3. Discussion

The ACCC notes that submissions received generally agreed that there was a significant potential issue with co-held water rights. The ACCC continues to have concerns, as discussed in its position paper, about the potential for barriers to trade to arise from the arrangements for subdivision and exit of co-holdings in New South Wales. The disparity between the exit arrangements for co-holdings when compared to IIOs whose members hold irrigation rights against the IIOs and to whom the water market rules apply, is significant and largely arises from historical issues only. As such, the ACCC considers that it would be appropriate that there be a review of mechanisms to alter this situation. It notes that the potential difficulties with obtaining consent to a subdivision remain and may be a barrier to trade.

The ACCC notes suggestions from the NSWIC and WMI in their submissions that the water trading rules should specify a regime to allow the subdivision of an individual's share of a co-held water access right. The ACCC agrees that it would be preferable if a regime similar to that applying under the water market rules were applicable to co-held water access rights. However, the ACCC notes that as subdivision of a water access right does not of itself constitute a trade or transfer of that water access right, the issues relating to co-holdings would appear to be beyond the scope of the water trading rules. Therefore, the ACCC has not recommended a Basin Plan water trading rule but continues to recommend that Basin state governments should review existing arrangements.

The ACCC does note that any regime for the subdivision of a water access right would need to account for conveyance water requirements, similar to that specified in the water market rules.

### 3.2.4. Draft advice

#### **Recommendation (3–B)**

The ACCC recommends that Basin state governments review the existing arrangements for trade or subdivision of co-held water access rights by members of a co-holding that are not related entities.

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<sup>138</sup> DERM, position paper submission, p. 1.

### 3.3. Unbundled water rights

#### 3.3.1. Background

Water rights can be unbundled into the actual right to water (separate to land), the right to use water on land, the right to construct or operate water related infrastructure and the right to have water delivered by an infrastructure operator.

The unbundling of water rights can increase trading opportunities and thus provide water users with greater flexibility to manage their water access, water use, delivery and land-holding needs. However, where an approval to trade an unbundled water access right is conditional on an associated right, this can act as a barrier to trade.

In the position paper, the ACCC noted that where water access rights have been unbundled, any trade in the water access right should not be conditional on those associated rights such as use, works or delivery. In particular, a water access right trade should only be assessed against criteria relevant to the water access right trade rather than matters relating to areas dealt with under separate regimes. This should ensure that water trades are not delayed while other associated approvals are being obtained or otherwise addressed.

The ACCC's preliminary positions were:

- The approval of an application to trade a water access right should not be conditional on the purchaser holding, obtaining, trading or terminating:
  - a water delivery right, or
  - a water use approvalwhere these rights or approvals are governed through separate instruments or processes.<sup>139</sup>
- The approval of an application to trade a water access right should not be conditional on the purchaser being the owner or occupier of land.<sup>140</sup>

#### 3.3.2. Summary of submissions

Most submissions to the position paper supported the ACCC's preliminary position in relation to unbundled water rights.

The NSWIC and the GVIA both agreed with the ACCC's preliminary position on unbundled water rights.<sup>141</sup>

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<sup>139</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 27, preliminary position 3–E.

<sup>140</sup> *ibid.*, preliminary position 3–F.

<sup>141</sup> NSWIC, position paper submission, p. 6; GVIA, position paper submission, p. 4.

The SAFF noted that it supported the separation of water rights and:

... encourages any mechanisms or processes to reduce the red tape and speed up the approval process for transfers of water allocations (trades), either permanent or temporary. There needs to be a comprehensive communication plan to inform all water users of rights and what each component of a water right is.<sup>142</sup>

The VFF agreed with the ACCC's preliminary positions but noted that it does not believe that governments and urban water authorities should enter the water market.<sup>143</sup>

The South Australian Government noted that water rights have been unbundled in the South Australian area of the River Murray and approvals for trade in water access entitlements and water allocations do not involve considerations of site use, works approval or delivery capacity. However, it noted that:

If trade in water access entitlements occurs in surface water systems with farm dams, there is a link between entitlement trade and approval for the construction of, or adjustments to, the existing farm dam.<sup>144</sup>

WMI stated that it 'is unclear as to the definition of approvals being governed through separate instruments or processes'<sup>145</sup>, and noted:

Dealing with the water delivery right and water use approval will generally be a consequence of trading a water access right and an operator will require a decision to allow processing to all registers and property files etc.<sup>146</sup>

However, WMI agreed with the position that the approval of an application to trade a water access right should not be conditional on the ownership of land.<sup>147</sup>

On landholding restrictions, DERM noted:

In Queensland, when purchasing a WAE [water access entitlement] there are no restrictions related to land ownership. However, prior to unbundling water entitlements through the water planning process, provision exists to permanently transfer specified groundwater and interim entitlements from one landholding to another. This can only occur in certain areas where demand exists and where third-party impacts are manageable and there is confidence that there will be no environmental impacts. The timetable for water planning is not a matter for water trading rules. Hence, trading of these bundled entitlements should be exempted under any rule arising from position 3F.<sup>148</sup>

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<sup>142</sup> SAFF, position paper submission, p. 2.

<sup>143</sup> VFF, position paper submission, p. 7.

<sup>144</sup> South Australian Government, position paper submission, p. 6.

<sup>145</sup> WMI, position paper submission, p. 3.

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.*

<sup>148</sup> DERM, position paper submission, p. 1.

DSE noted certain circumstances in which water access entitlement trades are not permitted under that state's *Water Act 1989* unless the purchaser is a landholder:

Trade of a take and use licence (for unregulated streams or for groundwater) is necessarily limited to a landholder or occupier due to the 'use' component of the licence ... In addition, the Act [Victorian Water Act 1989] prevents trade of allocation to an ordinary person who is not the owner or occupier of land (s33U and s33V). This is designed to reduce the opportunity for any market manipulation of the important allocation market, especially in small systems, where the market may be very thin and open to such activity. Victoria sees value in continuing with this constraint and, anyway, could not comply with this without a change to its legislation.<sup>149</sup>

### 3.3.3. Discussion

Most MDB jurisdictions have already unbundled water access rights from other rights in regulated systems within their parts of the MDB. As mentioned in the position paper, the unbundling of water access rights can increase trading opportunities and potentially speed up trade approvals where trades in a particular right are not conditional on processes or approvals involving other separate rights.

It is the ACCC's view that a trade in a water access right should only be assessed against criteria relevant to that trade rather than matters relating to areas dealt with under separate regimes. In this way, water access entitlement trades should be approved independently from processes or approvals for water delivery rights, water use rights, works approvals and landholdings, where these rights have been unbundled.

This will allow the timely assessment of water access right trade applications. It will also mean that water purchasers may purchase water access rights at any time according to their individual requirements and would better allow them to effectively manage their water needs. If all rights and approvals associated with delivery, use and other matters were required before a water trade could be approved, this would delay the trade, increase transaction costs and reduce a person's flexibility to manage their water use.

Similarly, a person may wish to hold rather than use their water access right. This could be because the water is for environmental purposes or because the holder wishes to on-sell the water rather than use it themselves. Linking the ability to purchase water to holding a use approval or water delivery right in this context would effectively prohibit such persons from entering the water market.

The majority of submissions that addressed this issue supported the ACCC preliminary position in respect of trading unbundled water rights.

However, the South Australian Government noted that trades in water access entitlements in areas with farm dams may be conditional on approvals associated with a farm dam. The ACCC notes that South Australia is moving towards an unbundled system of water access rights that will include a water access entitlement, a water

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<sup>149</sup> DSE, position paper submission, p. 3.

allocation (corresponding to the water access entitlement), a water resource works approval and a site use approval.<sup>150</sup>

Presumably, the construction of or adjustment to a farm dam would be a matter to be addressed through the water resource works approval process. The ACCC acknowledges that farm dams may not be unbundled into the four components listed above; however, partial unbundling (separating the entitlement from the works and use approval) is feasible. In this context, while an irrigator may hold or purchase a water access entitlement, the irrigator will not be able to use water received under that entitlement unless the irrigator holds the necessary site use approval and any associated works approval.

Therefore, the ACCC view is that where such rights are unbundled, a trade in a water allocation or water access entitlement should not be subject to the purchaser (or seller) holding, changing or terminating a works or use approval. The position of the ACCC does not require unbundling where it has not yet occurred. Note that trade involving farm dams is discussed in more detail in section 6.6.

In response to WMI's submission, the definition of 'approvals being governed through separate instruments or processes' is any approval associated with a right (whether it is a water delivery right, use right or a right to operate works) other than the water access right being traded. In response to the second of WMI's comments above, the ACCC acknowledges that a trade in a water allocation or water access right may often correspond with changes in water delivery rights and water use rights. However, the ACCC argues that such changes should occur through separate assessment processes rather than the water allocation or water access entitlement trade being conditional on these processes having been completed. Thus the buyer and seller can choose to complete these separate approval processes, if needed, before, after or at the same time as the trade is processed.

In response to the DSE comments, the ACCC notes that the 'take-and-use' licences referred to are in fact bundled rights to the water access right and the use of that water access right. In this way, a trade in the bundled right will be subject to all the necessary approvals that are associated with this right. This demonstrates how bundled rights necessarily take longer to trade because of the need to complete all the associated approvals. For this reason a number of states are moving towards unbundled rights. The ACCC notes that this discussion and the draft advice in this section relates to unbundled water rights.

While the ACCC believes that the trade of unbundled water access rights should not depend on other associated unbundled rights, the ACCC is not necessarily advocating that water rights in all water systems be fully unbundled. The ACCC recognises that there can be substantial administrative, transaction and legal costs associated with moving to unbundled water access rights.<sup>151</sup> The unbundling of water from land and

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<sup>150</sup> See the DWLBC website, *Unbundling water rights*, at [www.dwlbc.sa.gov.au](http://www.dwlbc.sa.gov.au), accessed 15 December 2009.

<sup>151</sup> The specification and separation of water delivery rights are considered in section 7.1.

water use has been completed in most regulated systems within the MDB and the benefits from these reforms are widely acknowledged.

The ACCC reiterates its position paper stance on the trading of unbundled water rights. Most submissions to the position paper that addressed this issue supported this position. The only change is to expand the position so that where water access rights have been unbundled from works approvals, the trade of a water access right should also not be conditional on the purchaser holding, obtaining, trading or terminating such a works approval. Given the support for these positions and their potential impact on trade, the ACCC recommends that they be incorporated into the Basin Plan water trading rules.

### 3.3.4. Draft advice

#### **Rule advice (3-C)**

The Basin Plan water trading rules should provide that approval of an application to trade a water access right should not be conditional on the purchaser holding, obtaining, trading or terminating:

- a water delivery right, or
- a works approval, or
- a water use approval

where these rights or approvals are governed through separate instruments or processes.

#### **Rule advice (3-D)**

The Basin Plan water trading rules should provide that approval of an application to trade a water access right should not be conditional on the purchaser being the owner or occupier of land where water access rights are unbundled from land.

## 3.4. Restrictions based on the intended use of water

### 3.4.1. Background

Water access rights in some jurisdictions are linked to a specific intended use. For example, in Queensland, water allocations (equivalent to a water access entitlement) have an associated purpose—urban, agriculture or any. Some of these categories of water access rights are subject to particular trading restrictions. For example, in some Basin states water access rights intended for urban use cannot be traded and can only be used for urban purposes. In other instances, trades may only be permitted between two parties that will use the water for the same purpose. In this way, certain types of water access rights may not be able to be traded between different uses. Alternatively, water access rights with certain specific uses may not be able to be traded at all. In a number of Basin states, there are trading restrictions on water that is used for stock and domestic purposes (discussed in section 3.5), for urban purposes, outside an IIO's irrigation network and for environmental purposes.

In the position paper, the ACCC stated that trading restrictions based on the intended use of the water create inefficiencies. In particular, the water market provides an efficient mechanism for distributing water resources between competing uses. Restrictions on trade limit the efficiencies that can be realised through trade.

The ACCC also stated in the position paper that there does not appear to be any reason why water access rights intended for environmental uses should be subject to different trading rules than water used for other purposes.<sup>152</sup>

As such, the ACCC's preliminary position was that in the case of tradeable<sup>153</sup> water access rights:

- there should be no restrictions on trade due to the purpose for which the water has, is currently, or will be used
- exit fees (or fees of a similar nature) should not be charged by an IIO solely for the reason that a water access right has been traded and will be used outside of the IIO's irrigation network
- the purpose for which water arising from a trade is used should not be restricted as part of the trade approval process (water use on land should be separately addressed through use approvals).<sup>154</sup>

The ACCC also put forward the position that:

- There should be no exemptions from water trading rules for, or additional restrictions placed on, environmental water holders.
- Water access entitlements and water allocations held by environmental water holders should be treated no differently to water access entitlements and water allocations held by any other person.<sup>155</sup>

### 3.4.2. Summary of submissions

#### General comment

The SAFF agreed with the ACCC's preliminary positions in respect of intended use restrictions.<sup>156</sup> The Australian Dairy Industry Council and Dairy Australia (ADIC & DA) also agreed and noted:

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<sup>152</sup> The ACCC notes that water for environmental purposes in this context should not be taken to include any rules-based water, such as minimum flow requirements. The ACCC considers that water trading should occur within the bounds of these specified environmental conditions and this is discussed further in section 3.7.

<sup>153</sup> This position is relevant to water access rights that are of a kind that can be traded to other users, absent any trading restrictions based on the purpose for which the water has been, currently is, or will be used.

<sup>154</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 34, preliminary position 3–G.

<sup>155</sup> *ibid.*, preliminary position 3–H.

<sup>156</sup> SAFF, position paper submission, p. 2.

Restrictions on the trade of water due to its intended use, e.g. trade between environmental water holders and rural users, could stifle the development of innovative market mechanisms and water products.<sup>157</sup>

The VFF agreed with most of the ACCC's preliminary positions in respect of intended use restrictions but noted that it does not believe that governments and urban water authorities should enter the water market.<sup>158</sup>

The QFF agreed with the ACCC's preliminary positions but noted that 'implications for state regulations should be checked'.<sup>159</sup>

The GVIA generally agreed with the ACCC's preliminary positions on intended use restrictions as long as 'the process does not change the fundamental characteristics of the licence'.<sup>160</sup>

The NSWIC generally agreed with the ACCC's preliminary positions on intended use restrictions with the exception of critical human water needs (see sub-heading below).<sup>161</sup>

WMI argued that:

... the wording of "there should be no restriction on trade due to the purpose for which the water will be used" has potential ramifications if a broad interpretation is taken. This definition would include trade to an illegal activity.<sup>162</sup>

DERM noted:

Queensland WAEs [water access entitlements] specify a 'purpose' attribute for which water under the entitlement may be used. The purpose can generally be changed through an application process under rules in the relevant water plan. This applies to all WAEs other than those with a purpose of urban or town supply.

Water reserved or designated for the purpose of 'urban' is reserved for the supply of towns and cities by local councils. These are generally the only entitlements that are unable to be traded and this aims to meet government's role in ensuring security for supply for essential purposes (noting that it is still possible to trade from other purposes to urban) ...

If the purpose attribute was to be removed from WAEs, as regulator of water service providers DERM would still need to achieve the same end through another mechanism such as operator license conditions, requiring the development of a new type of entitlement in Queensland. Consequentially, legislative amendments and changes to existing planning framework and institutional arrangements would then be necessary, all at considerable cost. This will also be less efficient and less transparent than the current approach and result in some impacts on trade.<sup>163</sup>

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<sup>157</sup> ADIC & DA, position paper submission, p. 3.

<sup>158</sup> VFF, position paper submission, p. 7.

<sup>159</sup> QFF, position paper submission, p. 3.

<sup>160</sup> GVIA, position paper submission, p. 4.

<sup>161</sup> NSWIC, position paper submission, p. 7.

<sup>162</sup> WMI, position paper submission, p. 3.

<sup>163</sup> DERM, position paper submission, pp. 1–2.

### **Current restrictions**

The South Australian Government noted that there are currently some intended use restrictions in South Australian legislation and regulations:

- ... South Australia's Metropolitan water is non-tradeable due to its purpose of use.
- ... the Environmental Land Management Allocation is reserved for environmental purposes and is not transferred ...
- Water ... held for environmental purposes ... will have a condition, stating that the allocations ... need to be used for a specific environmental purpose.<sup>164</sup>

The QFF similarly noted:

... water resource plans in the QMDB [Queensland Murray–Darling Basin] prohibit changing entitlements from urban to other purposes to ensure that water supply entitlements needed for towns in rural areas are preserved. In other areas, such as South East Qld, only one purpose is defined for all entitlements (urban and rural) but restrictions apply to conversions. This issue must be addressed in the preparation of each catchment water resource plan and should not be regulated Basin wide.<sup>165</sup>

### **Critical human water needs**

The NSWIC generally agreed with the ACCC's preliminary positions but noted that water access entitlements associated with critical human water needs or stock and domestic water should not be able to be traded:

... neither critical human needs water nor stock and domestic entitlements ought to be tradeable. To allow such trade clearly debases the concept of the entitlement in the first instance ...<sup>166</sup>

Similarly, the NFF noted:

The NFF supports there are some limit to the tradability of water rights that underpin critical human needs. This will most likely to a minimum proportion of the right owned by individual urban water authorities. It may be that this is the portion that is untradeable. Alternatively, the urban water authority may underpin their water requirements with a robust drought plan approved by the relevant Minister. Water surplus to requirements could be sold on an annual basis.

NFF does not support the permanent sale of urban water entitlements. The premise is that urban water authorities can go back to the Minister to have additional water rights granted (including on the grounds of forecast population increases). This comes at the impact to other entitlements holders (i.e. third party rights). Where urban authorities require additional rights (for critical human needs or population forecasts), urban water authorities ought to be required to enter the permanent market to acquire these requirements. The largesse of the Minister must be removed as a power.<sup>167</sup>

Also in relation to critical human water needs, the South Australian Government noted:

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<sup>164</sup> South Australian Government, position paper submission, p. 6.

<sup>165</sup> QFF, position paper submission, p. 3.

<sup>166</sup> NSWIC, position paper submission, p. 7.

<sup>167</sup> NFF, position paper submission, p. 5.

There will always be a tension between a trade of entitlements or allocations free of purpose, guaranteeing critical human needs and environmental in dry periods.<sup>168</sup>

### **Exit fees (or fees of a similar nature)**

On the position mentioning exit fees, WMI noted that the issue of exit fees ‘is covered more than adequately in the water market rules and the water charge termination fee rules’.<sup>169</sup> The QFF agreed that this issue has been addressed in the market rules.<sup>170</sup> The South Australian Government also noted the ‘application and make up of termination fees is covered by the Water Market Rules—Termination Fees. Termination fees have replaced exit fees’.<sup>171</sup>

DERM noted:

Rules for the management of exit fees were developed through the CoAG Exit Fees Working Group and are set out in the ACCC’s “A regime for the calculation and implementation of exit, access and termination fees charged by irrigation water delivery businesses in the southern Murray Darling Basin” November 2006. This the agreed method for addressing exit fees, and any changes to the agreed approach should be pursued through the national water reform process, and not through trading rules for the MDB.<sup>172</sup>

### **Environmental water**

The NSWIC noted its support for the ACCC’s positions on environmental water holders:

Aside from these observations [regarding critical human needs, as above], NSWIC concurs with the positions of the ACCC. In particular, we express our strong support for the position in respect of entitlements held by the Commonwealth Water Holder; viz, that they must not be exempted from the water trading rules and that they should be treated no differently from privately held entitlements.<sup>173</sup>

On environmental water holders, WMI noted:

WMI seeks clarification on whether this wording should include there will be no additional benefits extended to environmental water holders. A clear example may be where sheparding of water occurs where existing water access licences holders in affected valleys are not entitled to trade from these systems despite the sheparding occurring.

The environmental water holder may also have self imposed restrictions on water trading such as banning temporary trades of water for financial gain as the purpose is to provide environmental flows and benefits and the trading rules will need to provide discretion to the environmental water holder.

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<sup>168</sup> South Australian Government, position paper submission, p. 6.

<sup>169</sup> WMI, position paper submission, p. 3.

<sup>170</sup> QFF, position paper submission, p. 3.

<sup>171</sup> South Australian Government, position paper submission, p. 6.

<sup>172</sup> DERM, position paper submission, p. 2.

<sup>173</sup> NSWIC, position paper submission, p. 7.

At present the agreement between Victoria and the Commonwealth and the Memorandum of Understanding between NSW and the Commonwealth would breach this position as restrictions have been placed on how much water the environmental water holder can purchase.<sup>174</sup>

Also on environmental water holders, the QFF agreed with the ACCC's preliminary position, but noted:

... the environmental water holder will need to comply with an environmental watering plan and accordingly any water that the holder may have available to trade permanently would have to be approved as not required to meet the requirements of the plan. Temporary trades must also not limit the ability of the environmental water holders to meet plan requirements.<sup>175</sup>

On environmental water, the South Australian Government noted:

It could be advantageous to have the ability to place restrictions on the trading of environmental water under certain strictly defined and enforced circumstances.<sup>176</sup>

### 3.4.3. Discussion

The ACCC's consideration of restrictions based on the intended use of water is concerned with restrictions imposed through trading rules, rather than non-tradeability as an inherent characteristic of the water access right itself (as may be the case with rules-based environmental water, or a riparian stock and domestic right<sup>177</sup>). That is, where a right is tradeable, the trade of this right should not depend on the purpose for which the water has been, is currently or will be used.

The ACCC sees little reason for restricting trade between water access rights according to the purpose for which water is used either before or after the trade has occurred. Where a resource is scarce, the market provides an efficient mechanism for distributing that resource between competing uses. Restrictions on water access right trade because of historic, current or intended use of water act as unnecessary barriers to trade and limit the efficiencies that can be realised through trade.

Stakeholders put forward varying opinions on the intended use restrictions. In general, there appeared to be support for the ACCC's position that water trade should not be restricted by the intended use of the water access right. However, some of the state departments that made submissions on this issue noted that state legislation in South Australia, Queensland and Victoria did in fact limit trade in water access rights where such rights had intended purposes such as urban or environmental uses.<sup>178</sup>

The ACCC notes that removing restrictions based on intended use does not change the ability of individual organisations to make decisions about trading their water access rights. Urban and environmental water managers can still make policy decisions about

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<sup>174</sup> WMI, position paper submission, p. 4.

<sup>175</sup> QFF, position paper submission, p. 4.

<sup>176</sup> South Australian Government, position paper submission, p. 6.

<sup>177</sup> See section 3.5 of this paper for a discussion of stock and domestic water use.

<sup>178</sup> The ACCC responded to DSE's submissions on these positions in section 3.1.

trading their water access rights. A trade restriction is arguably not the appropriate way to ensure these water users are managing their water in line with state policy.

In relation to these current restrictions, the ACCC does not believe that the Basin Plan water trading rules should necessarily be limited to rules that already comply with current state legislation and regulations. Restricting the trade of tradeable water access rights because of their intended use creates inefficiencies as mutually beneficial trades fail to be realised. Therefore, the ACCC sees benefit in removing restrictions on water access entitlement trades associated with the water's past, present or future intended use even where this will require legislative amendment. The ACCC does not believe that any requirement for legislative amendments is a strong enough concern to warrant maintaining the status quo.

Two stakeholders believed that there should be an exemption to the ACCC's position for critical human water needs. They argued that a minimum volume of water should not be able to be traded to ensure that critical human water needs are met. The ACCC understands that urban water authorities or governments might wish to retain (i.e. not trade) a portion of their water access right to ensure critical human water needs are met. The ACCC is not proposing rules that would override this choice. Any water access right holder can choose whether to use, trade, forfeit or (where available) store that water (either when it is allocated to a water access right or in an ongoing sense). The ACCC is instead proposing that there be no blanket rule which prohibits the trade of a water access right simply because there is an associated intended use.

Therefore, where water access rights are important for delivering critical human water needs, limits on tradability of such rights should be addressed separately from the water trading rules (e.g. in the licence conditions of an urban water authority) and should still permit the (temporary) trade of any surplus water allocations. Minimum service standards associated with urban water consumption is an issue of broader governance.

Similarly, an environmental water holder may have to operate under its own set of policy rules and objectives that mean it will choose to use, trade, store or forfeit water to achieve different outcomes. In this regard the ACCC is only proposing that environmental water holders should be subject to the same water trading rules as all other holders of water access rights. The tradeability of the water access right should not be determined by the intended use of the water but instead by the decisions of the holder of that water access right and general water trading rules. Most stakeholders addressing this issue supported this position.

Three interested parties submitted that the Basin Plan water trading rules should not address the issue of exit fees because these are dealt with in the water market rules and water charge (termination fees) rules. The ACCC notes that the market and water charge (termination fees) rules address the issue of transforming entitlements to water under an irrigation rights into water access entitlements and what charges may be levied where an irrigator chooses to terminate access to an operator's network.

The ACCC acknowledges that the water charge (termination fees) rules, and the water market rules already address concerns about exit fees; however, the ACCC notes that

fees of a similar nature have the potential to unreasonably restrict trade in situations where IIOs are not subject to these rules.<sup>179</sup> As such, the ACCC view remains that it is desirable for the Basin Plan water trading rules to prohibit charges or fees being imposed by an IIO on the basis that a water access right has been traded and water will be used in a location outside the IIO's irrigation network. Peoples' decisions regarding their water access rights should remain decoupled from their decisions regarding their level of access to particular irrigation networks.

Given stakeholders' comments and the above discussion, the ACCC is proposing that the first position be incorporated into the Basin Plan water trading rules. The ACCC considers it is unnecessary for the second position—although a sound principle—to be incorporated in the Basin Plan water trading rules because these matters should be addressed through the first position, if incorporated into the Basin Plan water trading rules.

#### 3.4.4. Draft advice

##### **Rule advice (3–E)**

The Basin Plan water trading rules should provide that, in the case of tradeable water access rights:

- there should be no restrictions on trade due to the purpose for which the water has, is currently, or will be used
- fees or charges should not be charged by an IIO solely for the reason that a water access right has been traded and will be used outside the IIO's irrigation network
- the purpose for which water arising from a trade is used should not be restricted as part of the trade approval process (water use on land should be separately addressed through use approvals).

##### **Recommendation (3–F)**

The ACCC recommends that:

- there should be no exemptions from water trading rules for, or additional restrictions placed on, environmental water holders.
- water access entitlements and water allocations held by environmental water holders should be treated no differently to water access entitlements and water allocations held by any other person.

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<sup>179</sup> For example, water market rules apply primarily in New South Wales and South Australia.

## 3.5. Stock and domestic water use

### 3.5.1. Background

Generally speaking, stock and domestic water is provided through either an unlicensed statutory water access right that is not subject to a volumetric limit and cannot be traded, or through a licensed water access right which in some cases may be designated as only for stock and domestic uses.<sup>180</sup>

In the position paper, the ACCC used the term ‘basic landholder right’ to refer to unlicensed statutory stock and domestic rights; however, this term is usually only used in New South Wales. As such, the ACCC’s advice from now on will refer to these unlicensed statutory stock and domestic rights as ‘unlicensed rights’.<sup>181</sup>

The ACCC noted in its position paper that issuing new stock and domestic rights, or allowing stock and domestic use to increase may erode the reliability of other water access right holders. To protect against such third party impacts, the position paper noted that new stock and/or domestic water requirements (e.g. where a property is subdivided for residential development) should arguably be met through the water market rather than the creation of new stock and domestic rights.

Currently rights for both stock and domestic purposes are generally combined into the one water access right. However, the ACCC considered that water for stock purposes arguably should not have the same status as water for domestic consumption. The position paper also noted that the MDBA will consider the provision of critical human needs water as part of the broader Basin Plan.

Stock and domestic rights are usually not tradeable. However, the position paper noted the example of stock and domestic rights<sup>182</sup> in irrigation districts in northern Victoria that were converted into water access entitlements when water rights in northern

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<sup>180</sup> See *Water trading rules—Position paper*, September 2009, section 3.5.1 and appendix 3 for further information.

<sup>181</sup> These rights may be referred to as **basic landholder rights** (New South Wales), **private rights** (Victoria) or **riparian rights** (Queensland and South Australia). The ACCC notes that under the common law, riparian rights give the owner of land fronting a river or stream or through which a river or stream flows, to enjoy and use the water naturally flowing through the bed of the river or stream (*Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles* [1895] AC 587 ; [1895–9] All ER Rep 984). However, common law riparian rights have been abolished throughout the MDB—see s. 393, *Water Management Act 2000* (NSW); s. 124(8), *Natural Resources Management Act 2004* (SA); s. 8(7), *Water Act 1989* (Vic); s. 19, *Water Act 2000* (Qld); and s. 7, *Water Resources Act 2007* (ACT).

<sup>182</sup> **Prior stock and domestic rights** were converted into water access entitlements under clause 1, schedule 15, *Water Act 1989* (Vic). A prior stock and domestic right is a right that existed immediately prior to unbundling against a Victorian water authority to provide the service of delivering water to the owner or occupier of a serviced property in its irrigation district under s. 222(1)(a)(ii) of the Victorian Water Act. Private [riparian] rights under s. 8 of the Victorian Water Act, to which entitlement holders may separately have access, were not made tradeable.

regulated systems were unbundled on 1 July 2007. These water access entitlements can be traded like any other water access entitlement.<sup>183</sup> In extreme circumstances (where water allocations may be insufficient to meet critical needs), Victorian water access rights may be qualified to ensure that critical water needs are met.<sup>184</sup> In South Australia, licensed stock and domestic water rights<sup>185</sup> were also converted into tradeable water access entitlements in the River Murray prescribed system, when water access rights in this system were unbundled on 1 July 2009.<sup>186</sup>

In the position paper, the ACCC noted that stock and domestic rights could be made tradeable where certain arrangements were in place. In particular, the ACCC noted that existing stock and domestic rights would need to be converted into water access entitlements, and adequate safeguards would be required to meet critical human needs in the event of very low allocation levels. The ACCC further noted that a decision to enable trade of stock and domestic rights would need to be supported by a Basin state requirement that all new or expanded stock and domestic water needs be met by a water access entitlement (either already held or sourced through the market). That is, there would no longer be a specific stock and domestic right (as a water access entitlement, a licensed right or unlicensed rights) available as a matter of course.

The ACCC, in its position paper, put forward the following preliminary positions:

- Both stock and domestic rights could be made tradeable where existing stock and domestic rights are converted into water access entitlements, provided that there are adequate safeguards in place to meet critical human needs in the event of very low allocation levels, and that no new stock and domestic rights are created.<sup>187</sup>
- New stock and/or domestic water needs should be sourced through the market, rather than simply issuing new stock and domestic rights.<sup>188</sup>

### 3.5.2. Summary of submissions

The South Australian Government submitted that in South Australia where stock and domestic water has been prescribed (unbundled), it is licensed and tradeable. However, the South Australian Government noted that given its nature as domestic water, there

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<sup>183</sup> Clause 4, schedule 15, Water Act (Vic).

<sup>184</sup> DSE, *Qualification of rights to water*, available online at [www.ourwater.vic.gov.au](http://www.ourwater.vic.gov.au); viewed 25 September 2009.

<sup>185</sup> This does not refer to riparian rights under subs. 124(4) of the *Natural Resources Management Act 2004 (SA)*, to which the entitlement holders may separately have access

<sup>186</sup> South Australian Government, position paper submission, p. 7; Water access entitlements are issued under s. 146, *Natural Resources Management Act*. For information on unbundling in South Australia, see South Australian Government, *Explaining water access entitlement classes*; available on the Department of Water, Land and Biodiversity Conservation website, [www.dwlbc.sa.gov.au](http://www.dwlbc.sa.gov.au); viewed 13 November 2009.

<sup>187</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 39, preliminary position 3–I.

<sup>188</sup> *ibid.*, preliminary position 3–J.

has been very little trade of this category of water access right.<sup>189</sup> The South Australian Government further submitted that where riparian (unlicensed) rights are the source of stock and domestic water, it has not been licensed and is thus not tradeable.<sup>190</sup>

The SAFF considered that stock and domestic rights should not be tradeable. The SAFF noted that while stock and domestic rights along the River Murray are tradeable, for the rest of South Australia and its catchments and water resources, stock and domestic rights are not tradeable. The SAFF further submitted that:

The security of other water uses, both licensed and non-licensed, have the potential to be undermined in catchments or water resource areas where stock and domestic use forms a significant component of water use, or where water use is increasing. Rather than issuing water access rights to stock and domestic users, a better approach could address this issue through water allocation planning. Licensing for stock and domestic users would create issues with regards to metering and potential issues for future landholders where stock and domestic entitlements have been traded away. SAFF supports NFF in their previous submission [to the ACCC issues paper] that “this asset (stock and water rights) must remain bundled with the land.”<sup>191</sup>

However, the NFF submitted:

... [A]s a high-level principle, NFF supports trade of water right providing there are no third party impacts to existing entitlement holders. If the ACCC approach is to recommend that stock and domestic water supplies are converted to entitlements and made tradeable, this fundamental principle must be applied. Where this cannot be guaranteed, then the tradability of stock and domestic (or other) water cannot be supported.

In particular, the NFF supports that any new and/or additional stock and domestic water requirements (e.g. as a result of subdivisions) must be acquired from the market.<sup>192</sup>

The VFF disagreed with the ACCC’s preliminary position that stock and domestic rights could be made tradeable and noted that stock and domestic water is not a water share in Victoria, except for regulated systems in the north, and therefore cannot be traded. The VFF submitted that in any case, the cost of metering all the point sources of stock and domestic water would be astronomical and impractical. The VFF further submitted that accurate metering and recording of stock usage from a farm dam is impossible.<sup>193</sup>

The VFF also disagreed with the ACCC’s preliminary position that new stock and/or domestic water needs should be sourced through the market. The VFF submitted that as a fundamental principle, it opposed any attempts to remove existing property rights without adequate compensation. The VFF further submitted that it was opposed to any change that would limit or discourage farmers from sourcing reasonable stock and domestic supplies.<sup>194</sup>

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<sup>189</sup> South Australian Government, position paper submission, p. 6.

<sup>190</sup> *ibid.*, p. 7.

<sup>191</sup> SAFF, position paper submission, p. 3.

<sup>192</sup> NFF, position paper submission, p. 6.

<sup>193</sup> VFF, position paper submission, pp. 7–8.

<sup>194</sup> *ibid.*, p. 8.

The QFF submitted that:

Any regulation must not bind a jurisdiction to create tradeable entitlements for existing or new stock and domestic water rights.<sup>195</sup>

SunWater noted that under the Queensland planning framework, riparian (unlicensed) and groundwater stock and domestic access is generally not in the form of a tradeable allocation (water access entitlement) but is defined as a statutory right under that state's *Water Act 2000*. SunWater also noted that it assumed the ACCC's preliminary position did not require wholesale conversion of such statutory rights.<sup>196</sup>

On the ACCC's preliminary position that both stock and domestic rights could be made tradeable, DERM submitted that:

It is assumed that that this preliminary position is specific to S&D in regulated schemes. Although there may be some merit in allowing trade in S&D in regulated schemes, trading of unregulated S&D is a risk that needs to be managed and Queensland is already doing this via the water planning framework. It is considered that unregulated S&D should not be tradeable.

Any trade in unregulated S&D will also result in higher administrative, compliance and planning costs.<sup>197</sup>

On the ACCC's preliminary position that new stock and/or domestic rights should be sourced through the market, rather than simply issued as new stock and domestic rights, DERM submitted that:

This is a planning issue. The creation of new S&D is manageable with proper planning processes in Queensland. The *NWI Preliminary Guidelines for Water Planning and Management* will deal with interception activities such as S&D and it is appropriate that this issue continued to be address through this forum.<sup>198</sup>

The GVIA submitted:

GVIA has some sympathy with the ACCC position, but is concerned that access to stock and domestic water is currently not clearly defined, or strongly enough regulated to ensure water users would not be able to sell off entitlements but still access stock and domestic water through riparian or other rights. GVIA believes this area requires further work before there is comprehensive trade of stock and domestic rights. There is certainly an issue where new subdivisions are sourcing water through a stock and domestic right, and the logically [sic] way to manage that growth would be through the trade of well defined Stock and Domestic entitlement.<sup>199</sup>

The ADIC & DA submitted that additional stock and domestic water rights should not be allocated within the MDB, because an increase in the volume of these rights will diminish the availability of water to other existing right holders. The ADIC & DA also agreed with the ACCC's preliminary position that new stock and domestic

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<sup>195</sup> QFF, position paper submission, p. 4.

<sup>196</sup> SunWater, position paper submission, p. 3.

<sup>197</sup> DERM, position paper submission, p. 2.

<sup>198</sup> *ibid.*

<sup>199</sup> GVIA, position paper submission, pp. 4–5.

requirements as a consequence of property subdivision should be met through the water market rather than by allocating additional stock and domestic water rights.<sup>200</sup>

However, the ADIC & DA submitted that it was not proposing the cessation of additional stock and domestic water rights on groundwater, surface water or other systems outside the MDB, and that the allocation of stock and domestic rights should be considered on a catchment or system basis.<sup>201</sup> The ADIC & DA further submitted that its position did not imply encouragement of conversion of stock and domestic rights to water access entitlements in those systems (e.g. groundwater, unregulated systems and some regulated systems) where the right to water, its use, delivery and associated works have not currently been separated.<sup>202</sup>

DSE submitted that there are problems with the ACCC's preliminary position that stock and domestic rights should not be issued but rather sourced from the market. In particular, DSE submitted:

Firstly, the basis statement in the position is about [the] 'issue' [of stock and domestic rights] which is not a trading concept. Even if it is a good resource management principle, it is misplaced in the trading rules.

Secondly, there are situations (some groundwater systems) that are not fully allocated according to the Act [*Water Act 1989 (Vic)*] - these should not be constrained.

There are also 'private rights' (riparian rights) to water in the Act s. 8 where a right to stock and domestic water exists without any issue or trade being required. Victoria therefore cannot comply with this position without a fundamental review of this right, and a consequent change to legislation.<sup>203</sup>

The NIC submitted:

NIC is cautious about the trading of stock and domestic water. We contend that this water, along with that for critical human needs is provided for a specific purpose and should remain tied to land. Given the small volumes associated with stock and domestic entitlements, we find it hard to see what would be gained by making those entitlements tradeable.<sup>204</sup>

WMI submitted:

WMI remains firm in its opinion that stock and domestic water should not be tradeable. If stock and domestic entitlement were converted into general water access licences conversion factors would need to be applied while the entitlement would still retain a higher priority of allocation. There are no adequate safeguards in a market to ensure water for critical human and animal consumption needs. As outlined in the NSW Irrigators Council submission stock will need water and will take it regardless of entitlement. There are also "non-licensed" and unmetered riparian rights in NSW which may then be substituted for traded stock and domestic water.<sup>205</sup>

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<sup>200</sup> ADIC & DA, position paper submission, p. 3.

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*, p. 4.

<sup>203</sup> DSE, position paper submission, p. 3.

<sup>204</sup> NIC, position paper submission, p. 3.

<sup>205</sup> WMI, position paper submission, p. 4.

Similarly, NSWIC submitted:

The ACCC suggests that stock and domestic rights “could” be made tradeable. NSWIC concurs that, indeed, they could. This does not, however, justify taking that action. In particular, the [position] paper argues that farmers without access to an entitlement for stock and domestic purposes must enter into the market to obtain it. Whilst this is clearly logical, it simply isn’t practical. Australia is not ready to watch animals or people physically suffer or, more seriously, die, from lack of water. Moreover, enforcement officials are unlikely to be able to control the access of an animal to a critical requirement for its survival ... and are most unlikely to stop humans from drinking or engaging in basic sanitary actions.<sup>206</sup>

Furthermore, in its ‘Basic landholders’ rights’<sup>207</sup> paper (provided as an attachment to its submission) the NSWIC states that it maintains a basic philosophy of ‘if you can’t measure it, you can’t manage it.’ In this paper, NSWIC notes that in New South Wales:

Presently a works approval is not required when accessing a BLR.<sup>208</sup> The result is that there are no accurate records of how many BLR pumps exist, no restrictions in place for pump size or pipe size and no requirements for metres to measure the amount of water taken.

With no effective management of BLR, the water is accrued to losses rather than to extraction.

...

NSWIC submits that an accurate understanding of capacity and extraction of BLR is required in order to manage our river systems for the benefit of all users.<sup>209</sup>

In its paper on basic landholders’ rights, the NSWIC supported the establishment and enforcement of reasonable use guidelines as a vital part of implementing a basic landholder rights policy. In particular, the NSWIC submitted that a formula defining reasonable use must be developed in consultation with stakeholders, and that guidelines for both what is and is not reasonable use must be published before enforcement.<sup>210</sup>

The NSWIC further submitted that the reasonable use amount could be set in a number of ways, primarily by megalitres per hectare or pump and/or pipe size. However, while the NSWIC recognised that either of these would be best managed by a requirement for metering, it submitted that the significant expense that would be incurred by such a measure would not justify the benefit accrued and for that reason it did not support a requirement for metering all stock and domestic water. Where stock and domestic water is taken through metered works (such as an irrigation pump), the NSWIC submitted that the use of water from the unlicensed right should also be measured.<sup>211</sup>

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<sup>206</sup> NSWIC, position paper submission, pp. 8–9.

<sup>207</sup> As mentioned above, the ACCC refers to New South Wales basic landholder rights as an **unlicensed right** for the purposes of this advice.

<sup>208</sup> Landholder not authorised to construct a dam or water bore without a works approval.

<sup>209</sup> NSWIC ‘Basic Landholder Rights’ paper, position paper submission, p. 30.

<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*, pp. 30–31.

### 3.5.3. Discussion

Although stock and domestic rights are included in the definition of ‘water access rights’ and consequently ‘tradeable water rights’ under the Act<sup>212</sup>, in many cases stock and domestic rights are not a type of right which is inherently tradeable. For example, unlicensed rights are not tradeable in any Basin state. It is doubtful that the Basin Plan water trading rules could change the nature of these rights to make it possible to trade them.

However, as mentioned above, in South Australia and Victoria some stock and domestic water rights have been converted into tradeable water access entitlements. In these cases an occupier of land who has sold a water access entitlement that was previously a stock and domestic right may still have access to water for stock and domestic purposes through their unlicensed rights. In particular, they will still have the right to take water for stock and domestic purposes from a natural waterway that adjoins or runs through, a well or bore on, or surface water from their land for stock and domestic purposes.<sup>213</sup>

The ACCC also notes that water extracted by water users to meet their stock and domestic water requirements is not usually metered in the MDB. As such, it is difficult to accurately quantify the volume of water extracted under stock and domestic rights.<sup>214</sup>

This raises the issue that, if a person sells a water access entitlement which was formerly a stock and domestic right, they may still be able to access the same amount of water through their unlicensed rights. As such, where such stock and domestic rights are made tradeable, there may be an increase in extractions of water for stock and domestic purposes through other rights that do not have a volumetric limit, such as unlicensed rights, should these rights persist. This risk is identified in a number of submissions to the position paper.<sup>215</sup>

As discussed in the position paper, the ACCC considers that stock and domestic rights should not be turned into tradeable water access entitlements where the owner of the right is able to sell the right but still has access (e.g. through an existing bore) to an unlimited volume of water for stock and domestic purposes through a less well defined right (e.g. unlicensed rights). In other words, the ACCC considers stock and domestic rights could be made tradeable where **all** stock and domestic rights (including unlicensed rights) are replaced with a water access entitlement and adequate safeguards are in place for periods of very low water allocations.

Further, as noted in the position paper, a decision to enable trade of stock and domestic rights in a given area would need to be supported by a Basin state requirement that all new or expanded stock and domestic water needs in that area be met by a water access

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<sup>212</sup> Section 4 of the Act.

<sup>213</sup> Subsection 124(4) of the *Natural Resource Management Act 2004* (SA); Section 8 of the *Water Act 1989* (Vic); DSE, position paper submission, p. 3; South Australian Government, position paper submission, p. 7.

<sup>214</sup> For information on metering, see section 3.11.

<sup>215</sup> See WMI, position paper submission, p. 4; GVIA, position paper submission, p. 4.

entitlement (either already held or sourced through the market). That is, a specific stock and domestic right (as a water access entitlement or unlicensed right) would no longer be available as a matter of course. An exception to this is where a water resource is not fully allocated<sup>216</sup> and it is considered appropriate to allocate additional stock and domestic rights as part of the water resource planning process, rather than through the market.

Consistent with the position paper, the ACCC considers this requirement (to source new stock and/or domestic water needs through the market) should apply even when stock and domestic water rights are not made tradeable.<sup>217</sup>

Where the sale of a water access right would leave a property without water for stock and domestic purposes, it would be open to the landholder (or future purchaser of the land) to purchase a water access right to meet any future stock and domestic needs.

The ACCC's recommendations would clearly constitute a major reform to current stock and domestic water arrangements. The ACCC considers that the Basin Plan water trading rules are not the appropriate mechanism to pursue such reform.

As noted in the position paper, the Basin Plan will consider critical human water needs. However, the ACCC also recognises that if the circumstances in which people can access water for critical human needs are not tightly defined, this will affect the extent to which the benefits of making stock and domestic water rights tradeable are realised.

#### 3.5.4. Draft advice

##### **Recommendation (3–G)**

The ACCC recommends that stock and domestic rights (including special purpose water access entitlements and unlicensed statutory stock and domestic rights) could be turned into volumetric water access entitlements that are tradeable where:

- no new stock and domestic rights (of any kind) will be issued, except where a water source is not fully allocated and it is considered appropriate to allocate additional stock and domestic rights as part of the water resource planning process
- adequate safeguards are in place to meet critical human water needs in the event of very low allocation levels.

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<sup>216</sup> A water source is considered to be **overallocated** if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights at a given time **exceeds** the environmentally sustainable level of take for those water resources. See s. 4 of the Act.

A water source could therefore be considered to be **not fully allocated** if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights in a given time is **less than** the environmentally sustainable level of take for those water resources.

<sup>217</sup> See preliminary position 3–J of the position paper.

### **Recommendation (3–H)**

The ACCC recommends that in fully or overallocated water sources, new stock and/or domestic rights (water access entitlements, riparian rights or otherwise) should not be issued. Where a water source is fully allocated, water for new stock and/or domestic needs should be sourced through the market.

## **3.6. Trade into and out of the MDB**

### **3.6.1. Background**

A number of water supply arrangements involve the physical movement of water into and out of the MDB. For example, there are major diversions from the Snowy Hydro works into the Murray and Murrumbidgee systems, as well as pipelines to divert water from the MDB to provide for regions of South Australia outside the MDB (including Adelaide).

The ACCC position paper noted that the extraction point for MDB water resources remains within the MDB. Infrastructure is used to then divert (transport) this water to areas outside the MDB. Therefore, the ACCC position paper stated that trade of this water should be subject to the general trading rules governing the movement of water to a new point of extraction. These trading rules ensure third party interests (including the environment) are appropriately protected. Determining the purpose or location of the water's use once it is extracted should not be determined through the trading rules.

The ACCC position paper also noted that the new sustainable diversion limit for the MDB will apply to extractions from MDB water resources (whether the water will actually be used within the MDB). As such, a trade 'out of the MDB' should not lead to extractions beyond any sustainable limits set for the MDB water resources.

The ACCC, in its position paper, put forward the following preliminary position:

- A water access right trade should not be refused on the basis that the water will be used in an area outside of the MDB (and the use of water inside the MDB should not be restricted solely because it was taken from a water resource outside of the MDB). Relevant use approvals would be required in any case.<sup>218</sup>

### **3.6.2. Summary of submissions**

The GVIA submitted it concurred with the ACCC's position and stated:

... the important fact is where the water is extracted, rather than where it is used, and the trade must comply with the rules that govern the area where extraction occurs.<sup>219</sup>

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<sup>218</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 42, preliminary position 3–K.

<sup>219</sup> GVIA, position paper submission, p. 5.

The NIC submitted that ‘no specific rules need to be implemented to address trade into or out of the Basin.’<sup>220</sup> The NFF submitted that it supported the ACCC’s position providing the water access entitlement is tagged.<sup>221</sup>

The NSWIC stated:

... an already stressed system should not be seen as a solution for extra-Basin water requirements [but] ... this is a political matter and not one for the water trading rules.<sup>222</sup>

The SAFF submitted:

... extraction of water for use outside of the MDB should be treated no differently to other trades under water trading rules. However, the impacts of trade out of the Basin should be considered in relation to third party impacts i.e. loss of returns back to the river.<sup>223</sup>

The South Australian Government noted that ‘[t]he water planning process is the correct mechanism to set the environmental boundaries for water trade’.<sup>224</sup>

The ADIC & DA submitted:

Trade of water out of the Murray–Darling Basin is a contentious and emotive issue, particularly now that infrastructure investments, e.g. North-South Pipeline, connect systems and catchments that have not historically been connected. Impacts of water being traded out of the Murray–Darling Basin include:

- Potential reductions in groundwater recharge or return flows to streams within the Murray–Darling Basin;
- Volumes traded out of the Murray–Darling Basin being based on water savings calculations from investments in irrigation infrastructure upgrades. The volumes of any savings traded out must be independently audited and verified.

The dairy industry believes that both of these factors could contribute to extractions beyond sustainable diversion limits specified under the new Basin Plan. Whilst ADIC and DA agree with the position that trading rules should govern whether trade is allowed or refused rather than intended purpose or location of use, trade of water out of the Murray–Darling Basin must have no impact on the characteristics of existing entitlements and should not compromise sustainable diversion limits.<sup>225</sup>

The QFF stated:

The impact of any inter-basin trade on the Basin and relevant catchment plans must be assessed through a formal process before a trade is approved, this assessment could be done as part of the making of use approvals.<sup>226</sup>

WMI submitted that relevant use approvals should include:

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<sup>220</sup> NIC, position paper submission, p. 3.

<sup>221</sup> NFF, position paper submission, p. 6

<sup>222</sup> NSWIC, position paper submission, p. 8.

<sup>223</sup> SAFF, position paper submission, p. 3.

<sup>224</sup> South Australian Government, position paper submission, p. 7.

<sup>225</sup> ADIC & DA, position paper submission, p. 4.

<sup>226</sup> QFF, position paper submission, p. 4.

... environmental assessment, community agreement and alternative use assessment' and that the 'true costs of delivery must also be applied to non MDB users'.<sup>227</sup>

The WMI also submitted that trading out of the Basin would harm the environment by limiting additional flows from allocation in the future, and that holding carryover for non-MDB use may also have water-sharing consequences for the states.<sup>228</sup>

The VFF argued:

There should be no water being traded out of the Murray–Darling Basin, permanent or temporary. However, trade outside the Murray–Darling Basin is already occurring and likely to continue ... If trade outside of the Murray–Darling Basin is to occur, Carryover should not be available for use.<sup>229</sup>

### 3.6.3. Discussion

The trade of water access rights into and out of the MDB will continue to occur as new infrastructure works are built to increase connectivity between these areas. Where water is diverted into or out of the MDB, the extraction point for the water resource remains the same and the water is diverted to its new location via infrastructure. The ACCC considers that the trade of that water should not be subject to any special restrictions just because the water is used outside the water resource from which it was extracted. The use of that water in its new location should be handled through a separate use approval process.<sup>230</sup>

Most submissions that addressed trade into or out of the MDB supported the ACCC's preliminary position that a water trade should not be refused solely on the basis that the trade is occurring across a Basin boundary.

A number of stakeholders noted, however, that the use of any water after it has been traded should still be subject to the relevant use approvals. The ACCC concurs with this position. The use of traded water in its new location should be subject to the normal checks and approvals that apply for any water that is to be used in that location.

Some stakeholders stated that water trade out of the MDB could have implications for the sustainable diversion limit. The new SDL for the MDB will reflect an environmentally sustainable level of take, whether that water will be used within the MDB or outside the MDB. Hence, a trade 'out of the MDB' should not lead to extractions beyond any sustainable limits set for the MDB.

As noted by some stakeholders, there could be some impact on other water access right holders within the MDB if there is less return flow or groundwater recharge—as the water will be used in a different location, some return flow and groundwater recharge

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<sup>227</sup> WMI, position paper submission, p. 5.

<sup>228</sup> *ibid.*

<sup>229</sup> VFF, position paper submission, pp. 8–9.

<sup>230</sup> See section 3.3 on unbundled water rights.

will move from the location of extraction to the new location of use.<sup>231</sup> However, improving on-farm or off-farm infrastructure efficiency in the location of extraction can have similar effects. The ACCC does not consider it appropriate to restrict trades into or out of the MDB for this reason.

Two submissions argued that water access entitlements traded out of the MDB should not be able to have carryover associated with them. To the extent that a water access entitlement trade is tagged, it will retain the characteristics of its source location. Where these characteristics include access to carryover, the holder of the water access entitlement should be entitled to carryover whether they use the water within the source location or in another location. See section 3.10 for more discussion on carryover.

In summary, the fact that an MDB water access right to be used outside the MDB (and vice versa) should not, of itself, necessitate any special trading restrictions. It is the ACCC's view that such a trade should be subject to the same rules as any other trade under the same circumstances. This has been recommended as a trading rule on the basis that such a rule is necessary to ensure trade into or out of the MDB is not unreasonably restricted.

#### **3.6.4. Draft advice**

##### **Rule advice (3-I)**

The Basin Plan water trading rules should provide that a water access right trade should not be refused on the basis that the water will be used in an area outside the MDB (and the use of water inside the MDB should not be restricted solely because it was taken from a water resource outside the MDB).

### **3.7. Environmental impacts resulting from trade**

#### **3.7.1. Background**

Salinity and other environmental concerns can arise where water is traded between locations or uses that can result in changes to the timing and level of river flows and environmental impacts from water use. Currently, these concerns are usually managed through:

- water resource planning processes that define rules-based minimum flow criteria to maintain environmental flows
- water use approval processes.

The impacts of trade-induced changes can be both positive and negative. It is difficult to separate the impacts of movements of traded water from the impacts of movements

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<sup>231</sup> Note also the ADIC & DA's concerns regarding the calculation of water 'savings' that are subsequently transferred for use outside the MDB. The ACCC notes that this is a matter for Basin state governments when determining the volume of new water access rights resulting from infrastructure upgrades, rather than a trading issue per se.

on non-traded water (i.e. water being delivered to and extracted by existing water access right holders).

In the position paper, the ACCC suggested that state water planning processes continue to be the best approach to defining environmental water requirements and that the ACCC considers that water trading should occur within the bounds of these specified environmental conditions. This was reflected in the preliminary position:

- Water trading should occur within the environmental bounds set through the water planning process.<sup>232</sup>

The ACCC's position paper noted that the focus of its consideration was on in-stream environmental impacts. The position paper noted that there may be concerns over the salinity and environmental impact of high levels of water use on land in certain regions. The ACCC put forward the preliminary position:

- Where environmental impacts result from the use of water on land (e.g. salinity), these impacts should be managed through separate use approvals, not restrictions on trade.<sup>233</sup>

### 3.7.2. Summary of submissions

The QFF<sup>234</sup>, WMI<sup>235</sup>, NIC<sup>236</sup>, NSWIC<sup>237</sup> and the GVIA<sup>238</sup> submitted that they agreed with the ACCC's preliminary positions.

The NWC noted that in its biennial assessment it stated that:

The [National Water] Commission recommends that the direct impacts of water trade on third parties (for example, congestion and environmental externalities) be addressed through the most cost-effective instrument (such as water use licences) rather than by imposing trading restrictions where such restrictions are not based on hydrological or ecological constraints. Indirect impacts of water trade should not be managed by restricting the water market—they are better addressed directly through other policies (such as structural adjustment measures).<sup>239</sup>

The ADIC & DA submitted that they agreed with the ACCC's preliminary position and noted that:

Environmental requirements or impacts can be managed through the water resource planning processes plus management of the river, .e.g. timing environmental flow and irrigation releases together to gain the necessary river height to flood wetlands.

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<sup>232</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 44, preliminary position 3–L.

<sup>233</sup> *ibid.*, preliminary position 3–M.

<sup>234</sup> QFF, position paper submission, p. 4.

<sup>235</sup> WMI, position paper submission, p. 5.

<sup>236</sup> NIC, position paper submission, p. 9.

<sup>237</sup> NSWIC, position paper submission, p. 8.

<sup>238</sup> GVIA, position paper submission, p 5.

<sup>239</sup> NWC, position paper submission, p. 2; NWC biennial report, recommendation 7.7.

Restrictions on water trade should not be used to manage in-stream environmental impacts.<sup>240</sup>

The SAFF submitted:

... Water Allocation Plans (WAPs) are the proper mechanism to discuss environmental impacts as a result of water trade issues as they cover the whole catchment. SAFF would also point out that under the *Natural Resources Management Act 2004* [South Australia], the Minister for Environment and Conservation has authority to refuse or vary trades and licences for environmental reasons.<sup>241</sup>

The South Australian Government noted:

The water planning process and the operational rules for the river are the best place for management rules related to environmental impacts associated with trade. An example of this are the South Australian salinity impact zones established to manage salinity impacts in clearly defined regions in the River Murray Irrigation Management Zone. This becomes a consideration for the use of the water as the total volume of water that can be applied is limited within the high impact zone to reduce the adverse effect of salt.<sup>242</sup>

### 3.7.3. Discussion

The affect of water trade on environmental flows can be positive or negative depending on where the water has been traded from and where it is being traded to. In addition, it is difficult to separate the impact of traded water from the impact of water extraction more generally. Environmental water requirements, such as minimum passing flows, are currently specified through water planning processes. These in turn will be guided by, and accredited against, the Basin Plan requirements for new WRPs. The ACCC considers it appropriate that the environmental effects of trade (and water extraction more generally) are assessed within this broader approach rather than as part of any individual water trade approval process.

As with environmental flow impacts, it is difficult to ascertain whether environmental effects from the use of water on land are the result of water trade or water use more generally. Accordingly, such effects should be addressed separately from the approval of water trades. In most states the environmental impacts of water use are managed through water use approvals and broader water planning processes. In addition to these state specific measures, the Basin Plan is likely to contain provisions to manage the environmental impacts of water use more generally. The ACCC considers that water trading should occur within the bounds of these specified environmental conditions.<sup>243</sup>

It remains the ACCC's position that:

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<sup>240</sup> ADIC & DA, position paper submission, p. 4.

<sup>241</sup> SAFF, position paper submission, p. 3.

<sup>242</sup> South Australian Government, position paper submission, p. 7.

<sup>243</sup> Chapter 6 discusses the use of trading zones and specified environmental constraints to ensure that water trading occurs within these specified bounds. It is also important that where a water resource plan or the Basin Plan limits water trading/use for environmental reasons, these reasons are clearly set out and subject to ongoing review.

- environmental impacts of trade should be addressed through water planning instruments
- environmental impacts resulting from the use of water should be managed through separate use approvals.

This position was supported by almost all the submissions that addressed this issue. These positions accord with general practice in Basin state jurisdictions and the ACCC does not therefore propose the development of Basin Plan water trading rules in relation to this matter.

The ACCC position that water trading should occur within the environmental bounds set through the water planning process is directly relevant to discussion of location matters discussed in chapter 6. In particular, the ACCC's position on trading zones in regulated systems specifies that where trade is restricted between two trading zones, the rationale behind the restriction should be clearly outlined in the WRP and based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations.

#### 3.7.4. Draft advice

##### **Recommendation (3–J)**

The ACCC recommends that:

- water trading should only occur within the environmental bounds set through the water planning process
- where environmental impacts result from the use of water on land (e.g. salinity), these impacts should be managed through separate use approvals, not restrictions on trade

However the ACCC considers that it is unnecessary for the Basin Plan water trading rules to incorporate these positions explicitly.

### 3.8. Overallocation and overuse

#### 3.8.1. Background

In some instances, Basin states have allowed particular trades to occur subject to a reduction on the traded volume of the water access right.<sup>244</sup> This may be done, in part, to address concerns about overallocation<sup>245</sup> of the original water source or overuse.<sup>246</sup>

<sup>244</sup> For example, Victoria currently implements a 20 per cent reduction in volume for water traded in unregulated systems; see DSE, *Draft for community comment— Sustainable Water Strategy Northern Region*, Victorian Government, Melbourne, 2008, p. 118.

<sup>245</sup> Section 4 of the Act defines overallocation: there is an **overallocation** for a water resource plan area if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights at a given time exceeds the environmentally sustainable level of take for those water resources.

However, as outlined in the position paper, such rules can have a limited impact on addressing overallocation because they could create a significant disincentive to trade, thus limiting the volume of trade and having little effect on overallocation. Furthermore, such trading restrictions concentrate the burden of addressing overallocation on trading parties only.

The ACCC position paper discussed that trade within areas where overallocation exists should not lead to a greater level of overallocation because it will not impact on the total volume of water access rights on issue. It is true that water trading may increase the use of water in these areas if the purchaser is more likely to utilise the water access right. However, it should be noted that the water access right gives the buyer the same right to access water as previously held by the seller. Overall usage would still be limited to any SDL in place.

If actual usage was already at (or beyond) this limit, increased use of the traded water access right would possibly reduce the reliability of others' water access rights. While this is a third party impact, it is an impact caused by overallocation, not the trade per se. Other water access right holders have had higher reliability only because the seller has not previously used the full amount of water available under their water access right.<sup>247</sup>

The ACCC believes that it is not appropriate to prohibit or restrict a trade on the basis that the buyer of a water access right would extract more water under the right than had historically been extracted by the seller.

As such the ACCC put forward the following preliminary positions in its position paper:

- Water access right trades should not be conditional on a reduction in the trade volume to address overallocation.<sup>248</sup>
- Trade within an overallocated system should not be restricted solely on the basis that the system is overallocated.<sup>249</sup>

### 3.8.2. Summary of submissions

The ACCC position on overallocation and overuse found general support among stakeholders.

The VFF, GVIA, WMI and NSWIC noted they agreed with the ACCC position.<sup>250</sup>

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<sup>246</sup> Section 4 of the Act defines **overuse**—there is an overuse for a water resource plan area if the total volume of water actually taken for consumptive use from the water resources of the area at a given time exceeds the environmentally sustainable level of take for those water resources.

<sup>247</sup> Please see section 2.2.3 for a further discussion of the interaction between trade and 'sleeper' or 'dozer' water access rights.

<sup>248</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 48, preliminary position 3–N.

<sup>249</sup> *ibid.*, preliminary position 3–O.

The ADIC & DA also agreed and noted:

In systems that are over-allocated, water trading should not ultimately increase the total volume of water used. Over-allocation will be addressed using other mechanisms, such as the establishment of sustainable diversion limits and buybacks, rather than restrictions on water trade attempting to address over-allocation.<sup>251</sup>

Similarly, the SAFF supported the position and stated:

... the overallocation and overuse of water are best dealt with by mechanisms such as sustainable diversion limits and adjustments of the amount of water rights on issue. Trade barriers should not be put in place to address overallocation or overuse.<sup>252</sup>

The QFF put forward a more general comment:

... water trading rules are to be included in the Basin Plan and implemented through catchment water resource plans when they are reviewed and implemented in the QMDB [Queensland Murray–Darling Basin] from 2014. It is also understood that the Plan will address the over-allocation issue and require entitlements to be adjusted through catchment water resource plans to meet sustainable development limits. Trading arrangements can then be put in place within the planning framework.<sup>253</sup>

DSE responded to a reference in the position paper to the 20 per cent volume reduction applied in Victoria, stating that volume reductions can be necessary for trades in unregulated streams to address issues other than overallocation:

If an entitlement is traded downstream, the downstream person may have access to a greater proportion of the entitlement volume than the upstream person would have had (due to inflows that occur between the two points).

Victoria addresses that by a general rule requiring a 20% volume reduction. This is not because the river is overallocated, but as a mechanism to prevent third party impacts.

It may be that [ACCC preliminary position] 3-N would not apply in such a case, but that should be specifically said in the final advice. Otherwise, the ACCC should suggest a practical alternative approach to management of downstream trade, rather than ignore the third party impact or close off trade altogether.<sup>254</sup>

### 3.8.3. Discussion

Two major initiatives are currently underway that aim to address overuse in the MDB (and potentially overallocation):

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<sup>250</sup> VFF, position paper submission, p. 9; GVIA, position paper submission, p. 5; NSWIC, position papers submission, p. 8; and WMI, position paper submission, p. 5.  
<sup>251</sup> ADIC & DA, position paper submission, p. 4.  
<sup>252</sup> SAFF, position paper submission, p. 3.  
<sup>253</sup> QFF, position paper submission, p. 5.  
<sup>254</sup> DSE, position paper submission, p. 3.

- Establishing a sustainable diversion limit—the Basin Plan will define sustainable levels of take for Basin resources.<sup>255</sup>
- Government buybacks—the Australian Government in particular is purchasing water from willing sellers to provide water for the environment and ‘restore the balance in the basin’.<sup>256</sup>

However, some Basin states also have trading rules that aim to address the issue of overallocation. These rules typically require the volume of the water access right to be reduced as a condition of the trade. Such restrictions act as barriers to trade and generally mean that less water is traded. This, in turn, will mean that such a measure is less effective as a means to address overallocation than any measure directed across a system as a whole. In particular, in groundwater systems, there are generally very low levels of trade. If overallocation were being addressed only by reducing traded water access rights to groundwater, this would be a very ineffective mechanism for addressing overallocation in groundwater systems.

Another of the Basin water market and trading principles is:

Trades within overallocated water resources (including ground water resources) may be permitted in some cases subject to conditions to manage long-term impacts on the environment and other users.<sup>257</sup>

As noted above, water trade should not affect overallocation because it will not impact on the total volume of water access rights on issue. Water trade can increase water usage if the purchaser is more likely to utilise the water access right than the seller. However, overall usage would still be limited to any SDL in place. If actual usage were at or above the SDL, the reliability of water access rights in that area would decrease. However, this is the result of overallocation rather than water trade. For this reason, the ACCC believes it would not be appropriate to prohibit or restrict a trade on the basis that the buyer of a water access right would extract more water under the right than historically had been extracted by the seller.

As noted earlier, concerns about overuse will need to be addressed by the establishment of SDLs. Obviously, the reliability of water access rights in an area will be influenced by any cap or SDL in that area.

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<sup>255</sup> Section 22(1), item 6, of the Act defines the **long-term average sustainable diversion limit** as:

the maximum long term annual average quantities of water that can be taken, on a sustainable basis from:

- (a) the Basin water resources as a whole; and
- (b) the water resources, or particular parts of the water resources, of each water resource plan area.

<sup>256</sup> The Department of Environment, Water, Heritage and the Arts website states the aim ‘of improving the balance between water for consumptive use and water for a healthy river system’; see the DEWHA website, [www.environment.gov.au](http://www.environment.gov.au).

<sup>257</sup> *ibid.*, clause 4 (7).

In response to DSE’s comments, the ACCC position is that no conversion factor should be applied to trades to account for overallocation or overuse in the system. The ACCC had interpreted the role of the 20 per cent reduction in volume for water traded in unregulated systems from a Victorian government policy paper that states:

To minimise the environmental impacts of reduced [water] in unregulated rivers, only downstream trade is permitted, and there is a 20 per cent reduction in volume (unless the resulting licence is winter-fill or for domestic and stock purposes).<sup>258</sup>

To the extent that there are transmission losses relating to trades in unregulated systems these should be determined and applied transparently and consistently (see section 6.1 for a discussion on transmission losses).

The ACCC’s positions on overallocation and overuse are vital to ensuring that the water trading rules contribute to achieving the Basin water market and trading objectives and principles. Hence, they are recommended for incorporation into the Basin Plan water trading rules.

#### 3.8.4. Draft advice

##### Rule advice (3–K)

The Basin Plan water trading rules should provide that water access right trades should not be conditional on a reduction in the trade volume to address overallocation.

##### Rule advice (3–L)

The Basin Plan water trading rules should provide that trade within an overallocated system should not be restricted solely on the basis that the system is overallocated.

### 3.9. Conversion between priority classes

#### 3.9.1. Background

Water access rights may have different priority classes. This is typically the case in regulated systems, where rights generally take the form of water access entitlements. The priority class<sup>259</sup> of a water access right determines the priority of access to available water for that water access right.

In some jurisdictions, the holder of a water access right of a particular priority class may apply to convert that right to a right of a different priority class.<sup>260</sup> This usually

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<sup>258</sup> DSE, *Draft for community comment—Sustainable Water Strategy Northern Region*, Victorian Government, Melbourne, 2008, p. 118.

<sup>259</sup> The priority class of a water access right may also be referred to with reference to the **security** or **reliability** of a water access right.

<sup>260</sup> The New South Wales Government has [embargoed such conversions](#); see Department of Water and Energy website, [www.dwe.nsw.gov.au](http://www.dwe.nsw.gov.au), viewed 13 August 2009.

involves a conversion factor (sometimes referred to as an **exchange rate**) whereby the initial water access right of a certain priority class is cancelled and a new water access right of another priority class is created with a volume that represents some proportion of the initial volume.<sup>261</sup> This section considers such conversions, rather than changes made to the volume of a water access right because of a change in the location of extraction pertaining to the water access right or a more fundamental ‘re-scaling’ of all water access rights of a particular type.<sup>262</sup>

While conversion between priority classes can have advantages in terms of managing risk under unpredictable rainfall outcomes, the ACCC considered in its position paper that these advantages are outweighed by the significant negative impacts it can have on third party interests. In particular, conversion between priority classes has the potential to change the amount and timing of water received by other holders of water access rights of both the priority class being converted from, and that being converted to.

In addition, where there is an active water market, irrigators may purchase water access rights of varying priority classes to reduce the risk associated with variable water supply. Where the water market provides this opportunity (without the associated third party impacts), there is little need for the conversion of a water access right between priority classes. Furthermore, allowing for conversions between priority classes would also fix the price ratio between the two priority classes of water access rights.

As such, the ACCC’s preliminary position was to recommend against allowing for conversion between priority classes of water access rights. It noted that the benefits of allowing conversion may be realised through more efficient water markets and the potential disadvantages may be severe in terms of third party impacts.<sup>263</sup>

### 3.9.2. Summary of submissions

The NSWIC, the VFF, the GVIA, ADIC & DA, the SAFF and WMI agreed with the ACCC’s preliminary positions that there should be no conversion between priority classes of water access rights.<sup>264</sup>

In particular, the ADIC & DA noted that it:

... does not support the conversion of priority classes of water access rights (entitlements) as there is the potential for impacts to be negative and significant on third party interests (and highly dependent on the total amount of water available, the conversion factor used between classes, and the total volume of conversions that could take place). There is also difficulty in adequately establishing an accurate exchange rate, particular one that takes account of future water availability scenarios.

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<sup>261</sup> The conversion could also be affected by amending the properties (volume and priority class) of the water access right.

<sup>262</sup> See chapter 6. Exchange rates may be employed as a trading mechanism where the location of extraction of a water access right is changed.

<sup>263</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 53, preliminary position 3–P.

<sup>264</sup> NSWIC, position paper submission, p. 7; VFF, position paper submission, p. 9; GVIA, position paper submission, p. 5; ADIC & DA, position paper submission, pp. 4–5; SAFF, position paper submission, p. 3; WMI, position paper submission, p. 5.

The key third party impact is the compromised reliability of water entitlements of existing entitlement holders.

An “arbitrage” issue could also arise where price differences as a consequence of conversion rates are more favourable than market prices; alternatively, the exchange rate could fix the relative market prices for high and low priority classes at the same proportion as the conversion rate.

The ADIC and DA believe that risk management and supply variability of water can be managed by a range of other mechanisms, e.g. carryover, water trading, purchase of additional water of varying priority classes, etc.<sup>265</sup>

Similarly, SAFF noted:

Whilst water users would support the conversion between general security to high security water as a risk management tool, SAFF acknowledges that allowing conversion between priority classes can have significant third party impacts i.e. eroding the security of current holders of high security water. This conversion process is very dependent on the exchange rates to ensure the integrity of each class and prevent perverse outcomes. Concerns are raised regarding the robustness and difficulty in assigning the exchange rates, given the changing climate. As such, SAFF supports the recommendation against allowing for conversion between priority classes of water access rights.<sup>266</sup>

The South Australian Government noted:

The River Murray Prescribed WAP [Water Allocation Plan] specifically prevents conversion of an entitlement to different classes.<sup>267</sup>

DSE suggested the ACCC’s position on conversion between priority classes be refined:

Position 3-P (no conversion between priority classes of water access rights) may be generally supportable in a time of climate change. However it remains a useful tool in special cases, such as (for unregulated systems) conversion of a summer pumping licence to a winter-fill licence at the point of trade, in order to improve environmental outcomes. The position should be refined to allow for conversion in certain cases.<sup>268</sup>

SunWater did not agree with the ACCC’s preliminary position on conversions and noted:

... conversion between priority classes is allowed in several Queensland Resource Operations Plans but only after rigorous hydrologic modelling has been undertaken to demonstrate that such conversions will have limited or acceptable levels of third party impacts. SunWater contend that conversions should be allowed but only where such analysis has occurred and considered as part of an open water planning process.<sup>269</sup>

Similarly, the QFF noted:

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<sup>265</sup> ADIC & DA, position paper submission, pp. 4–5.

<sup>266</sup> SAFF, position paper submission, p. 3.

<sup>267</sup> South Australian Government, position paper submission, p. 6.

<sup>268</sup> DSE, position paper submission, pp. 3–4.

<sup>269</sup> SunWater, position paper submission, p. 3.

The water resource planning process should be able to address whether conversions should be allowed or not. A trading rule should not constrain the water planning process in this regard.<sup>270</sup>

DERM argued:

Any restriction on allowing priority changes is considered a restriction on trade that would reduce the ability to provide for changes in localised demand patterns.

Conversion between priority classes is not currently provided for in the Queensland portion of the MDB but is allowed in other water supply schemes where it has been planned for. Similar arrangements may be a future option in the MDB.

Such conversions are only allowed if it is determined that they meet strict water planning criteria. In particular, any conversions must be within the measurable tolerance levels that have pre-assessed these trades from potential impacts on a plan's environmental flow objectives (EFO's) and water allocation security objectives (WASO's). This ensures there can be no such conversions if there are environmental or third party impacts.<sup>271</sup>

### 3.9.3. Discussion

While conversions between priority classes of entitlement can have some advantages as a water variability management tool, the ACCC considers these advantages do not outweigh the third party impact costs. Conversion between priority classes relies on the use of conversion factors (often referred to as exchange rates). As such, it is open to many of the same criticisms as exchange rate trades.<sup>272</sup> In particular, where actual water availability diverges from any long-term averages used to calculate the conversion rate, there can be negative effects on the interests of existing water access right holders and the environment.

For example, if a water access right holder converts their lower priority water access right into a higher priority water access right, there will be third party impacts:

- Where there is not enough water to fulfil all higher priority water access rights, each holder of these rights will receive less water than they would have before the conversion took place, as the total nominal volume of higher priority water access rights has increased.
- Where there is enough water to fulfil all higher priority water access rights but not all lower priority water access rights, holders of the lower priority water access rights may receive higher or lower allocations over the course of the season compared to if the conversion had not taken place.
- Where enough water is available over the course of a year to fulfil both higher and lower priority water access rights, the total volume of water

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<sup>270</sup> QFF, position paper submission, p. 5.

<sup>271</sup> DERM, Position paper submission, pp. 2–3.

<sup>272</sup> As discussed in sections 6.1.2 and 6.1.3.

allocated to all water access rights will not be affected by the conversion.

- However, regardless of water availability, holders of lower priority water access rights will begin receiving allocations later in the season (albeit at a faster rate)<sup>273</sup> than if a conversion had not taken place.

Conversions from higher to lower priority water access rights would have the opposite effects.

Further, as noted in the position paper, conversions are not necessary where there is an effective water market because these different products can be purchased through the market. Where the water market provides this opportunity (without the associated third party impacts), there is little need for the conversion of a water access right between priority classes. In addition, irrigators are only likely to convert their water access right where the conversion (or exchange) factor is more favourable to them than the relative market prices. By allowing conversions, the market price of higher and lower priority water access rights would effectively be fixed in the same ratio as the conversion factor in the relevant plan.<sup>274</sup>

The majority of submissions that addressed this issue—six of 10 submissions—supported the ACCC’s preliminary position not to allow conversions between priority classes. These submissions cited the significant third party impacts that can result from allowing conversions between priority classes and the fact that conversions are unnecessary where there is a fully functioning water market. In addition, the South Australian Government noted that conversions are specifically prevented in the South Australian part of the MDB.

The only stakeholders to support allowing conversions between priority classes were SunWater, the QFF, DERM and DSE in Victoria. Conversions between priority classes are currently allowed in some areas in Queensland. The two Queensland stakeholders that commented on this issue supported allowing for conversions where the conversion factors have been set through considered and open planning processes.

While the ACCC recognises that allowing conversions between priority classes can have advantages for some water users, the ACCC maintains that such advantages are outweighed by the associated third party impacts that may not be appropriately protected against even with an open planning process. The ACCC considers that it is very difficult to determine an appropriate conversion factor that does not have third party impacts at least on some occasions, even where there is rigorous assessment around the calculation of that conversion factor.

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<sup>273</sup> Because conversion from a lower to higher priority class (with a conversion factor of less than 1) would increase the total nominal volume of higher priority water access rights (which must be allocated to first) and reduce the total nominal volume of lower priority water access rights (so that further available water has to be shared among fewer water access rights).

<sup>274</sup> The existence of transaction costs (for both conversions and trade) would mean that the actual ratio of prices for each priority class may not exactly match the conversion factor.

Further, the existence of an efficient water market reduces the need for allowing conversions between priority classes. In fact, allowing conversions between priority classes can undermine the efficiency of the market by fixing the price ratio between the two water access right priority classes in question.

DSE also noted that allowing for conversions between different types of licences can be useful in certain circumstances to achieve positive environmental outcomes. The ACCC notes that the types of conversions that DSE referred to in its submission are different from conversions between priority classes. The example used by DSE represents changing the time at which a licence holder can extract their water under their licence. While the ACCC does not consider this a conversion between priority classes, it would appear to be using a trading rule to address overallocation in summer months. The ACCC's position on overallocation is outlined in section 3.8.

Given the above considerations and the general support for the ACCC's preliminary position on conversions, the ACCC is maintaining its position as a recommendation, provided below. This position has not been recommended as a rule because it does not directly relate to water trade but rather, has the ability to affect the water market by allowing for an alternative to water trade that distorts markets.

#### **3.9.4. Draft advice**

##### **Recommendation (3-M)**

The ACCC recommends against allowing for conversion between priority classes of water access rights. The benefits of allowing conversion may be realised through more efficient water markets and the potential disadvantages may be severe in terms of third party impacts.

### **3.10. Carryover**

#### **3.10.1. Background**

Generally, carryover involves a water access entitlement holder retaining an amount of their unused water allocation in storage to be made available in the next water year. The main advantage of carryover is that it allows a person to manage variability in water availability across seasons (especially at the start of an irrigation season). In particular, carryover can be beneficial where there are limited opportunities for on-farm storage or water trade.

Where a water access entitlement is traded, the characteristics of that entitlement, including whether there is carryover associated with that entitlement, should remain unchanged. Similarly, any water accessed through carryover should be able to be traded in the same manner as any other water allocation. The ACCC's preliminary position was:

- There should not be restrictions on trade specific to water carried over, nor should there be any specific exclusion of traded water from having

access to carryover (assuming other criteria, such as the possession of a water access entitlement, are met).<sup>275</sup>

The ACCC's position paper noted that Queensland and New South Wales have initiated capacity sharing or continuous sharing<sup>276</sup> in a number of their catchments. In capacity share schemes, carryover is effectively perpetual because irrigators hold a licence to a share of storage capacity (and its inflows and losses) and they manage inflows and outflows individually, as one might manage a bank account.

In schemes without capacity share, there are often volumetric constraints on maximum carryover volumes to protect third party interests. To address these constraints, Victoria has proposed a 'spillable water account' that will allow higher volumes of carryover, with any risk of spillage being borne by those with water in their spillable water account. The ACCC position paper included the following preliminary position:

- Where continuous sharing arrangements are not in place, the ACCC supports the use of a 'spillable water account' with no limits on carryover volumes.<sup>277</sup>

While the ACCC supports the idea of a spillable water account, the position paper noted the importance of keeping market participants informed of the triggers for gaining access to water allocations held in such an account and, conversely, an indication of the likelihood of a spill occurring.

Whether a spillable water account is used, the ACCC position paper stated that it is important that market participants have access to relevant information before making carryover decisions. The water market will be negatively affected if property rights are not adequately protected. This includes water allocations carried over in storage. If water is carried over, it is by definition water that is already recorded in storage and allocated to a user. While delivery of these allocations may not be possible if there is no additional water in storage to meet delivery needs in the following year, the ACCC considered that rules for limiting access to carryover water should be clearly defined in advance.

The ACCC's position paper argued that the ability to deliver carryover water, or to access carryover water for other uses, should be based around clearly defined triggers. The Basin Plan will assist by more clearly defining the tiered water-sharing arrangements and required storage reserves to manage future risk.<sup>278</sup> The position paper stated that this information needs to be clearly communicated to market participants to

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<sup>275</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 58, preliminary position 3–Q.

<sup>276</sup> Capacity sharing is where individuals have a share of the dam capacity and its inflows. Continuous accounting is a mechanism for continually assessing and reporting accounts. Continuous sharing is a system where both capacity sharing and continuous accounting are in place.

<sup>277</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 58, preliminary position 3–R.

<sup>278</sup> See part 2A of the Act.

assist in their decision-making about carryover and water allocation trade. The ACCC position paper put forward the following preliminary position:

- Relevant agencies should determine appropriate signals about the likelihood of carryover water being available (and the timing of that availability in the season) and how this should be communicated to water access right holders. This could possibly be linked to the tiered water sharing arrangements in the Basin Plan.<sup>279</sup>

### **3.10.2. Summary of submissions**

Stakeholders were generally in favour of the ACCC position on carryover and spillable water accounts.

#### **Carryover restrictions**

The VFF, QFF and GVIA agreed with the ACCC position that restrictions should not be placed on trade of carried over water.<sup>280</sup>

The ADIC & DA also noted their support for the ACCC position on carryover:

Where carryover water is available, it is an important risk management tool used extensively by dairy farmers to manage variability in water allocations. It is also an important production management tool, allowing water to be available early in the irrigation season, to support spring forage production.<sup>281</sup>

However, the NFF raised concerns over the notion that carryover water is legally tradeable:

The NFF notes that it is a deficiency of water access entitlements that carry over water does not have a legal property right status. Its precarious nature can be demonstrated by State Governments suspending this water and using it to underpin critical human and other water needs.

The NFF notes that carry over is not a water product but a policy tool. Carry over is not recognised in legislation or in water plans and does not, as a result, have a property right. However, irrigators have access to the water held in their “account” for trade and or use—this collectively includes purchased water, allocation assignments and water carried over. As such, all this water is “tradeable” as allocation or annual trade. Therefore, the premise that carry over water is tradeable is a misnomer.<sup>282</sup>

#### **Spillable water accounts**

The use of a spillable water account with no limits on carryover volumes found mixed support among stakeholders, though in many cases the support was conditional.

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<sup>279</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 59, preliminary position 3–S.

<sup>280</sup> VFF, position paper submission, p. 9; QFF, position paper submission, p. 5 and GVIA, position paper submission, p. 5.

<sup>281</sup> ADIC & DA, position paper submission, p. 5.

<sup>282</sup> NFF, position paper submission, p. 6.

The VFF noted that it:

Agreed subject to no impact on reliability of other irrigators' water holder entitlements. VFF support a capacity share model where the individual water share owner has a specific share of the capacity of the storage. The individual should be able to carry over up to that maximum capacity share that he is already paying for. Any water stored as carryover in excess of the individual capacity share becomes casual use storage and then will be the first water to spill under the spillable water account model.<sup>283</sup>

The QFF was also in favour of the position, but noted:

... it must be recognised that carryover arrangements that are suitable for implementation in a scheme are defined and implemented through operating licences granted to IIOs to meet water resource planning requirements for the particular scheme. It may not be feasible to implement carry over in QMDB [Queensland Murray–Darling Basin] schemes that don't have continuous sharing arrangements.<sup>284</sup>

The NFF stated:

[it] supports the position of the ACCC in principle. However, this must be subject to modelling to ensure that there are no third party impacts to other irrigators and to the allocation of water between the Southern states according to the MDB Agreement (enshrined as Schedule 1, Water Act 2007).<sup>285</sup>

The GVIA endorsed the continuous accounting model currently in use in parts of New South Wales because this method eliminates the issue of determining the availability of carry over water:

GVIA believes the model used in the northern NSW valleys of continuous [sic] accounting is much preferable, with water only being credited into accounts when it has been physically made available, and therefore water "carried-over" from one season to the next has the same level of security as any other water in the account, as it is indistinguishable.<sup>286</sup>

StateWater raised some concerns about spillable water accounts:

State Water notes that the establishment of a spillable water account would require changes to the current legislative and regulatory framework. Furthermore, it is potentially unrealistic to expect an operator to determine whether a dam will spill or not in any particular year.<sup>287</sup>

The ADIC & DA also supported the ACCC preliminary position:

The dairy industry supports the availability of the option to irrigators to carry over water in a way that does not negatively affect property rights and does not negatively affect the reliability of other users' water access entitlements.

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<sup>283</sup> VFF, position paper submission, p. 9.

<sup>284</sup> QFF, position paper submission, p. 5.

<sup>285</sup> NFF, position paper submission, p. 7.

<sup>286</sup> GVIA, position paper submission, p. 5.

<sup>287</sup> StateWater, position paper submission, attachment, p. 1.

The introduction of more refined carryover mechanisms such as continuous sharing/accounting or spillable water accounts are endorsed by the dairy industry, with some clear stipulations:

- Market participants have accessible, clear and relevant information on which to base decisions to carry over water;
- Availability and timing information on carryover water, including the triggers for allowing access, must be communicated widely and in a timely manner;
- The implications of the Basin Plan with respect to carryover water must be clearly defined and communicated.<sup>288</sup>

#### The NSWIC submitted:

With respect to “spillable water accounts”, NSWIC has no objection to Victoria introducing such a program. We do not, however, see the necessity or benefit in such a system in NSW and, in particular, believe that such a system would intrinsically undermine the existing right.<sup>289</sup>

#### DERM noted:

Carry over rules and trade in carry over should be determined on a system by system basis as part of the planning. Carryover arrangements must seek to balance the needs of water users and the environment. Any changes to carryover arrangements should only be done in consultation with the water users.<sup>290</sup>

#### WMI also noted some concerns over the ‘no limits’ position on carryover water:

Given the large valleys including the Murray and the Murrumbidgee do not have continuous sharing arrangements the statement about “no limits” on carryover volumes for continuous sharing arrangements needs to be carefully considered. It sets a dangerous precedent to have no limits on carryover volumes as it can impact future allocations for all entitlement holders.<sup>291</sup>

#### SunWater suggested rewording to emphasise differing state processes:

... SunWater has reservations about this statement as it ... refers to the Victorian concept of a ‘spillable water account’ rather than specifically to the ‘carry-over’ account rules currently applied in Queensland.

For water sharing systems such as those applied in Queensland, a move to simply remove existing limits to carryover volumes would be considered by SunWater to be fundamentally flawed and not in the best interests of water users, the market or the industries dependent on them. Limits on carry-over are considered vital to limit the impacts of one water user’s usage decisions or behaviours on other water users’ options or future water availability.

SunWater suggest that the above statement be clarified to properly distinguish between carry-over in the Victorian context (which appears to relate to the opportunity to share

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<sup>288</sup> ADIC & DA, position paper submission, p. 5.

<sup>289</sup> NSWIC, position paper submission, p. 8.

<sup>290</sup> DERM, position paper submission, p. 3.

<sup>291</sup> WMI, position paper submission, p. 5.

future inflows) and in the Queensland context (which relates to the sharing of unused water allocations from one water year to the next).<sup>292</sup>

Additionally, the South Australian Government noted its strong reservations over the use of spillable water accounts:

... this proposal promotes opportunistic use of water and maximises use within the existing licensed entitlements. As such it will have third party impacts on downstream water users. Introduction of this proposal would require a greater reduction in the total volume of water on entitlement within each catchment to constrain total use within sustainable limits and adoption of this proposal (and other similar actions) in isolation, rather than considering them as part of an overall package of reforms on water resources allocation and management for the Murray Darling Basin, will result in a “shifting of the goal posts” for future negotiations on the broader issues to be resolved through the Basin Plan.<sup>293</sup>

The South Australian Government noted that its policy on carryover was still being developed:

South Australia is yet to formalise a long term carryover policy. The state has implemented a carryover process and short term policy as an interim emergency drought response. A formal carryover arrangement is under development as part of South Australia’s storage right access schedule under the MDB Agreement. Carryover will have an impact on a number of issues that extend beyond the specific water that is subject to carryover including: third party impacts, physical and internal spill rules, bulk water transfers (Hume and Dartmouth Reservoirs and Lake Victoria), Basin water sharing and unregulated flow determinations, and potential changes in the cost structures related to storages.<sup>294</sup>

### **Transparency around carryover and spills**

Developing signals about the likely availability of carryover water received a positive response from submitting parties. The ADIC & DA supported the ACCC’s preliminary position.<sup>295</sup> The VFF submitted that these determinations should ‘follow the seasonal allocation policy within the state.’<sup>296</sup>

The NFF supported the position and noted:

...the word “available” should be replaced by “deliverable”. It should NOT be assumed that water carried over in individual water accounts is available to other users to underpin critical human needs. Other arrangements are being put in place to deal with this, particularly in the Southern Basin.

It further submitted:

Water carried over should be afforded the highest property right definition as this is physically water in the dam ... if Government wish to have access to this water for critical human needs, then the market is the available mechanism.

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<sup>292</sup> SunWater, position paper submission, p. 3.

<sup>293</sup> South Australian Government, position papers submission, pp. 7–9.

<sup>294</sup> *ibid.*, p. 7.

<sup>295</sup> ADIC & DA, position paper submission, p.5

<sup>296</sup> VFF, position paper submission, p. 9.

... irrigators who physically wish to use the water for production need to have clearly identified information on when and how (e.g. triggers) this water will be made available to them ... As an example, a warmer than expected winter may see increased evaporation and seepage from dams and less water held than expected. In such cases, it may be appropriate to apply a loss factor to this water. This was a previous position in NSW but ceased. It may be appropriate to explore such options again.<sup>297</sup>

DERM supported the concept of increased transparency around carryover arrangements; however, it noted that costs would be involved:

DERM is supportive of any system that provides information to customers that helps to manage their WAE account. However, there would obviously be costs involved in providing such a service and it would need to be determined how much water users would be willing to pay for such a service.<sup>298</sup>

The South Australian Government noted:

SA currently notifies carryover entitlement holders of the volume available each month through regular media releases. Once the storage right schedule is agreed by Ministerial Council in 2010, we will then need to determine the appropriate method of communicating availability information to carryover entitlement holders.<sup>299</sup>

The QFF noted:

It is not considered that it would be feasible for agencies such as IIOs to provide these forward seasonal forecasts with any confidence in QMDB [Queensland MDB] schemes.<sup>300</sup>

### **3.10.3. Discussion**

Carryover is an important tool for irrigators in managing variability in water availability across seasons. It is particularly beneficial for irrigators with limited access to on-farm storage or water trade and for irrigators that need a reliable supply of water early in the irrigation season.

Carryover arrangements vary in each state and are strongly influenced by how infrastructure operators manage their storages. These differences can result in greater volumes of trade in water allocations towards the end of an irrigation season into areas that allow greater volumes of carryover. Differences in carryover arrangements can also influence the market price of water allocations in different irrigation areas.

To the extent that a water access entitlement is tagged, the ACCC believes that the holder of that water access entitlement should have the same access to carryover as other holders of water access entitlements of the same type. Similarly, if an irrigator has carried over a portion of their water allocation from one season into the next, that irrigator should be able to trade any portion of that water allocation in the same manner

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<sup>297</sup> NFF, position paper submission, pp. 6–7.

<sup>298</sup> DERM, position paper submission, p. 3.

<sup>299</sup> South Australian Government, position paper submission, p. 9.

<sup>300</sup> QFF, position papers submission, p. 5.

as any other water allocation could be traded. These views were widely supported by stakeholders.

The ACCC notes the NFF's concerns that carryover is not a right but rather a policy tool. While the ACCC acknowledges this submission, it still considers that carryover should be extended to all holders that meet the requirements to have access to carryover, including those that have acquired any necessary water access rights through trade.

As mentioned above, some schemes in Queensland and systems in New South Wales have capacity share or continuous sharing arrangements. In these systems there is no need for separate carryover provisions because carryover is effectively perpetual (subject to the constraints of the storage facility and adjustments to account for inflows and outflows including evaporation).

In the absence of such arrangements, Victoria is proposing to introduce spillable water accounts. This will allow irrigators to carryover as much water as they like provided that any water carried over past a certain volume will sit in a spillable water account that will be the first volume to be deducted from the pool should the storage spill. The ACCC recommends that where carryover is managed using spillable water accounts, market participants should be kept informed of the triggers for gaining access to water allocations held in these accounts (for use or trade, delivery permitting) and information on the likelihood of a spill occurring.

There were mixed views on the Victorian proposal to introduce spillable water accounts. In particular, a number of participants questioned whether this model would work for New South Wales and Queensland. The South Australian Government also noted it had serious reservations about the Victorian proposal because of the potential for greater utilisation of water access rights in upstream states (leading to less water availability downstream).<sup>301</sup> However, where continuous accounting or capacity-sharing systems have been implemented, these have received greater support from stakeholders.

The ACCC recognises that water storages are managed differently in each MDB state (and sometimes within the state). The ACCC supports continuous accounting, capacity sharing and spillable water accounts as measures to give water access right holders greater access to carryover water. However, the ACCC recognises that these models may not be appropriate for all storages in the MDB. Where these models are not appropriate, the ACCC recommends expanded access to carryover water to the extent that the storage allows and to the extent that third party impacts are appropriately protected.

As mentioned in the position paper, a well functioning water market requires well-defined property rights. This includes property rights for carried over water allocations.

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<sup>301</sup> Any carryover arrangements in place could not result in a reduction in South Australia's entitlement to water under the MDB Agreement, but could potentially reduce the amount of flow into South Australia above these amounts. The issue of utilisation of water access rights is considered in section 2.2.3.

Carryover is water that is already recorded in storage and allocated to a user. While delivery of these allocations may not be possible if there is not sufficient water in storage to meet the delivery needs of the following year, the rules for limiting access to carryover water should be clearly defined in advance. Similarly, the provision for critical human water needs should be clearly defined with information available on the potential impact this will have on water access right holders.

The ability to deliver carryover water or to appropriate carryover water for other uses should be based around clearly defined triggers. The Basin Plan will assist by more clearly defining the tiered water-sharing arrangements and required storage reserves to manage future risk.<sup>302</sup> This information needs to be clearly communicated to market participants to assist in their decision-making about carryover and water allocation trade. For example, under tier one and tier two arrangements, it may be appropriate to specify what arrangements will apply if carryover water is required for other uses.<sup>303</sup> One such possible arrangement would be using the water market to purchase water from willing sellers of carryover water.

The majority of stakeholders supported greater provision of market information on availability of and access to carryover. The QFF expressed concern that an IIO would not be in a position to provide such information. The ACCC considers that most IIOs managing storages will have sufficient resources and capability to provide this information.

Given the above, the ACCC considers that its first carryover-related position should be incorporated into the Basin Plan water trading rules given its general support and relevance to the water market. The second position has been revised to reflect the fact that while the ACCC continues to support both continuous accounting and spillable water accounts, different storages may require different approaches to carryover and alternative approaches may also have merit. This position has been put forward as a recommendation rather than advice to formulate a rule because it is not, fundamentally, a water trading matter. The last position has also been put forward as a recommendation rather than a rule advice because it is complementary to an effective water market, rather than being directly related to trade.

#### **3.10.4. Draft advice**

##### **Rule advice (3–N)**

The Basin Plan water trading rules should provide that there are no restrictions on trade specific to water carried over, nor should there be any specific exclusion of traded water from having access to carryover (assuming other criteria, such as the possession of a water access entitlement, are met).

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<sup>302</sup> See part 2A of the Act.

<sup>303</sup> Section 86D(1)(d) provides that the Basin Plan must—in relation to tier two arrangements—'specify arrangements for carrying water over in storage from one year to another for New South Wales, Victoria and South Australia'.

### **Recommendation (3–O)**

The ACCC recommends the use of continuous accounting, capacity sharing and spillable water account with no limits on carryover volumes to increase water holder's access to water across seasons. Where these are not feasible, other methods to extend access to carryover water should be pursued.

### **Recommendation (3–P)**

The ACCC recommends that relevant agencies should determine appropriate signals about the likelihood of carryover water being available (and the timing of that availability in the season) and how this should be communicated to water access right holders. This could possibly be linked to the tiered water sharing arrangements in the Basin Plan.

## **3.11. Metering**

### **3.11.1. Background**

Metering is the measurement of water used by a particular water user from a water source or out of an irrigation area.<sup>304</sup> The NWI included requirements relating to both the extent of metering and the appropriate accuracy for meters.<sup>305</sup>

In relation to the accuracy of metering, the Australian Government and the states and territories have established the Water Metering Experts Group (WMEG) to develop accuracy standards and accompanying testing, approval mechanisms and upgrade paths. The WMEG has proposed an accuracy standard of performance in the field within an error of  $\pm 5$  per cent.<sup>306</sup>

The current extent of metering varies between the Basin states.<sup>307</sup> Each Basin state has its own legislative and regulatory requirements on when metering is required—these requirements include WRPs or equivalents, bulk licences, works or use approval conditions and IIO requirements. All Basin states also have some sort of metering policy<sup>308</sup>, which typically states that complete coverage of metering is desirable but also provides for a variety of exceptions.

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<sup>304</sup> It may also be possible to meter the timing / rate of extraction in systems where there are pumping conditions applicable to a water user.

<sup>305</sup> NWI, clauses 87 and 88.

<sup>306</sup> WMEG, *National framework for non-urban water metering*, policy paper, December 2008, p. 4.

<sup>307</sup> Sinclair Knight Merz, *Stocktake of Australia's non-urban water metering systems*, May 2008.

<sup>308</sup> DSE, *Securing our water future together*, Victorian Government white paper, June 2004, p. 31; DWLBC, *South Australian licensed water use metering policy*, January 2003; Queensland Department of Natural Resources and Mines (DNRM), *Metering water*

*Footnote continues on next page.*

Notably, the requirements in the different Basin states vary between water sources and also types of extraction. Regulated (supplemented) river extractions are generally metered, while metering of unregulated or groundwater sources is more varied and stock and domestic use is often not metered. In some states, smaller extraction volumes are not required to be metered.

The ACCC considered in its position paper that the extent of metering in the MDB is highly relevant to trade. It considered that, where metering did not take place or was significantly inaccurate, robust market function and third party interests could be affected.

The ACCC considered that third party interests, in particular, could be significantly affected by inaccurate or no metering. Obviously, this would occur where a party traded water but continued to take a significant proportion, or all, of the amount traded. This would have two effects—first, it would reduce the quantity and reliability of water in the area from which water was traded and, as a result, would reduce the ability of other water users to extract water; and second, it would lead to adverse environmental effects from increasing the total amount of water extracted from the water source. The ACCC considered that these third party impacts would aggregate over time and have particular effect in unregulated rivers.

The ACCC also considered that, more generally, both an absence of metering entirely or significant inaccuracies in metering would lead to reduced confidence in the integrity of water access rights and would inhibit the functioning of the market.

Overall, in its position paper the ACCC considered that, given these impacts from an absence of metering or metering inaccuracies, metering should be a prerequisite for trade between two users and that both the seller and buyer of the water access right should have an approved meter installed. Given that inaccurate metering may also have third party effects, the ACCC considered that meters should be required to be accurate to within national standards. However, the ACCC did not consider that a meter reading would necessarily be required before a trade can occur.

Given the above considerations, the ACCC reached the following preliminary positions on metering:

- Both the seller and buyer of a water access right should have an approved meter installed for all off-take points (except where the water is held independently of land, or where the seller does not retain any water access rights)<sup>309</sup>

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*extractions policy*, May 2005; DWE, *New South Wales water extraction monitoring policy*, August 2007.

<sup>309</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 63, preliminary position 3–T.

- The meters should be compliant with relevant National Standards or Framework, such as that being developed through the Water Metering Experts Group.<sup>310</sup>

### 3.11.2. Summary of submissions

The ADIC & DA and SAFF submitted that they agreed with a need for accurate metering before trade.<sup>311</sup> The ADIC & DA considered that a transition period would be required. State Water noted that national metering standards are yet to be finalised.<sup>312</sup>

The South Australian Government stated that it ‘fully supports that license extractions be metered’ and considers that compliance with national standards should be required once they are finalised.<sup>313</sup> However, the South Australian Government raised some issues about the ACCC’s preliminary positions:

Metering needs to be linked to take and use approvals and water allocations, but there is no point linking meters to water access entitlements.

It will be impractical to meter all environmental watering in the same manner as irrigation licences and metering.<sup>314</sup>

Similarly, the NSWIC supported the use of metering:

NSWIC supports the installation of accurate and reliable meters on extraction points.<sup>315</sup>

However it considered that metering was not appropriately dealt with in water trading rules (a position with which WMI concurred<sup>316</sup>):

NSWIC disagrees that metering must be required before trade can occur. Metering is relevant to extraction, not trade and, as such, does not necessarily have any bearing whatsoever on the trading rules.

...

Meters are a function of water *use* and hence have no place in *trading* rules.<sup>317</sup>

Similarly, the NIC, GVIA and QFF submitted that they support accurate metering of water extractions but did not consider that it should be addressed in the water trading rules.<sup>318</sup> The VFF also opposed metering being addressed in the water trading rules, stating that metering was a compliance issue that should be left to local authorities or

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<sup>310</sup> *ibid.*, preliminary position 3–U.

<sup>311</sup> ADIC & DA, position paper submission, p. 5; SAFF, position paper submission, p. 3.

<sup>312</sup> State Water, position paper submission, p. 1.

<sup>313</sup> South Australian Government, position paper submission, p. 9.

<sup>314</sup> *ibid.*

<sup>315</sup> NSWIC, position paper submission, p. 9.

<sup>316</sup> WMI, position paper submission, p. 6.

<sup>317</sup> NSWIC, position paper submission, p. 9.

<sup>318</sup> NIC, position paper submission, p. 3; GVIA, position paper submission, p. 4, QFF, position paper submission, p. 5.

IIOs.<sup>319</sup> The NFF similarly noted that ‘it makes reasonable sense for the meter to be applied to the use approval’ and that fines, rather than trade restrictions, could be used to manage metering issues; it also noted the presence of ‘a number of programs targeting metering’.<sup>320</sup>

### 3.11.3. Discussion

The ACCC notes that by and large submissions agreed with a need for accurate metering of water extractions. The ACCC considers that, for the reasons identified in its position paper, it is very important that accurate metering becomes widespread. More extensive and more accurate metering would help to limit third party impacts and would improve general market confidence in the integrity of water access rights. A lack of metering could seriously impact on water market function. As such, the ACCC remains of the view that a rollout of accurate meters is a critical step in the development of water markets.

However, submitting parties generally disagreed with the ACCC’s preliminary position that both the seller and buyer of a water access right should have an approved meter installed for all off-take points (except where the water is held independently of land or where the seller does not retain any water access rights). In general, parties considered that metering should not be addressed in the water trading rules. Rather, parties considered that metering should be linked to the use of water, rather than trade. Some parties also submitted that metering should essentially be left as a compliance issue for state or local authorities.

The ACCC notes that both the upfront capital expenditure and ongoing meter reading costs associated with metering water extractions can be significant. Basin states have not required metering of all extractions in the past for this reason. This is particularly the case for stock and domestic water use and, to a lesser extent, groundwater use. The ACCC notes that, while the relative volume of extraction for stock and domestic water may be small compared to other extractive rights, in aggregate there may be significant impacts on other water users and the environment. The ACCC also notes that government programs may help address some of the costs of installing or upgrading metering—for example, one of the matters that may be considered under the Australian Government’s Irrigation Modernisation Planning Assistance program is:

the opportunities to improve knowledge of water use in the system through improvements to metering.<sup>321</sup>

The New South Wales Government also has a Rural Metering Project, funded through Australian Government programs, that seeks to replace existing customer-owned meters in regulated rivers with State Water-owned meters and to install or

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<sup>319</sup> VFF, position paper submission, p. 10.

<sup>320</sup> NFF, position paper submission, p. 7.

<sup>321</sup> DEWHA, *Water for the future sustainable rural water use and infrastructure program guidelines for irrigation modernisation planning assistance*, October 2009, p. 5.

upgrade about 9500 meters in groundwater and unregulated river sources.<sup>322</sup> Technological advances such as remote reading have the potential to lower ongoing meter reading costs.<sup>323</sup>

The ACCC has considered the nature of the submissions on its preliminary positions and notes that metering is an important issue for efficient market function, as generally agreed by submitting parties. Further, there would be some benefit to requiring trading parties to have meters, given that it would be one mechanism to require meters to be installed. There are also potentially greater issues from significantly inaccurate metering or an absence of metering for trading parties, given that the movement of water access rights may particularly exacerbate concerns about amounts of water extracted in particular areas. Trading may therefore increase the importance of improving metering.

However, the ACCC considers that addressing metering in a Basin Plan water trading rule may not properly deal with the issue. In particular, the ACCC agrees that metering is more appropriately a function of water use than water trade. It notes that current metering requirements in all MDB states are enforced through the use of works approvals and/or use licences, which reflects the current approach that metering is a function of extraction and/or use. Making a water trading rule would to some extent relate use and trade together in a way that is inappropriate for unbundled systems. In any case, a rule requiring water traders to have meters would not address issues of the metering of water access right holders more generally. The ACCC also notes that there is relatively little trade in unregulated systems and groundwater areas, where the need to improve metering appears greatest. As such, focusing on trade would not capture all water users. The extent of metering of non-trading parties is also important in assessing third party impacts.

The ACCC notes that metering may be an issue better addressed through the process in item 11 of the Basin Plan, which deals with the requirements for accreditation of a WRP. The ACCC notes that s. 22(3)(i) of the Act specifically identifies requirements relating to metering as a necessary requirement within that process. Accordingly, it would seem that item 11 of the Basin Plan is better suited to address metering issues, particularly given that its effect would not be limited to just trading parties.

As such, the ACCC does not propose any Basin Plan water trading rules (under item 12) about metering. However, it remains strongly of the view that accurate metering should be widespread due to the potential negative impacts of a lack of accurate metering on robust market function—and that ideally all water extraction should be metered. It recommends that jurisdictions continue to explore possibilities for improving metering in the MDB.

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<sup>322</sup> Statewater, [Rural metering project](#), viewed 23 November 2009; Statewater, [What the metering project means for you](#), viewed 23 November 2009.

<sup>323</sup> For example, see DEWHA, [Remote reading of irrigation water meters](#), viewed 23 November 2009.

#### **3.11.4. Draft advice**

##### **Recommendation (3–Q)**

The ACCC recommends that all jurisdictions should take steps to improve the accuracy and extent of metering in the MDB. Jurisdictions should ensure that all water access right holders have an approved meter installed at all off-take points, except where metering is assessed as not being cost-effective (although such assessments should be regularly reviewed with reference to changes in metering costs and expected benefits).

The ACCC recommends that meters should comply with relevant national standards or frameworks, such as that being developed through the Water Metering Experts Group.

## 4. The 4 per cent limit

A highly contentious water trading issue in recent times has been the existence of the 4 per cent limit on the permanent trade of water access entitlements out of irrigation areas (also known as the **4 per cent rule** or the **4 per cent cap**). This chapter refers generally to ‘the 4 per cent limit’ but recognises that such a limit has been implemented in different ways and to different extents throughout the MDB. In particular, the application of the 4 per cent limit within Victoria has been the subject of considerable debate. This chapter considers the approach that should be taken in the Basin water trading rules to volumetric restrictions such as the 4 per cent limit.

This chapter does not discuss environmental or hydrologic-based volumetric restrictions. The ACCC recognises that the volume of water able to be traded out of particular areas may be subject to a separate volumetric limit for valid hydrologic or environmental reasons (see chapter 6).

### 4.1. Background

#### 4.1.1. Implementation of the 4 per cent limit

The 4 per cent limit was originally agreed by state and territory signatories to the Intergovernmental Agreement on a National Water Initiative (NWI).<sup>324</sup>

Under the NWI, jurisdictions agreed to move to full and open trade by 2014 at the latest, but with an allowance for the 4 per cent limit. The limit was introduced to address concerns about possible stranded asset risks and the pace of community structural adjustment.

Within this NWI framework, the 4 per cent limit has been implemented inconsistently across the MDB. Victoria and, to a lesser extent, New South Wales have implemented the 4 per cent limit through legislation, while South Australia, Queensland and the Australian Capital Territory have not done so.

The Victorian legislative approach has been to limit the revocation of association between Victorian water shares (water access entitlements) and land, rather than directly applying to the volume of water access entitlement permanently traded to a location outside that area.<sup>325</sup> Once disassociated, the water access entitlements are free to be traded to another area. The Commonwealth and Victoria have agreed to provide a

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<sup>324</sup> NWC, [Intergovernmental Agreement on a National Water Initiative](#), clause 60(iv); available online at [www.nwc.gov.au](http://www.nwc.gov.au); viewed on 18 August 2009.

<sup>325</sup> DSE, *Trading rules for declared water systems*, 30 June 2009, clause 25.

limited exemption from the Victorian 4 per cent limit for the Commonwealth's water purchases.<sup>326</sup>

Until recently New South Wales did not directly impose a 4 per cent limit in its legislation but instead provided an exemption from a civil penalty that would ordinarily apply under the New South Wales legislation to irrigation corporations—a particular form of IIO—that take action to prevent transformation.<sup>327</sup> However, on 12 November 2009 the New South Wales Government introduced a bill to repeal this exemption and stated that:

For now, the intention is to maintain the current cap through a trade order to ensure that regional economies continue to be protected.

The New South Wales Office of Water has commenced consultation on the terms of a trade order under section 71 Z of the Water Management Act to maintain the 4 per cent cap.<sup>328</sup>

The water market rules prohibit an IIO from preventing or unreasonably delaying transformation or the trade of a water access entitlement arising from transformation.<sup>329</sup> These rules apply primarily to IIOs in New South Wales and South Australia, meaning that IIOs in those states cannot apply a 4 per cent limit to transforming irrigators. An exception to this water market rule is where a term or condition is required or expressly permitted by or under a law of the relevant state or territory. The exception does not apply to South Australian IIOs as the 4 per cent limit is not required or expressly permitted by law in South Australia. This was also true of New South Wales but, depending on the form of the proposed New South Wales implementation of the 4% rule under its access licence dealing principles, there is the potential for IIOs to apply, or be required to apply, a 4 per cent limit. As such, any consideration of the 4 per cent limit was largely related to its application in Victoria, but may in future also relate to New South Wales.

South Australia announced in March 2009 that it was considering a High Court challenge to existing water trade barriers in upstream states.<sup>330</sup> On 1 December 2009, South Australia filed a writ of summons against Victoria, Goulburn-Murray Water and Lower Murray Water in the High Court of Australia. The writ argued that the limit was in breach of section 92 of the Constitution, which states:

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<sup>326</sup> The Hon. Kevin Rudd (Prime Minister) and the Hon. John Brumby (Premier of Victoria), *New Commonwealth—Victorian water agreement*, media release, 4 June 2009.

<sup>327</sup> *Water Management Act 2000* (NSW), s. 71ZA, schedule 1.

<sup>328</sup> Penny Sharpe (Parliamentary Secretary), Water Management Act Amendment Bill 2009, second Reading Speech, 12 November 2009. The Water Management Amendment Bill 2009 received royal assent on 14 December 2009.

<sup>329</sup> Water market rules 2009, r. 17, 20(1)(b).

<sup>330</sup> The Hon. Mike Rann (Premier of South Australia), *Ministerial statement—Mike Rann* (media release), 5 March 2009.

## **92 Trade within the Commonwealth to be free**

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The writ sought declarations by the High Court that the Victorian 4 per cent limit was invalid by reason of section 92.

The ACCC also notes that the Productivity Commission (PC) is currently conducting a study into market mechanisms for recovering water in the Murray-Darling Basin. The PC's draft report considered the 4 per cent limit in the context of its effect on the Australian government's water purchases for the environment, although the study is not directly addressing trading rules as such. The PC's draft report stated that:

The Productivity Commission agrees that the 4 per cent limit is a poorly targeted means of addressing rural adjustment concerns and stranded assets issues and that it should be removed as soon as possible. While the limit might result in some reduction in the rate of decline of some regional economies, it does so at the expense of other regions and the broader community.

...

### **DRAFT RECOMMENDATION 10.1**

The 4 per cent limit on out-of-area trade of water entitlements should be eliminated as soon as possible, rather than phased out by 2014 as currently scheduled.

### **4.1.2. Effect of the 4 per cent limit**

When the position paper was released, the ACCC largely considered the application of the rule in Victoria, as the expected operation of the water market rules at that time would mean that the limit could not be applied by IIOs in South Australia or New South Wales. The ACCC position paper first considered the effects of the 4 per cent limit on water access entitlement markets and water market participants in general, and then considered the extent to which the ability to trade in water allocations, which are not restricted by the 4 per cent limit, ameliorates those effects.

The ACCC considered in its position paper that the 4 per cent limit prevented water moving to its highest value use by restricting the sale of water access entitlements and denying irrigators the opportunity to access buyers in external regions who would value water more highly.<sup>331</sup> This leads to an artificial segmenting of the market and results in efficiency losses. The ACCC considered that, while some of these efficiency losses may be short-term, the more significant efficiency losses from limiting water access entitlement trade are likely to be dynamic efficiency losses that occur over the longer term. This is because water access entitlements are useful for irrigators seeking to manage their water usage in the long term, including decisions about farm production type and investments in appropriate farm technology and infrastructure.

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<sup>331</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 71.

The ACCC noted that the quantification of these inefficiencies was difficult given an absence of useful price data. However, the number of Victorian irrigation areas affected by the 4 per cent limit has increased from 2007-08 to 2008-09 and is likely to again increase in 2009-10. The limit for some irrigation areas was reached early in the water year and the time within which they are being reached is becoming earlier year on year. The ACCC considered that these results suggested that efficiency losses would have been experienced in an increasing number of irrigation areas.

The ACCC also considered that the 4 per cent limit:

- could have a particular impact on individual irrigators (particularly those who may be suffering financial distress and/or are wishing to exit irrigation or reduce their scale of operations) by limiting access to potentially higher market prices for water access entitlements in other geographic areas
- has limited the ability of environmental water holders to purchase water for the environment
- may restrict the ability to invest in reconfiguration activities
- will lead to greater market uncertainty and increased transaction costs.

Given these effects of the 4 per cent limit on the market for water access entitlements and water market participants in general, the ACCC considered the extent to which the concerns were ameliorated by the availability of trade in water allocations. Such trade is not subject to the 4 per cent limit.<sup>332</sup> The fact that the 4 per cent limit is reached does not prevent water moving between alternate users altogether. However, any such movement must happen on a more temporary basis. Water allocation trade is used widely as an alternative to water access entitlement trade, and is likely to occur more in areas where the 4 per cent limit has been reached.

The ACCC's position paper considered that there were a number of reasons why water allocation trade was not likely to be a viable or complete alternative to water access entitlement trade for many irrigators:

- Irrigators usually wish to use a combination of water allocations available under the water access entitlements they hold and purchases of further water allocations. The combination used (and their level of reliance on the water allocation market) will reflect their particular risk profile. The 4 per cent limit prevents irrigators choosing a combination that suits their risk profile, particularly for more risk-averse irrigators reluctant to rely too heavily on the more price-volatile water allocation market each year.
- Water allocation trade is not a good substitute where irrigators are looking to make long-term adjustments away from irrigated agriculture

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<sup>332</sup> *ibid.*, p. 77.

because they will be unable to realise the necessary capital from water allocation sales and will be subject to ongoing fixed charges.

- A series of water allocation trades will not provide the same investment signals as the permanent movement of water resulting from water access entitlement trades thereby limiting the dynamic efficiency benefits, including in complementary infrastructure markets.
- Transaction costs for a series of water allocation trades will be higher than the costs for one-off water access entitlement trade.
- As carryover rights are typically linked to the amount of water access entitlement held, limits on the ability to trade water access entitlements will limit the ability of irrigators to access carryover.
- There are also differences in the way that uncertainty about allocation announcements is managed, and potentially different taxation treatment for water allocation trade and water access entitlement trade.

#### 4.1.3. Justifications for the 4 per cent limit

The ACCC considered in its position paper that the two justifications usually provided for the 4 per cent limit—stranded asset risks and managing community structural adjustment—are both valid concerns.<sup>333</sup> However, it considered that the 4 per cent limit is a poorly targeted mechanism to manage those issues.

The ACCC considered that stranded asset risks are best addressed through termination fees provided for in the water charge (termination fees) rules.<sup>334</sup> It also considered that more targeted policy tools, such as some of those already used in the water industry to date, may be a more appropriate way to manage structural adjustment.<sup>335</sup>

#### 4.1.4. Other issues

Along with the matters discussed above, the ACCC's position paper considered a number of further issues relating to the 4 per cent limit. The ACCC noted that the Victorian implementation of the 4 per cent limit was more restrictive than that envisaged under the NWI.<sup>336</sup> It also noted that, while the ACCC considered that the 4 per cent limit would ideally be removed across the MDB immediately, a transition period may reflect certain provisions in the Act<sup>337</sup> and is not uncommon in situations where regulatory policy change may have broad customer impacts.<sup>338</sup>

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<sup>333</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 81.

<sup>334</sup> Water charge (termination fees) rules 2009.

<sup>335</sup> For example, [Strengthening Basin communities program](#), DEWHA; viewed 15 November 2009.

<sup>336</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 82.

<sup>337</sup> See, for example, clause 4(1) of Schedule 3 of the Water Act.

<sup>338</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 84.

#### 4.1.5. ACCC preliminary positions

Given the above considerations, the ACCC reached the following preliminary positions in relation to the 4 per cent limit:

- As the rationales for the 4 per cent limit are better addressed through other mechanisms, the ACCC believes that the 4 per cent limit should be removed throughout the MDB.<sup>339</sup>
- If not already removed, a limit on the volume of trade out of an area (other than for environmental or physical reasons) should only be applied on permanent trades of water access entitlements (of any priority class) out of an irrigation area **as defined in the NWI** (that is, the area managed by an operator, rather than a number of particular areas within an operator's network).<sup>340</sup>
- If not already removed, any such limit should be raised according to a minimum transition path and must be completely removed by 1 July 2014.<sup>341</sup>

#### 4.2. Summary of submissions

A number of parties submitted they agreed with the ACCC's preliminary position that the 4 per cent limit should be removed. The South Australian Government submitted:

South Australia believes the four per cent limit should be removed as soon as possible. The existing imposition of the limit as a barrier is having negative effects on both buyers and sellers of water access entitlements.<sup>342</sup>

The SAFF similarly supported the removal of the 4 per cent limit:

Whilst it is acknowledged that the original intent was to allow regional communities and industries to cope with change over time, in fact it appears to be preventing the significant structural adjustment that needs to occur in parts of the Basin. It also causes undue stress on those water users that wish to sell all or part of a water access right. Instead this barrier should be removed but a significant structural adjustment program should be put in place to assist communities and industries to adjust to change.<sup>343</sup>

WMI stated:

WMI supports full removal of the 4% cap and remains concerned Victoria is adamant the 4% will stay. The hardship being experienced by many Victorian irrigators who are unable to trade their water as the 4% cap has already been reached in the 2009/10 season is unacceptable.

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<sup>339</sup> *ibid.*, p. 85, preliminary position 4–A.

<sup>340</sup> *ibid.*

<sup>341</sup> *ibid.*

<sup>342</sup> South Australian Government, position paper submission, p. 9.

<sup>343</sup> SAFF, position paper submission, p. 4.

Communities are already adjusting and will continue to do so. An individuals decision as to how to manage his water asset should not be controlled by a cap.<sup>344</sup>

The VFF Sunraysia branch submitted:

The ongoing deterioration in the terms of trade facing irrigators has meant that their properties in most cases no longer have significant real market value as going concerns, and that the growing numbers of irrigators being forced to exit farming are reliant on realising the value of their water entitlements. The current cap is discriminatory and deprives an increasing number of irrigators of the chance to sell their only remaining significantly valuable asset, their water, for a reasonable price outside the district to the Commonwealth or other buyers.<sup>345</sup>

It also submitted that the justifications for the cap were no longer compelling for Sunraysia:

The primary justification for retention of the cap is that it keeps water in districts and is therefore necessary to maintain the viability of irrigation schemes, and to sustain local economies and physical amenity. That argument is no longer compelling in the case of Sunraysia because it discriminates against and severely penalises a specific class of individual, namely irrigators who wish to sell a capital asset to exit farming or raise capital to enhance their water asset portfolio, but cannot do so because they are prevented from selling their entitlement advantageously by the arbitrary operation of an artificial barrier to trade.

Effectively, irrigators looking to exit or to realise capital in order to alter their water asset mix are being forced to retain their entitlement and are being exposed to low allocations in conjunction with high fixed annual charges. They are unfairly and with great hardship subsidising both the retention of water within the state of Victoria and within the district and the operating costs of LMW. Additionally, Sunraysia is attempting to reshape its future with a broader based economy with the encouragement of mining, refining, gambling and tourism, and alternative energies. Artificial and discriminatory barriers on the economic activity of a particular group, pumped district irrigators, will continue to impede and distort this process and continue to disadvantage these irrigators.<sup>346</sup>

The VFF Sunraysia branch also submitted that the 4 per cent limit had affected water access entitlement holders seeking to sell their water:

Growers who miss the cap are being forced to sell entitlement inside the district at a significant discount, or to retain their entitlement and suffer exposure to the substantial fixed charges levied annually by Lower Murray Water. Significant numbers of growers have had their tender of water to the Commonwealth environmental buybacks accepted but cannot proceed with the deal because of the cap. These irrigators now face a significant financial penalty of around \$700 per Meg of entitlement and are confronting the prospect of having their only realisable capital asset progressively depleted, especially if government buy back programs are scaled back, stopped, or confined to tenders from outside irrigation districts such as Sunraysia which have reached the cap.<sup>347</sup>

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<sup>344</sup> WMI, position paper submission, p. 6.

<sup>345</sup> VFF Sunraysia Branch, position paper submission, p. 2.

<sup>346</sup> *ibid.*

<sup>347</sup> *ibid.*

The NWC's submission supported the ACCC's positions and reproduced the following relevant recommendations from its 2009 biennial assessment:

The Commission recommends the coordinated removal of all artificial barriers to trade, including the 4 per cent limit. The Commission considers that buyback programs should continue without being constrained by the 4 per cent limit or other trade barriers in order to provide financial resources directly to entitlement holders and facilitate adjustment. The Commission supports monitoring and enforcement of the new water market and charge rules for the MDB by the ACCC, and the trading rules by the MDBA, to ensure that the rules are implemented effectively.

...

The Commission recommends that direct impacts of water trade on third parties (for example, congestion and environmental externalities) be addressed through the most cost-effective instrument (such as water use licences) rather than by imposing trading restrictions where such restrictions are not based on hydrological or ecological constraints. Indirect impacts of water trade should not be managed by restricting the water market—they are better addressed directly through other policies (such as structural adjustment measures).<sup>348</sup>

The ADIC & DA stated that they supported the ACCC's preliminary positions 'provided there is a clear transition process (recognising that regional and community support may be appropriate as part of this process)'.<sup>349</sup> However, they submitted that the 4 per cent limit had allowed a managed transition for the community:

The ADIC and DA support the need for the orderly transition of water use from within geographic areas for environmental or consumptive use. The establishment of the 4 per cent limit has provided a basis for this orderly transition.

While NSWIC also considered that the 4 per cent limit should be removed immediately, it stated its basic position was one of supporting competitive neutrality:

NSWIC concurs that the 4 per cent limit is a barrier to trade and must be immediately removed across the Basin, but notes that the Commonwealth have reached an agreement with Victoria that precludes this sensible course.

We reiterate our basic position—*competitive neutrality* means that barriers must be equivalent across states.<sup>350</sup>

The NSWIC also stated that the ACCC should comment on the interaction between Basin Plan water trading rules and interim and transitional WRPs and the potential for Victoria to maintain the 4 per cent limit.<sup>351</sup>

The NFF similarly submitted:

[it] supports a consistent application of rules across all jurisdictions are a pre-requisite to competitive neutrality.<sup>352</sup>

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<sup>348</sup> NWC, position paper submission, p. 2.

<sup>349</sup> ADIC & DA, position paper submission, p. 6.

<sup>350</sup> NSWIC, position paper submission, p. 10.

<sup>351</sup> See section 2.1.3 of this draft advice for a more general discussion of this issue.

The NIC likewise stated that it ‘would like to see a level playing field for all irrigators when it comes to trade’.<sup>353</sup> It further stated:

NIC is also concerned that the 4 per cent limit is, perversely, harming the irrigators and communities that it is designed to protect, as the ACCC has pointed out.

...

NIC supports the ACCC’s position that the 4 per cent limit—and any other barriers to trade, including the volumetric limit now in place in NSW - be removed across the basin immediately.<sup>354</sup>

In contrast to the above submissions, the VFF stated that it strongly disagreed with the ACCC’s preliminary positions and supported the retention of the 4 per cent limit:

The VFF strongly supports mechanisms like the 4% limit on permanent trade out of an irrigation district and termination fees, not only to allow the adjustment process to occur at a rate that does not cause massive and rapid dislocation for rural businesses and communities but to also guarantee that farmers not selling their water and wanting to continue farming are not faced with stranded assets and increased costs.<sup>355</sup>

As noted above, the VFF Sunraysia branch in contrast submitted that it no longer supported the retention of the 4 per cent limit in Sunraysia irrigation districts, although it stated that it did not seek to impose its recommendations on other irrigation districts.<sup>356</sup>

However, the VFF distinguished between high reliability and low reliability water access entitlements, and submitted that only the former should be subject to the 4 per cent limit:

The VFF believe that the 4 per cent cap on High Reliability Water shares is essential in preventing large scale and significant social and economic dislocation of rural communities. Most recently, the VFF has formulated a new policy position in regards to allowing 100 percent of Low Reliability water (LRW) to be exempt from the four per cent limit on permanent trade out of an irrigation district in Victoria.

...

VFF believe that allowing 100 percent of Low Reliability water to be exempt from the 4 percent cap would provide a more equitable approach for entitlement holders facing significant hardship under current circumstances.<sup>357</sup>

The VFF Sunraysia branch submitted on this point that:

Sunraysia irrigators constitute a special class of irrigator in that they do not have this option to fall back on to alleviate their economic circumstances.<sup>358</sup>

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<sup>352</sup> NFF, position paper submission, p. 8.

<sup>353</sup> NIC, position paper submission, p. 4.

<sup>354</sup> *ibid.*

<sup>355</sup> VFF, position paper submission, p. 10.

<sup>356</sup> VFF Sunraysia branch, position paper submission, p. 11.

<sup>357</sup> VFF, position paper submission, p. 11.

## 4.3. Discussion

The ACCC considers that there are a number of issues to be addressed that arose from submissions in response to its position paper.

### 4.3.1. Effect of the 4 per cent limit

Other than the VFF, interested parties who made submissions to the ACCC generally supported the removal of the 4 per cent limit on the permanent trade of water access entitlements out of irrigation areas. Parties submitting in favour of the removal of the 4 per cent limit considered that the limit was a barrier to trade and was leading to negative effects for buyers and sellers of water access entitlements. This concurs with the conclusions reached by the ACCC in its position paper, as summarised above, where it considered that the 4 per cent limit prevented water moving to its highest value use, artificially segmented the water market and resulted in efficiency losses.

The limit may, in particular, affect individual irrigators seeking to sell their water access entitlements because of financial hardship. The VFF Sunraysia branch submitted that such individuals who are forced to sell within their district may have to sell ‘at a significant discount’ or face substantial ongoing fixed charges if they retain their entitlement. It submitted that such irrigators would ‘face a significant financial penalty of around \$700 per Meg of entitlement’.<sup>359</sup> The ACCC notes that the difference between prices paid for trades subject to the limit and trades not subject to the limit will depend on the particular area. However, it considers that the extent of the difference could be substantial.

The ACCC considered in its position paper that water allocation trade is not a good substitute for water access entitlement trade in many circumstances.<sup>360</sup> The ACCC remains of this view. The ACCC also notes that there is the possibility of using long term leases of water access entitlements as a substitute for trade of those water access entitlements. This would potentially allow a greater level of certainty about future allocations and may therefore address some of the reasons why water allocation trade is not a good substitute for water access entitlement trade. However, a long term lease would not address many other issues, such as the inability of farmers to make long-term adjustment away from irrigated agriculture, investment signal effects and transaction costs. The ACCC accordingly does not consider that the ability to enter long-term leases fully ameliorates all of the effects of the 4 per cent limit. However, the extent to which long-term leases are utilised is unclear.

The ACCC notes that the above conclusions are not isolated limited to the implementation of the 4 per cent limit in Victoria. They would also equally apply to the proposed imposition of the limit in New South Wales.

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<sup>358</sup> VFF Sunraysia branch, position paper submission, p. 3.

<sup>359</sup> *ibid.*, p. 2.

<sup>360</sup> ACCC, *Water trading rules position paper*, September 2009, p. 77-81.

### **Low reliability water shares**

The ACCC has considered the VFF's proposal that high reliability water access entitlements should be subject to the cap while low reliability water access entitlements should not. The VFF submitted that this would 'provide a more equitable approach for entitlement holders facing significant hardship under current circumstances'.<sup>361</sup>

The ACCC considers that the VFF proposal, while not necessarily leading to a worse outcome than maintaining the 4 per cent cap on all water access entitlements, does not address fundamental issues in relation to the 4 per cent limit. First, maintaining a limit on the trade of high reliability water access entitlements will still be a barrier to trade and lead to efficiency losses. Second, the ACCC does not consider a distinction between high reliability and low reliability water access entitlements on equity grounds to be a useful one. The ACCC considers that there is no evidence that high reliability water access entitlement holders are less likely to be in financial distress than low reliability water access entitlement holders. It therefore considers that preventing high reliability water access entitlement holders from having the choice of being able to sell water outside their area when in financial hardship does not seem equitable. The ACCC notes that high reliability water access entitlements have typically reached the 4 per cent limit before low reliability water access entitlements. This perhaps indicates that there is at least as great a need to sell amongst high reliability water access entitlement holders.

The ACCC also notes the VFF Sunraysia branch's submission that irrigators within some irrigation districts will not have the ability to sell low security water access entitlements.

### **Level playing field**

Some submitting parties, such as the NSWIC, NFF and NIC, submitted that it was important to have competitive neutrality or a 'level playing field' across the MDB so that trade barriers are equivalent across states. In particular, these parties noted the potential for inconsistencies to exist because of the continued operation of transitional and interim WRPs. This issue is discussed more generally in section 2.1.3.

The ACCC agrees that a level playing field is important and notes it would be preferable to have one where the 4 per cent limit has been removed from all jurisdictions. It would not be appropriate for other states to impose a 4 per cent limit to maintain competitive neutrality with Victoria, as has been proposed in New South Wales. Such an approach would not address the fact that the 4 per cent limit results in water being prevented from moving to its highest value use, artificially segments the market and leads to efficiency losses. Imposing that limit where it does not currently apply would only increase the number of water market participants and geographic areas subject to such effects.

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<sup>361</sup> VFF, position paper submission, p. 11.

The ACCC considers that the proposed introduction of the 4 per cent limit in New South Wales will damage the water market in that state and will lead to similar negative effects to those experienced in Victoria.

The ACCC notes that the Australian Government has also recently signed a memorandum of understanding with New South Wales under which it agreed to voluntarily limit the volume of water access rights that it offers to buy from within New South Wales.<sup>362</sup> In turn, New South Wales committed to:

... refrain from introducing any new barriers to trade, except where such amendments are needed for operational purposes.<sup>363</sup>

The ACCC considers that New South Wales' proposed imposition of the limit may have the effect of a new barrier to trade, given that the 4 per cent limit would not have had effect in New South Wales because of the commencement of the water market rules. The ACCC also notes that the previous implementation did not **require** IIOs to impose a 4 per cent limit.

The ACCC also notes an issue relating to the present exemption under the Victorian 4 per cent limit for Australian Government purchases of water for the environment. The ACCC considers this exemption does not provide a level playing field between the Australian Government and other potential purchasers of water access entitlements. While the exemption will, as noted in the ACCC's position paper, maintain a larger range of purchasers in the market than under the 4 per cent limit without the exemption, it will advantage the Australian Government relative to all other potential purchasers, including potential irrigator purchasers. Such an approach would violate the ACCC's proposal for a water trading rule—that there should be no special treatment of environmental water holders. In the ACCC's view, if there is reason for the 4 per cent limit to be lifted for environmental water holders, it should also be lifted for other potential purchasers.

#### **4.3.2. Justifications for the 4 per cent limit**

The VFF was the only party that supported retaining the 4 per cent limit, although this was only for high reliability water shares. The VFF supported the 4 per cent limit on the basis of its effects in managing both community structural adjustment and stranded asset risks. The ADIC & DA also submitted that the 4 per cent limit had been useful to manage transitional issues.

The ACCC has considered these submissions but continues to believe, as outlined in its position paper, that the 4 per cent limit is a poorly targeted mechanism to address these issues, and that both structural adjustment and stranded asset risks are better addressed through other mechanisms. The ACCC considers that stranded asset risks are already addressed through termination fees, while more targeted policy tools, such as programs along the lines of the small block irrigators exit grant already used in the water industry

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<sup>362</sup> New South Wales Government and the Commonwealth of Australia, *Memorandum of understanding in relation to water for the environment*, 23 September 2009.

<sup>363</sup> *ibid*, clause 23.

to date, may be more appropriate to manage structural adjustment. These tools will avoid the barriers to trade and the efficiency implications that exist as a result of the 4 per cent limit.

The ACCC notes that New South Wales has justified its proposed imposition of the 4 per cent limit by reference to the same community structural adjustment arguments:

On the other hand, many of our towns and regional centres have grown around the existing irrigation communities. To mitigate the impacts on regional economies of any rapid movement of water out of an area, the National Water Initiative enables the States to impose an interim trade threshold limit on permanent trade in water entitlements out of all water irrigation areas.

...

For now, the intention is to maintain the current cap through a trade order to ensure that regional economies continue to be protected. ...the Government also recognises the need to maintain communities and infrastructure based on historical levels of use, and that is the purpose of the 4 per cent limit.<sup>364</sup>

The ACCC considers that New South Wales' position is an inferior policy tool for addressing concerns about community structural adjustment. These issues would be better addressed through more targeted policy tools, rather than through the introduction of a barrier to trade and the resulting efficiency losses. The ACCC considers that the stated aim of maintaining communities and infrastructure based on historical levels of use would appear to be in contrast to the longer term impact of drought and climate change, and fails to recognise the benefits of trade in moving water to higher value uses. It also contrasts with New South Wales' recognition that:

If implemented well, trade will benefit New South Wales communities by enabling water to be used where it is of greatest value.<sup>365</sup>

As discussed in its position paper, the ACCC considers that the 4 per cent limit could potentially impede necessary structural adjustment by communities. This is particularly true at the individual irrigator level where an irrigator in financial hardship and/or who may not have a viable ongoing irrigated agriculture business will be unable to make the adjustment decision to sell water access entitlements. This point was made in submissions by parties such as the NIC, WMI, VFF Sunraysia branch and SAFF.<sup>366</sup> Furthermore, as noted by the VFF Sunraysia branch, maintaining the 4 per cent limit may impede communities from developing alternative industries to agriculture.

#### **4.3.3. Application of the rule—consistency with NWI**

The ACCC considered in its position paper that, where not already removed, any 4 per cent or similar limit should only be applied in a way consistent with the limit as

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<sup>364</sup> Penny Sharpe (Parliamentary Secretary), Water Management Act Amendment Bill 2009, Second Reading Speech, 12 November 2009.

<sup>365</sup> *ibid.*

<sup>366</sup> NIC, position paper submission, p. 4; WMI, position paper submission, p. 6; VFF Sunraysia branch, position paper submission, p. 2; SAFF, position paper submission, p. 4.

envisaged in the NWI. The ACCC considers that the Victorian implementation of the 4 per cent limit is significantly more restrictive than envisaged in the NWI. As a result, the ACCC considers that the Basin Plan water trading rules should require that any implementation of the 4 per cent limit be consistent with the NWI formulation.

The ACCC has revised the language used in this draft advice to more closely mirror the language of the NWI.

#### **4.3.4. Application of the rule—adjustment path timelines and the role of interim and transitional plans**

The ACCC remains of the view that the 4 per cent limit should ideally be removed immediately across the MDB because it presents a significant barrier to trade. Removing the limit would lead to a water market that functions more efficiently.

However, the ACCC recognised in its position paper that the Basin Plan water market and trading principles in the Act state:

(16) Barriers to permanent trade out of water irrigation areas up to an annual threshold limit of 4% of the total water entitlement of that area will be immediately removed, subject to a review by 2009 by the National Water Commission under paragraph 7(2)(h) of the National Water Commission Act 2004, with a move to full and open trade by 2014 at the latest.

The Basin Plan water trading rules must contribute to the achievement of these principles. Given the effect of this principle, the ACCC recognises that the water trading rules may not be able to require full and open trade before 2014. However, the ACCC also notes that other Basin Plan water trading principles and objectives may equally suggest that removing the 4 per cent limit might contribute to other principles and objectives. For example, the following is another relevant principle that would be facilitated by the removal of the 4 per cent limit:

(15) Institutional, legislative and administrative arrangements will be introduced to improve the efficiency and scope of water trade and to remove barriers that may affect potential trade.

Overall, the ACCC proposed in its position paper that, if not already removed, any 4 per cent limit should be raised according to a minimum transition path and must be completely removed by 1 July 2014. The ACCC has further considered the form that such a transition path might take.

The Basin Plan is intended to commence on 1 July 2011. The Basin Plan water market and trading principles, as well as documents such as the NWI, specify that there should be a move to full and open trade by 2014. As such, the ACCC considers that it should specify a transition path for the three-year period from 1 July 2011 to 1 July 2014.

The ACCC proposes the following minimum transition path:

- 1 July 2011 (start of Basin Plan)—6 per cent
- 1 July 2012—9 per cent
- 1 July 2013—12 per cent
- 1 July 2014—full and open trade.

The ACCC also notes that the commencement of the Basin Plan will also require that, as discussed above, the implementation of the limit is consistent with the limit as envisaged in the NWI.

The ACCC considers that the initial lifting of the limit to 6 per cent at the commencement of the Basin Plan is consistent with the commitment by the Council of Australian Governments (COAG) to lift the limit to 6 per cent by the end of 2009:

COAG reaffirmed its commitment under the National Water Initiative to reconsider the limit on out-of-district trade of permanent water entitlements in the Southern Murray–Darling Basin. COAG stated its ambition to increase the cap from four per cent to six per cent by the end of 2009.<sup>367</sup>

On the transition to 9 per cent and 12 per cent, the ACCC notes it is not possible to define exact numbers by reference to economic modelling, given the lack of usable price data available at this time. Given that the reason for removing the limit is largely one about community structural adjustment, the minimum transition path will inherently require an element of estimation. However, the ACCC notes that increasing the limit by relatively small increments, such as 3 per cent a year, will allow a measured movement towards full and open trade by 2014.

The ACCC's proposed transition path has been informed by discussion in Frontier Economics' advice to the ACCC in the context of the ACCC's development of advice on the water charge (termination fees) rules.<sup>368</sup> In assessing the effect of termination fees changes on farm profitability, that advice noted the following information presented by Central Irrigation Trust (CIT) in regard to one of its constituent trusts, Loxton Irrigation Trust:

Loxton Irrigation Trust (LIT)

The LIT business plan has an allowance for a 1% decline in water [entitlement] each year... If current water, commodity and economic conditions were to continue into the medium term (1 to 5 years) it is considered likely that the [current] 4% cap on permanent trade would be reached each year. If the cap were to be lifted a reduction in [entitlements] between 15% to 30% within 3 to 5 years may occur.<sup>369</sup>

The ACCC considers that this estimate of 15 to 30 per cent over three to five years is a useful example of an operator's views on unconstrained demand for

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<sup>367</sup> COAG communiqué, 3 July 2008, p. 10.

<sup>368</sup> Frontier Economics, *Termination fees and landholder considerations*, December 2008, p. 29.

<sup>369</sup> *ibid.*

water to be traded out of an area (and/or of demand for termination). The ACCC's proposed transition path of 6 per cent, 9 per cent and 12 per cent would allow for a cumulative total of around 25 per cent of water to be traded out of the area over this period, which corresponds broadly to the possible upper bound scenario estimated by CIT. The ACCC notes that South Australia is typically a net importer of water, which suggests that the above estimates would be conservative. To that extent, it could be expected that the caps of 6 per cent, 9 per cent and 12 per cent would continue to restrain trade to some extent.

The ACCC also noted in its position paper that the 4 per cent limit was being reached early in the water season in multiple areas in Victoria, which suggests that a significant amount of unfulfilled trades could take place if the limit were raised. The ACCC also notes that when CIT expanded its 4 per cent limit to 6 per cent, the revised limit was reached quickly and required a further revision to 12 per cent over two years.<sup>370</sup> This suggests that there is significant unmet demand for trade that could be facilitated by expanding the limit under a transition path.

The ACCC also notes that the use of a minimum transition path is consistent with Victoria's stated intention of phasing out the 4 per cent limit:

Under the agreement, and subject to a review of progress on the modernisation project, Victoria will begin to phase out the four per cent cap on permanent water trades from irrigation districts from July 2011, with a view to removing the cap entirely by 2014.<sup>371</sup>

The other issue related to the application of the rule relates to the role played by interim and transitional WRPs. The NSWIC specifically submitted that the ACCC should comment on the interaction between the Basin Plan water trading rules and interim and transitional WRPs, and the fact that Victoria is yet to specify its WRPs.<sup>372</sup> The ACCC notes this issue is equally relevant to the proposed imposition of the 4 per cent limit in New South Wales, to the extent that the New South Wales access licence dealing principles are contained within interim or transitional WRPs.

The ACCC has addressed this issue more fully in chapter 2 of this draft advice. As stated in chapter 2, the ACCC is limited to providing advice within the given legislative framework. In the view of the ACCC, where its advice is reflected in Basin Plan water trading rules, there is merit in applying these Basin Plan water trading rules wherever possible, even if they do not operate throughout the entire MDB initially.

On the 4 per cent limit specifically, the ACCC agrees with the NSWIC submission—under the legislation as currently drafted a potential outcome whereby provisions imposing a 4 per cent limit contained in a Victorian or New South Wales interim or transitional WRP would prevail over any inconsistent Basin Plan water trading rules until the expiration of the interim or transitional WRP. The ACCC agrees that this

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<sup>370</sup> CIT, issues paper submission, p. 1.

<sup>371</sup> The Hon. Kevin Rudd (Prime Minister) and the Hon. John Brumby (Premier of Victoria), *New Commonwealth—Victorian water agreement*, media release, 4 June 2009.

<sup>372</sup> NSWIC, position paper submission, p. 10.

would be an undesirable outcome, and remains of the view that the 4 per cent limit should be removed immediately across the MDB, or at least according to a minimum transition path.

#### 4.4. Draft advice

##### **Rule advice (4-A)**

The Basin Plan water trading rules should provide that:

- if not already removed, a limit on the volume of trade out of an area (other than a limit for environmental or physical reasons) should only be applied on permanent trades of water access entitlements (of any priority class) out of an irrigation area as defined in the NWI (i.e. the area under control of an individual water service provider (e.g. an irrigation corporation, cooperative or trust, or water authority), rather than a number of particular areas under the control of the one water service provider).
- if not already removed, any such limit should be raised according to the following minimum transition path:
  - 1 July 2011—raised to 6 per cent of the total water entitlement of the applicable irrigation area
  - 1 July 2012—raised to 9 per cent of the total water entitlement of the applicable irrigation area
  - 1 July 2013—raised to 12 per cent of the total water entitlement of the applicable irrigation area

and must be completely removed by 1 July 2014.

##### **Recommendation (4-B)**

The ACCC recommends that, as the rationales for the 4 per cent limit are better addressed through other mechanisms, the 4 per cent limit should be immediately removed by Basin states throughout the MDB.

## 5. Water access rights—approval processes

The trade of a water access right<sup>373</sup> requires the approval of, and/or registration by, the relevant Basin state(s). These roles are usually held by a state government department or delegated to an infrastructure operator.<sup>374</sup> These entities are referred to as an ‘approval authority’ throughout this chapter.

The position paper provided an overview of the approval authorities in each Basin state and the administrative processes for approving trades of water access rights within and between Basin states.<sup>375</sup>

### 5.1. Approval times

#### 5.1.1. Background

The efficient operation of the market depends on the timely processing of applications to trade water access rights. Uncertainty in approval times and undue or unexpected delays provide disincentives to trade and can impose additional transaction costs on irrigators and other water market participants. Undue delays in processing applications to trade water allocations can also have serious consequences when crops or stock urgently need watering.

The ACCC position paper noted that a number of factors can prolong approval times for water trades. These include the level of resources (especially human resources) available to approval authorities, staff training, incorrectly filled-in forms, slow communication processes between approval authorities (where more than one is required to approve a trade) and the complexity associated with the need for multiple jurisdictions and approval authorities to be involved in some trades.

The position paper also noted a number of reasons why it may not be appropriate to impose maximum approval times on approval authorities to approve applications to trade water access rights. In particular:

- approval authorities are unlikely to have an incentive to delay approving a trade
- trades of water access rights requiring assessment by an approval authority may involve considering issues such as hydrological constraints, environmental limits and possible third party impacts

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<sup>373</sup> Approval arrangements for the trade of a water delivery right or an irrigation right are discussed in sections 7.2 and 8.2 respectively.

<sup>374</sup> For example, Lower Murray Water and Goulburn Murray Water in Victoria.

<sup>375</sup> See *Water trading rules—Position paper*, box 5.1. For a discussion of tagged trading, see section 6.1.3.

- approval authorities may be required to liaise with other authorities as a part of a trade approval process, particularly for interstate trades.<sup>376</sup>

Approval authorities are also subject to (voluntary) COAG and Natural Resource Management Ministerial Council (NRMMC) service standards for water allocation and water access entitlement trades respectively.

From 1 July 2009 COAG service standards were tightened so that approval authorities in the MDB seek to process 90 per cent of intrastate water allocation trades within five business days and 90 per cent of interstate water allocation trades within 10 business days.<sup>377</sup> The NRMMC service standards specify that 90 per cent of water access entitlement trades will be approved within 20 business days and registered within a further 10 business days.<sup>378</sup>

In its position paper, the ACCC noted that these standards provide a framework for ongoing improvement in approval times for these trades.<sup>379</sup> However, the ACCC considered that to maximise the benefits of the COAG / NRMMC standards, ongoing review, monitoring and public reporting are critical.

The ACCC therefore put forward the following preliminary position:

- As long as COAG and NRMMC service standards are subject to ongoing review, monitoring and public reporting, there does not appear to be a compelling case to impose maximum approval times for trades of water access rights at present.<sup>380</sup>

### 5.1.2. Summary of submissions

The QFF submitted that it agreed with the ACCC's preliminary position on approval times.<sup>381</sup>

The GVIA submitted that:

[it] does believe there would be justification to setting maximum approval times, which in themselves would be subject to monitoring and review.<sup>382</sup>

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<sup>376</sup> See section 5.2 for information about further implications of multiple approval authorities

<sup>377</sup> From October 2008 to 1 July 2009, the COAG service standards for water allocation trades were 90 per cent of intrastate trades within 10 business days and 90 per cent of interstate trades within 20 business days. These standards still apply in South Australia. The NRMMC service standards for water access entitlement trades were introduced on 1 July 2009.

<sup>378</sup> NRMMC communiqué, 21 May 2009, p. 2; viewed online at [www.mincos.gov.au](http://www.mincos.gov.au) on 11 November 2009.

<sup>379</sup> See ACCC, *Water trading rules—Position paper*, September 2009, p. 96, section 5.1.1.

<sup>380</sup> *ibid.*, preliminary position 5–A.

<sup>381</sup> QFF, position paper submission, p. 6.

<sup>382</sup> GVIA, position paper submission, p. 6.

WMI submitted:

WMI does not agree that maximum approval times should not be noted in the trading rules given the water market rules have been very clear on a 25 day approval and processing timeframe for infrastructure operators.<sup>383</sup>

The NSWIC submitted that mandated timeframes are worthless unless enforceable.<sup>384</sup>

The ADIC & DA submitted that voluntary compliance by approval authorities to service standards is a preferred option and that statistics on times for individual approval authorities should be publicly available.<sup>385</sup> The ADIC & DA further submitted:

Service standards should reflect the differences in complexity of approval processes for the transfer of water access entitlements versus water allocations. The service standard for all water allocation trades (whether intrastate or interstate) should be moved from five business days (as proposed under the National Water Market System) to a maximum of two business days.<sup>386</sup>

The South Australian Government submitted:

Over the last two years there has been a significant improvement in time taken to process trades. Time needs to be allowed for the COAG standards for processing to have an effect, and for the NWMS and alignment of registers to facilitate change in the market.<sup>387</sup>

The VFF<sup>388</sup> and NFF<sup>389</sup> submitted that they disagreed with the ACCC preliminary positions on approval times.

### 5.1.3. Discussion

Although some submissions argued there would be justification in setting maximum approval times for water access right trades, the ACCC remains of the view that as long as approval authorities' performance against the COAG / NRMMC service standards are subject to public reporting, monitoring and ongoing review, there is not a compelling case to impose maximum approval times.

#### Reporting and monitoring

The ACCC considers it is important that the performance of each approval authority against the COAG / NRMMC service standards is reported publicly.<sup>390</sup> Public reporting

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<sup>383</sup> WMI, position paper submission, p. 6.

<sup>384</sup> NSWIC, position paper submission, p. 11.

<sup>385</sup> ADIC & DA, position paper submission, p. 6.

<sup>386</sup> ADIC & DA, position paper submission, p. 7.

<sup>387</sup> South Australian Government, position paper submission, p. 9.

<sup>388</sup> VFF, position paper submission, p. 12.

<sup>389</sup> NFF, position paper submission, p. 8

<sup>390</sup> See ACCC, *Water trading rules—Position paper*, September 2009, p. 90, box 5.2.

Note: since the NRMMC standards for entitlement trades came into effect on 1 July 2009,

*Footnote continues on next page.*

ensures that approval authorities' performance against the standards can be monitored by market participants and other relevant stakeholders.

The ACCC notes that currently, all Basin states (except for the ACT) report on the performance of their approval authorities using a broadly standard reporting framework, reporting the number of trades in a given period, the intended COAG / NRMCC service standard and their performance against that standard. In particular:

- In Victoria, processing times for both water allocation and water access entitlement trades for the last quarter are on the Victorian Water Registry website.<sup>391</sup>
- In New South Wales, State Water reports on its performance against the service standard for approving water allocation trades each month and annually.<sup>392</sup> The New South Wales Office of Water (NOW) website also includes information about water allocation trade processing times by State Water<sup>393</sup>, as well as processing times by NOW for share assignments.<sup>394</sup> The NOW website further records the Department of Land's (DOL's) performance against the service standard for registering share assignments and transfers of ownership of water access entitlements.<sup>395</sup>
- In Queensland, SunWater reports on its performance against the standard for water allocation trades<sup>396</sup> in supplemented (regulated) systems<sup>397</sup>, and DERM reports on its performance against the service

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approval authorities' performance against the NRMCC service standards are being reported against on the same sites.

<sup>391</sup> Victorian Water Register, <http://www.waterregister.vic.gov.au/Public/Reports/ProcessingTimes.aspx> viewed, 4 November 2009.

<sup>392</sup> See State Water, *Water trading*, <http://www.statewater.com.au/Custom+er+Service/Water+Trading>, viewed 17 November 2009.

<sup>393</sup> New South Wales Office of Water, *Water allocation assignment statistics*, <http://www.wma.dwe.nsw.gov.au/wma/ProcessingTimes.jsp?selectedRegister=Allocation>, viewed 17 November 2009.

<sup>394</sup> Under s. 71Q (1) of the *Water Management Act 2000* (NSW), on the application of the holder or holders of two or more access licences of the same category with respect to the same water management area or water source, the minister may consent to the assignment of right between the access licences concerned by: a) reduction of the share or extraction component, or both, of one or some of the licences, and b) a corresponding increase in the share or extraction component, or both, of the others.

<sup>395</sup> Share assignments are under s. 71M and transfers or ownership under s. 71Q of the *Water Management Act 2000*; see New South Wales Office of Water, *Transfer and share assignment statistics*, <http://www.wma.dwe.nsw.gov.au/wma/ProcessingTimesEntitlement.jsp?selectedRegister=WaterShare>, viewed 17 November 2009.

<sup>396</sup> Known as **seasonal water assignments** in Queensland.

<sup>397</sup> SunWater, *Water trading*, <http://www.sunwater.com.au/watertrading.htm>, viewed 17 November 2009.

standard for water access entitlement<sup>398</sup> trades in both supplemented and unsupplemented (unregulated) systems, and water allocation<sup>399</sup> trades in unsupplemented systems. DERM does not report its performance against the service standard for trades involving location changes but not changes in ownership.<sup>400</sup>

- In South Australia, the DWLBC website reports DWLBC's performance against the service standards for allocation and entitlement trades in relation to the River Murray prescribed water area.<sup>401</sup>
- The Australian Capital Territory does not report its performance against the service standards.<sup>402</sup>

The ACCC considers that approval authorities' performance against the COAG / NRMMC service standards should also be published at a central point so that approval authorities' performance against the service standard can be tracked over time and compared against each other.

The MDBA would appear to be the most appropriate agency to collect and publish approval authorities' performance against the COAG / NRMMC service standards. Publication of performance against service standards could also be undertaken through the NWMS. Therefore, the ACCC considers that Basin states should make available to the MDBA information about their approval authorities' performance against the service standards.

The MDBA should continuously monitor approval authorities' performance against the service standards.

The ACCC considers that if approval authorities are consistently not meeting the COAG / NRMMC service standards as they exist from time to time, or the service standards are not regularly reviewed, the MDBA should reconsider the need for a Basin Plan water trading rule mandating service standards for trade approval times.

## Review

The performance by approval authorities against the COAG / NRMMC service standards suggests that approval authorities are generally meeting the service standards.<sup>403</sup>

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<sup>398</sup> Known as **water allocations** in Queensland.

<sup>399</sup> Known as **seasonal water assignments** in Queensland.

<sup>400</sup> See Queensland Department of Environment and Resource Management, *Water trading service standards*, [http://www.derm.qld.gov.au/water/trading/service\\_standards.html](http://www.derm.qld.gov.au/water/trading/service_standards.html), viewed 16 November 2009.

<sup>401</sup> See DWLBC, *Processing Times for Water Trade*, <http://e-nrims.dwlbc.sa.gov.au/wtr/ProcessingTimes.aspx>, viewed 15 December 2009.

<sup>402</sup> ACCC notes that few, if any, water access entitlements are transferred in the Australian Capital Territory separately from those transferred with land.

<sup>403</sup> See *Water trading rules—Position paper*, box 5.2 and Basin state and approval authority web links above. The ACCC notes New South Wales has attributed delays to entitlement processing times to the implement the s. 71Z(1) ministerial order of 29 May 2009 and 9 July

*Footnote continues on next page.*

The ACCC considers it is also important that the COAG / NRMCC service standards—as they apply to the MDB—are regularly reviewed to ensure that they remain effective and appropriate. In particular, the ACCC considers that a review process for the COAG / NRMCC service standards should be established to consider whether it would be appropriate to further tighten the standards. It is important that this review process:

- provides a clear timetable and process for a review of the service standards
- includes an opportunity for stakeholders to comment.

The ACCC considers that the service standards should be reviewed at least every two years by COAG and the NRMCC, as relevant.

#### 5.1.4. Draft advice

##### **Recommendation (5–A)**

The ACCC recommends that Basin states provide to the MDBA the following information in relation to their approval authorities' performance against the COAG / NRMCC standards for each month and water year:

- the number of water allocation and water access entitlement trades processed (both approved and rejected)
- the percentage of water allocation and water access entitlement trades processed (both approved and rejected) within the applicable COAG / NRMCC service standards.

##### **Recommendation (5–B)**

The ACCC recommends that approval authorities' performance against the COAG / NRMCC service standards should be published by the MDBA (or another Australian Government agency nominated by the MDBA, such as the NWMS National Portal).

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2009 (which effectively embargoed sales of water access entitlements to the Commonwealth Environmental Water Holder). The ACCC also notes that State Water's processing times for water allocation trades fell following the introduction of the interim moratorium on water allocation trades out of the Murrumbidgee. This interim moratorium was placed on 30 June 2009 because of unacceptably high transmission losses and other physical constraints resulting from the ongoing drought; 70 000 ML was made available to trade out by a ballot run by State Water. See

<http://www.statewater.com.au/Customer+Service/Water+Trading/Murrumbidgee+Water+Trading+Ballot> , viewed 12 November 2009.

**Recommendation (5–C)**

The ACCC recommends that the MDBA should:

- continuously monitor approval authorities' performance against the COAG / NRMMC service standards
- review the appropriateness and effectiveness of the COAG / NRMMC service standards at least every two years to consider whether the service standards can be further tightened and by how much. This review process should include an opportunity for stakeholder comment on the appropriateness and effectiveness of the service standards.

**Recommendation (5–D)**

The ACCC recommends that if approval authorities are consistently not meeting the COAG / NRMMC service standards as they exist from time to time, or the service standards are not regularly reviewed, the MDBA should reconsider the need for a Basin Plan water trading rule mandating service standards for trade approval times.

## **5.2. Consideration of applications by multiple approval authorities**

### **5.2.1. Background**

A Basin market and trading objective is to minimise transaction costs, including through good information flows in the market and compatible entitlements and other regulatory arrangements across jurisdictions.<sup>404</sup> At present, multiple approval authorities are required to approve interstate (and some intrastate) trades.

The position paper noted that the existence of multiple approval authorities may impose higher transaction costs on water market participants than would be the case if there was a single entity, although the establishment of a single MDB approval authority is unlikely to be feasible in the short to medium term.

The position paper suggested that a more feasible short-term option would be Basin states delegating limited approval powers to other approval authorities (including interstate authorities) in relation to particular trades. The ACCC noted that this option would need to be assessed to determine whether the likely benefits would outweigh any initial or ongoing costs.

The ACCC therefore put forward the following preliminary positions:

- Basin states should investigate the potential for trade approval cross-delegations to enable a trade approval authority in one state to carry out

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<sup>404</sup> Clause 3(b) of Basin water market and trading objectives (schedule 3 of the Act).

specified approval functions on behalf of an interstate approval authority. This could potentially reduce processing times but would need to be considered carefully.<sup>405</sup>

- Over time, Basin states should consider the merits of consolidating trade approval functions into one approval authority.<sup>406</sup>

### 5.2.2. Summary of submissions

SunWater submitted that to meet shorter response timeframes, SunWater believes that there is merit in investigating the idea of cross delegations.<sup>407</sup> The GVIA<sup>408</sup> and the VFF<sup>409</sup> concurred with both the ACCC's preliminary positions.

The ADIC & DA submitted that it agreed with the ACCC's preliminary positions and noted:

The involvement of multiple water authorities can result in significant delays in approvals for interstate changes in ownership of water access entitlements. These delays impair the operation of an efficient water trading market and the opportunities this provides for dairy farmers.<sup>410</sup>

The QFF also submitted that it agreed with the ACCC's preliminary positions as a recommendation regarding further investigations but that it was not a matter for regulation.<sup>411</sup> Similarly, the NSWIC submitted that:

Whilst NSWIC does not disagree with the aspiration aims of the ACCC's preliminary position, we do not believe that they are relevant to the water trading rules.<sup>412</sup>

WMI submitted that the ACCC's preliminary positions 'over simplify the actual task of transferring water permanently', and that the preliminary positions should not be taken up in the water trading rules.<sup>413</sup>

The South Australian Government submitted:

...would imply that the processing would be effectively outsourced. This raises serious issues concerning the rights of states over their own licences and the significant funds invested in licensing systems over the past decade that have been focused on in house processing and capability.

Major regulation and legislative changes would be required to permit such a radical change to current practices. There would be a cost to any such changes. Jurisdictions

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<sup>405</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 98, preliminary position 5–B.

<sup>406</sup> *ibid.*, preliminary position 5–C.

<sup>407</sup> SunWater, position paper submission, p. 4.

<sup>408</sup> GVIA, position paper submission, p. 6.

<sup>409</sup> VFF, position paper submission, p. 12.

<sup>410</sup> ADIC & DA, position paper submission, p. 7.

<sup>411</sup> QFF, position paper submission, p. 6.

<sup>412</sup> NSWIC, position paper submission, p. 11.

<sup>413</sup> WMI, position paper submission, p. 6.

would need to revise their own rules (which are already in place and in operation) and a cut off point would be required where decisions or processes would have to come back to jurisdictions for the most complex or difficult trades.

The outcomes of the NWMS are intended to improve the approval and processing of trades which may well reduce the need for such a radical proposal.<sup>414</sup>

#### DSE submitted:

Position 5-B (“investigate the potential for trade approval authority to cross-delegate”) is unnecessary and unworkable. It is unnecessary because work is underway to improve interstate trading processes, including the development of interoperability of water registers. It is unworkable because it dilutes accountability and ignores the responsibilities of the Victorian Minister (and his delegates) under the [Victorian Water] Act, with similar issues likely to be present in other States. It also requires operators in each State to have full knowledge of the arrangements in other States—better to leave it to the ‘expert’.<sup>415</sup>

#### DSE further submitted:

Position 5-C (consolidating trade approval functions into one approval authority) is also not supported. Creation of a separate authority for the purpose of processing interstate trades would seem a most inefficient outcome. It must be remembered that most aspects of each State’s end of an interstate trade are identical to the same function an intra-state trade. There is no point in allotting some of this workload to a totally different body.<sup>416</sup>

### 5.2.3. Discussion

Trade approval cross-delegations and/or the consolidation of trade approval functions into a single approval authority would involve a significant reform of trading arrangements in the MDB. The submissions from DSE and the South Australian Government indicated that these measures would likely require amendment to Basin state legislation. The ongoing work under, and in conjunction with, the NWMS is also relevant to this discussion. The ACCC also notes that while a number of submissions agreed with the ACCC’s preliminary positions, two did not think it was a matter for the water trading rules.<sup>417</sup>

#### Trade approval cross delegations

The ACCC agrees with stakeholder submissions that argued against these matters being addressed in Basin Plan water trading rules at the present time.

The ACCC contends that cross-delegation would not be appropriate for all approval functions. The ACCC notes that the vast majority of interstate trades, by number and by volume, are trades of water allocation.

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<sup>414</sup> South Australian Government, position paper submission, p. 10.

<sup>415</sup> DSE, position paper submission, p. 4.

<sup>416</sup> *ibid.*

<sup>417</sup> QFF, position paper submission, p. 6; NSWIC, position paper submission, p. 11.

In relation to a water allocation trade, the ACCC notes that the approval authority in the state of destination generally needs to ensure that the trade is allowed between the applicable trading zones and according to applicable trading rules. The approval authority in the state of origin is responsible for ensuring that the seller has sufficient water allocation in their account. If the approval authority in the state of destination delegated its approval functions to the approval authority in the state of origin, there may be potential for many water allocation trades to be approved by the state of destination alone.

In this situation, the approval authority in the state of origin would have authority to approve the transaction where the seller had sufficient water in their account, the buyer had an water allocation account and the trade was allowed according to the applicable trading zones and trading rules. If the state of origin erroneously allowed more water allocation to be transferred than the seller had in their account, this loss would have to be born by the state of origin, thereby ensuring that no additional water was created as a result of the trade.

Approval functions relating to the ownership of water access entitlements would necessarily be assessed in the Basin state that the water access entitlement relates to (given that any trade would need to be reflected on that state's register). It is not yet clear to what extent this may be affected by the introduction of a common registry system and register enhancements under the NWMS.<sup>418</sup>

### **Consolidated trade approval authority**

As long as there are multiple approval authorities with different responsibilities, information requirements and procedures, there are likely to be delays and higher costs associated with interstate water trades. However, the advantages of a single MDB approval authority would be curtailed to the extent that Basin states would still require their own approval authorities to assess intrastate trades.

Even if a single MDB approval authority were to be empowered to consider intrastate trades, trades relating to the non-MDB area of a Basin state would require assessment by a separate approval authority. Similarly, the NWMS and related reforms may lessen some of the complexities associated with having multiple approval authorities involved in trade approvals.

### **Conclusion**

Despite the potential shortcomings described above, it is still the ACCC's view that these issues deserve more detailed consideration before firm conclusions are drawn. While initial costs would undoubtedly be involved and the scope of any such measures would need to be carefully considered, the potential benefits of these measures should also be considered.

To this end, the ACCC considers that a working group involving the Australian Government, Basin states and approval authorities would be an appropriate forum to

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<sup>418</sup> See also section 5.3.

more formally consider the longer term potential for cross-delegation of selected trade approval functions or the consolidation of particular trade approval functions relevant to the MDB into one entity.

The ACCC agrees with stakeholder submissions that argued against these matters being addressed in Basin Plan water trading rules at the present time.

#### 5.2.4. Draft advice

##### **Recommendation (5-E)**

The ACCC recommends that a working group comprising representatives from the Australian Government, Basin states and approval authorities would be an appropriate forum to more formally consider the longer term potential for cross-delegating selected trade approval functions or consolidating particular trade approval functions relevant to the MDB into one entity. Relevant considerations—for both cross-delegating approval functions and consolidating approval functions into one entity—include:

- the types of trade approvals most amenable to such measures
- likely benefits to water market participants and approval authorities
- the initial and ongoing costs
- the extent of any legislative changes that would be required
- the future role and effect of the National Water Market System.

### 5.3. Information sharing between approval authorities

#### 5.3.1. Background

In November 2008 COAG agreed to the development of a National Water Market System (NWMS), with the objective of improving the functioning of the water market in Australia by facilitating the flow of information on water entitlements, allocations and trade between all market participants, and supporting timely and low-cost water transfers across irrigation area boundaries and state borders.

On 9 November 2009 the Minister for Climate Change and Water announced funding for the NWMS comprising:

- a National Portal—a web-based portal to provide access to new summary market information and to existing state and territory information—due for completion by April 2010. Over time, subject to cost benefit analysis, the portal could also provide an access point for initiating transactions.
- The development of a common registry system to be implemented in New South Wales, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory, and enhancements to existing register systems in Victoria and Queensland.

States and territories will maintain their statutory role for water registries.

- Interoperability between registers to facilitate more efficient interstate trade and enhancements to the existing systems in Victoria and Queensland.<sup>419</sup>

In its position paper, the ACCC considered that a NWMS is likely to have significant benefits for water market participants. In particular, it should facilitate information-sharing between approval authorities and therefore shorten approval times and lower transaction costs for water market participants.

However, the ACCC noted that water access rights are rights by or under the law of a state. Even where a water access entitlement is traded using a tagged trade approach to a person interstate, the water access entitlement remains on the register of the ‘state of origin’.<sup>420</sup> As such, the ACCC considered that there appeared to be little need to enable water access entitlements to transfer between registers or for there to be a single register for the MDB.<sup>421</sup>

The ACCC therefore put forward the following preliminary positions:

- There are likely to be significant benefits in making approval authorities’ systems interoperable or otherwise providing authorities with the opportunity to access information contained on each other’s systems. The ACCC notes the work being done by the National Water Market System in this regard.<sup>422</sup>
- Jurisdictions should prioritise work towards a common registry system as part of the National Water Market System.<sup>423</sup>

### 5.3.2. Summary of submissions

SunWater submitted:

SunWater agrees that making data mutually accessible between approval authorities should allow a quicker assessment of trading applications, thereby facilitating water trade across jurisdictions.

However, SunWater notes that there is likely to be significant investment required to upgrade existing water accounting systems for this to occur. SunWater is hopeful that

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<sup>419</sup> See the Hon. Penny Wong, Minister for Climate Change and Water, media release [\\$56 million for development of national water market system](#), 9 December 2009; viewed 12 November 2009.

<sup>420</sup> For more information on tagged trading, see section 6.1 of this draft advice.

<sup>421</sup> The ACCC notes that water allocations are accounted and for transferred using water allocation accounts (e.g. Victorian **allocation bank accounts**). Note, however, that the ACCC sees merit in considering the potential for certain approval functions from throughout the MDB to be consolidated into one entity—please see section 5.2 of this draft advice.

<sup>422</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 101, preliminary position 5–D.

<sup>423</sup> *ibid.*, preliminary position 5–E.

the proposal to develop a National Water Market System will offer a way for increased commonwealth coordination and investment in the upgrading of such systems between and within states.<sup>424</sup>

The GVIA and VFF concurred with both the ACCC's preliminary positions.<sup>425</sup> The QFF also agreed with both the ACCC's preliminary positions as recommendations but submitted they were not a matter for regulation.<sup>426</sup> The NSWIC submitted that the ACCC's preliminary positions, while commendable, were not relevant to water trading rules.<sup>427</sup> WMI also submitted that the ACCC's preliminary positions should not be taken up in the rules.<sup>428</sup>

The South Australian Government submitted that full unbundling across the southern-connected Basin and improvements in jurisdiction registers are increasingly facilitating the sharing of information between approval authorities.<sup>429</sup>

The ADIC & DA submitted that it supported the preliminary positions and noted:

The involvement of multiple approval authorities can result in significant delays in approvals for interstate changes in ownership of water access entitlements. Improved information sharing between approval authorities, especially via a common national water register, would go some way towards addressing these delays, although internal administrative processes and requirements will still have a significant bearing on the timeliness of approval.<sup>430</sup>

### 5.3.3. Discussion

The ACCC also notes that while a number of submissions agreed with the ACCC's preliminary positions, some did not consider they were matters for the water trading rules.<sup>431</sup>

As noted in the ACCC's position paper and in section 5.3.1, the NWMS is currently under development and is likely to have significant benefits to the extent it improves information flow between approval authorities themselves, and for water market participants more generally.

The ACCC also notes that DSE is in discussions with the New South Wales and South Australian governments to facilitate interoperability of water registers in those states.<sup>432</sup> This should mean that the benefits of interoperability between approval authorities systems will be achieved more quickly than otherwise.

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<sup>424</sup> SunWater, position paper submission, p. 4.

<sup>425</sup> GVIA, position paper submission, p. p. 6; VFF, position paper submission, p. 12.

<sup>426</sup> QFF, position paper submission, p. 6.

<sup>427</sup> NSWIC, position paper submission, p. 11.

<sup>428</sup> WMI, position paper submission, p. 6.

<sup>429</sup> South Australian Government, position paper submission, p. 10.

<sup>430</sup> ADIC & DA, position paper submission, p. 7.

<sup>431</sup> QFF, position paper submission, p. 6; NSWIC, position paper submission, p. 11.

<sup>432</sup> DSE, issues paper submission, p. 3; position paper submission, p. 4.

As such, the ACCC considers that it is not appropriate for the Basin Plan water trading rules to address the establishment of a common registry system or interoperability between approval authorities' systems.

#### 5.3.4. Draft advice

##### **Recommendation (5-F)**

The ACCC recommends that jurisdictions continue to prioritise work towards the National Water Market System and complementary interstate information-sharing arrangements.

### 5.4. Applications to trade

#### 5.4.1. Background

Water market participants are usually required to apply to an approval authority (or authorities) to trade a water access right. The application forms—and the conditions on how applications must be made—vary between and within Basin states depending upon the trade in question.

##### **Application forms**

Application forms are generally available from an approval authority's website and require similar (but not identical) information across the MDB. In the position paper, the ACCC considered that allowing interstate trading application forms to be lodged with just one of the approval authorities (as opposed to approval authorities in both jurisdictions) would appear to offer significant advantages. As well as reducing transaction costs, there would be less opportunity for applicants to provide inconsistent or incorrect information on the forms,<sup>433</sup> or the forms being delayed or misplaced (for example, in the postal system).

The ACCC also considered that standardising application forms would help facilitate trade and reduce transaction costs by simplifying the trading process. However, the position paper noted that there may be some difficulty in developing standardised forms because of differences in terminology among authorities, the characteristics of water access rights and particular jurisdictional procedural requirements.

The position paper therefore put forward the following preliminary position:

- Jurisdictions should seek to standardise their application forms as much as possible. It may also be useful for jurisdictions and the MDBA to develop standard application forms for interstate trades that would

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<sup>433</sup> Water market participants can be required to provide the same information (such as personal details and entitlement particulars) more than once, raising the possibility of inconsistent information being provided (e.g. slightly different trading volumes), which in turn may cause an application to be rejected.

include all information required by the relevant approval authorities to approve the transaction.<sup>434</sup>

### **Lodgement**

Timeliness and convenience are extremely important in the trade of water, especially for water allocation trades where water is often urgently needed. In the position paper, the ACCC considered that there are significant benefits if an approval application for a trade can be lodged quickly and in an easily accessible manner. In particular, where an approval authority accepts electronic lodgement (by email or through the approval authority's website) of application forms, the approval process is likely to be simpler, more timely and accessible for many water market participants.<sup>435</sup> Conversely, where application forms must be submitted by post or in person, significant delays in the approval process and higher transaction costs for applicants can occur.

Where a trade requires approval from multiple approval authorities, a decision by one approval authority to accept electronic lodgement of application forms will be of limited benefit if other approval authorities relevant to the prospective trade require application forms to be lodged in person or by post.

As such, in the position paper, the ACCC put forward the following preliminary position:

- Basin states should provide a facility to allow electronic lodgement of applications to trade a water access right, where this is not currently possible.<sup>436</sup>

### **5.4.2. Summary of submissions**

The ADIC & DA submitted that it agreed with the ACCC's preliminary positions and noted:

Delays in approvals for changes in ownership of water access entitlements can have significant financial and production consequences for dairy farmers, particularly where there is an urgent need for water. To reduce delays associated with approvals for changes in ownership of water access entitlements, the dairy industry favours:

- Standardised application forms;
- Electronic lodgement available for all water trade applications, bearing in mind that property transfers occur electronically in some States already, and;
- Support for enquiries regarding completion of application forms.<sup>437</sup>

The GVIA and VFF concurred with both the ACCC's preliminary positions.<sup>438</sup>

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<sup>434</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 105, preliminary position 5–F.

<sup>435</sup> *ibid.*, p. 101, section 5.4.1.

<sup>436</sup> *ibid.*, p. 105, preliminary position 5–G.

<sup>437</sup> ADIC & DA, position paper submission, p. 7.

<sup>438</sup> GVIA, position paper submission, p. 6; VFF, position paper submission, p. 12.

The NSWIC submitted that the ACCC's preliminary positions are unenforceable.<sup>439</sup>

The QFF agreed with the ACCC's preliminary positions in principle, although it submitted that both propositions have been subject to some investigation already and a number of significant impediments have been identified. The QFF submitted that further investigation may be warranted into ways to address identified impediments.<sup>440</sup>

DERM submitted:

Previous investigations at the national level into standardising application forms has shown that standardisation is impracticable and the costs far outweigh any benefits.<sup>441</sup>

On the ACCC's preliminary position that Basin states should provide a facility to allow electronic lodgement of applications to trade a water access right, DERM submitted:

This is being addressed through existing CoAG frameworks such as the development of the National Water Market System and is not relevant to MDB trading rules.<sup>442</sup>

DSE submitted:

Electronic lodgement of allocation trades is supported and available already in Victoria for larger brokers, and there are plans to make it more widely available.

However the provision of an electronic lodgement facility for water entitlements, the ongoing right to water, is a major step. The ACCC notes that electronic conveyancing for land can occur in Victoria. While this is true, it is the result of a large investment over many years, justified by a very large market. It is doubtful that the water entitlement market would ever be large enough to support the investment needed, and certainly should not be assumed to be so without a proper analysis. This part of position 5-G is therefore not supported.

The South Australian Government submitted that:

An application process that is as simple as possible whilst covering all legislative requirements is a desirable feature of any market. Attempts have been driven in the past by the COAG Water Markets Reform Working Group to develop standardised water allocation trade forms. This is not possible given the differences in legislative requirements of the jurisdictions and the operating systems in each state. Advances in unbundling, compatibility of water registers and the NWMS project and operating rules will increase the ease of the application process. The benefits of such a change would need to be greater than the costs to bring real benefit to the overall market.<sup>443</sup>

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<sup>439</sup> NSWIC, position paper submission, p. 11.

<sup>440</sup> QFF, position paper submission, p. 7.

<sup>441</sup> DERM, position paper submission, p. 4.

<sup>442</sup> *ibid.*

<sup>443</sup> South Australian Government, position paper submission, p. 10.

### **5.4.3. Discussion**

#### **Application forms**

The ACCC notes that while a number of submissions supported the ACCC's preliminary position that jurisdictions should seek to standardise trade approval application forms as much as possible, several stakeholders also noted that it is difficult to develop a standardised form given that each Basin state has different legislative requirements.

While the ACCC considers that developing a standardised trade approval application form for the MDB would be beneficial, it recognises that, given current legislative arrangements, developing a standardised form that is not unnecessarily long and confusing might be difficult.

However, the development of a standardised form may become easier as processes are refined over time and information-sharing arrangements develop under the NWMS and related processes. As such, the potential for standardised application forms may be more formally considered in the future.

#### **Lodgement**

Although the ACCC would encourage jurisdictions to implement web-based systems (similar to those available to larger brokers for allocation trades in Victoria) to accept trade approval applications, it is aware that the cost of setting up such application systems may be significant and difficult to justify for all types of water access right trade. For example, the ACCC notes DSE's submission that the water access entitlement market is not large enough to support the investment needed for approval authorities to develop systems to accept entitlement trade approval applications electronically

Electronic lodgement not only includes lodgement by a web-based system (i.e. a web-based form completed entirely online), but also by email (e.g. where the applicant emails a scanned version of a printed and signed copy of the application form to an email address dedicated to receiving such applications). The ACCC considers that the cost of approval authorities receiving applications by email is unlikely to be significant (and may in fact be cheaper and more efficient than only accepting them by post or in person).

The ACCC considers that the benefits of approval authorities accepting trade approval applications for both water access entitlements and water allocation trades electronically are likely to be significant, including time and cost savings, as well as greater convenience for water market participants.

Although the ACCC is aware that many IIOs roster water deliveries through the use of web-based ordering (suggesting that many likely water market participants do have internet access), it is not proposing that approval authorities no longer accept paper trade approval applications. This ensures that water market participants who would prefer to submit their application in person or by post, or who do not have internet access, are not prevented from doing so by the Basin Plan water trading rules.

The ACCC notes that the process of **registering** a water access entitlement trade is very similar to the conveyancing procedures associated with land transfers<sup>444</sup> and is, in some jurisdictions, administered by the same agency.

The ACCC therefore considers that such a rule should apply to the lodgement of applications for trade approval, but not—at this time—extend to the registration of a (permanent) water access right trade, where the registration is undertaken as separate process.

#### 5.4.4. Draft advice

##### **Rule advice (5–G)**

The Basin Plan water trading rules should provide that approval authorities are required to accept duly completed applications to trade a water access right submitted by email to an email address established by the approval authority for this purpose. This requirement would not apply to situations where an approval authority offers a web-based form for applications (although approval authorities may wish to offer both facilities), nor would it apply to applications to register a trade where this is conducted as a separate process. Approval authorities may also continue to accept trade approval applications by post and in person.

##### **Recommendation (5–H)**

The ACCC recommends that approval authorities consider the development of web-based forms for applications to trade water access rights. Approval authorities may also continue to accept trade approval applications by post and in person.

## 5.5. The role of water market intermediaries

### 5.5.1. Background

Water market participants often use the services of an intermediary (such as a water broker or exchange)<sup>445</sup> when seeking to trade a tradeable water right. As such, approval

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<sup>444</sup> These processes are paper-based and involve the discharge of all mortgages, covenants and other caveats on the right (i.e. settlement), as well as the registration any new mortgage. The ACCC notes that state and territory governments are working towards an electronic conveyancing system for land transfers. See *National Electronic Conveyancing System*, available online at [www.necs.gov.au](http://www.necs.gov.au); viewed 26 November 2009.

<sup>445</sup> **Intermediaries** is a general term that refers to water brokers (who perform a similar function to mortgage brokers in that they investigate trading options on behalf of clients and arrange the necessary paperwork) and water exchanges (akin to a trading platform, rather than a stock exchange).

authorities and IIOs (for trade of irrigation rights)<sup>446</sup> often deal directly with water market intermediaries rather than the trading parties.<sup>447</sup>

Like any business, water market intermediaries are required to comply with the fair trading provisions of the *Trade Practices Act 1974* (the TPA) and/or similar fair trading legislation in each state and territory. However, no industry-specific legislation applies to the conduct of water market intermediaries.

The position paper noted that, as water market intermediaries are not specifically required to act consistently with the Basin Plan by the Act, Basin Plan water trading rules appear limited in their ability to address concerns about the conduct of water market intermediaries.<sup>448</sup>

The position paper noted that there is some concern about water market intermediaries engaging in misconduct,<sup>449</sup> although the ACCC and other government regulators receive very few complaints about water market intermediaries.<sup>450</sup> The position paper noted that concerns about the conduct of water market intermediaries (whether justified or not) have the potential to undermine confidence in water markets.<sup>451</sup> The ACCC considered that self-regulation may be a more appropriate tool to deal with concerns about water market intermediaries<sup>452</sup> and noted that the more serious concerns raised about water market intermediaries such as fraud, theft, trading while insolvent or misleading conduct are already covered by the criminal law, the *Corporations Act 2001* or fair trading legislation (such as the TPA).

The ACCC also noted that water market intermediaries often require significant amounts of money on deposit from purchasers of water access rights (in some cases, the entire purchase price or otherwise an amount in excess of the intermediary's total commission or fee) at or before trading application forms are lodged. The ACCC considered that to the extent these deposit requirements are excessive, water market participants appear to face higher than necessary transaction costs and concerns about

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<sup>446</sup> See section 8.2 regarding the trade of irrigation rights.

<sup>447</sup> The manner in which approval authorities interact with water market intermediaries (including potential conflicts of interest) is considered in section 5.6.

<sup>448</sup> See ss. 34 and 35 of the Act.

<sup>449</sup> See Allen Consulting Group, National Water Commission 'Improving market confidence in water intermediaries', *Waterlines* occasional paper No. 3, July 2007, p. 37.

<sup>450</sup> This may be because those adversely affected may not be aware that misconduct is occurring or, where they do detect a problem, may not be aware of their rights. Water market participants may also be uncertain about who, where and how to complain when they believe their fair trading rights have been infringed.

<sup>451</sup> See section 5.6 of this draft advice for a discussion of approval authorities' other activities (including where an approval authority owns or operates an intermediary service).

<sup>452</sup> The ACCC noted that Australian Water Brokers' Association has developed a voluntary code of conduct and the NFF has undertaken work with intermediaries to develop a code of conduct for adoption by intermediaries. However, a voluntary code of conduct will be most effective when the self-regulatory body has widespread support from industry participants, comprises representatives of all key stakeholders and operates an effective system of complaint-handling.

money on deposit are exacerbated.<sup>453</sup> Nevertheless, the ACCC considered that over time competitive pressures can be expected to lead to intermediaries offering services (and deposit or prepayment requirements) that better meet the needs of water market participants.

The ACCC therefore put forward the following preliminary position:

- There is insufficient evidence to support the introduction of specific regulation of water market intermediaries.<sup>454</sup>

### 5.5.2. Summary of submissions

The NWC recommended in its 2009 Biennial assessment that:

The jurisdictions and the ACCC should continue to monitor the actions of market intermediaries and should adopt any further measures considered necessary to preserve and build user confidence in the water trading system and to advance water market objectives under the NWI.<sup>455</sup>

The GVIA submitted it:

... has some concerns with this position. Intermediaries are in many cases holding large sums of clients' money, as well as overseeing very valuable transactions, and there is a strong case for some regulation, even if there is little in the way of evidence proving wrong-doing to-date.<sup>456</sup>

The VFF submitted it did not agree with the ACCC's preliminary position on water market intermediaries. In particular, the VFF submitted:

[its] view [is that] a regulatory and/ or licensing approach would provide a means to enforce compliance with expected or stipulated broker practices, but will add costs to the broker operations. A Code of Practice while possibly imposing a lesser cost does not have the compliance strength of [a] regulatory approach.<sup>457</sup>

The NIC submitted that a number of its members have raised concerns about the behaviour, or potential behaviour, of water market intermediaries, and that while as a general rule, NIC would prefer to see a 'light-touch' when it comes to regulation in the water industry, there is support for better regulation of the broking sector.<sup>458</sup>

The NIC further submitted that while it may be true that the Basin Plan trading rules are not the correct forum for this discussion, it believes the ACCC has some role in

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<sup>453</sup> This is particularly relevant to water access entitlement trades or other trades involving more detailed consideration (over a longer time period) by approval authorities.

<sup>454</sup> ACCC, *Water trading rules—Position paper*, preliminary position 5–H.

<sup>455</sup> NWC, position paper submission, p. 2.

<sup>456</sup> GVIA, position paper submission, p. 6.

<sup>457</sup> VFF, position paper submission, p. 14.

<sup>458</sup> NIC, position paper submission, p. 4.

oversighting this sector and that the implementation of minimum standards, similar to those applicable to real estate agents and accountants, should be pursued.<sup>459</sup>

The NFF<sup>460</sup>, WMI<sup>461</sup> and the NSWIC<sup>462</sup> disagreed with the ACCC's preliminary position and submitted that specific regulation should be introduced for water market intermediaries.

The ADIC & DA submitted:

The dairy industry believes that voluntary compliance with the Australian Water Brokers' Association Code of Conduct should provide confidence in the role of intermediaries in the water market. However, the lack of specific regulation of, or requirements for, water market intermediaries does not address the concerns about potential misconduct by these market participants. ADIC and DA acknowledge that incidents of misconduct are not widespread, but the impacts of even a small number of misleading or deceptive activities by water market intermediaries could be significant on individual dairy farmers.<sup>463</sup>

On this basis, the ADIC & DA suggested:

- Information on water market participants' rights should be distributed widely and made easily accessible through water market intermediaries and other water-related organisations;
- An effective and easily accessible complaint-handling process should be developed, or existing processes improved and more widely promoted, and;
- Specific regulation of water market intermediaries should be considered.<sup>464</sup>

The South Australian Government submitted:

There are only a few dominant intermediaries operating in the market and therefore ongoing vigilance is recommended in the absence of specific regulation of intermediaries. If there is a slip in standards by any of the intermediaries a large proportion of the market participants could be adversely affected very quickly.

Although the market has grown substantially over the past three water years, it is still a young and developing market. Any activities which threaten the confidence of the market must be carefully monitored and corrected quickly.<sup>465</sup>

The QFF submitted that it agreed with the ACCC's preliminary position in principle.<sup>466</sup>

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<sup>459</sup> *ibid.*

<sup>460</sup> NFF, position paper submission, p. 8.

<sup>461</sup> WMI, position paper submission, p. 7.

<sup>462</sup> NSWIC, position paper submission, p. 11.

<sup>463</sup> ADIC & DA, position paper submission, p. 8.

<sup>464</sup> *ibid.*

<sup>465</sup> South Australian Government, position paper submission, p. 10.

<sup>466</sup> QFF, position paper submission, p. 7.

### 5.5.3. Discussion

As noted in the position paper, Basin Plan water trading rules appear limited in their ability to address concerns about the conduct of water market intermediaries. This is because water market intermediaries are not specifically required under the Act to act consistently with the Basin Plan (including water trading rules to be included in the Basin Plan).<sup>467</sup> Consequently, even if there were, in the ACCC's opinion, sufficient evidence to support the introduction of specific regulation of water market intermediaries, the Basin Plan water trading rules appear to be an unsuitable mechanism for such specific regulation.<sup>468</sup> The potential for industry-specific legislation to regulate the conduct of water market intermediaries is a matter for governments (both federal and Basin state) to consider.

Most submissions disagreed with the ACCC's preliminary position on water market intermediaries.

Further, as mentioned above, the TPA and similar fair trading legislation in each state and territory prohibits, inter alia, misleading or deceptive conduct, false representations and unconscionable conduct. The more serious concerns raised about water market intermediaries—such as fraud, theft and trading while insolvent—are covered by the criminal law and the *Corporations Act 2001*. It is not clear that direct regulation of intermediaries (e.g. through licensing or requiring the use of trust accounts) is likely to offer any significant further protection against the occurrence of serious cases of fraud or theft. The ACCC and other government bodies with which it has consulted receive very few complaints about water market intermediaries.

The ACCC also notes that in its 2009 biennial assessment of progress in implementing the NWI, the NWC found:

The level of confidence in market intermediaries is critical to the continued growth and efficient operation of water markets. The [National Water] Commission recognises that significant efforts have been made to improve confidence in market intermediaries, in particular through the provision of better information about rights and obligations under consumer protection legislation by relevant authorities (for example, the ACCC). While the [National Water] Commission is concerned about reported incidents of misconduct, and acknowledges arguments in favour of regulation from some market participants, there is not yet a compelling case for industry-specific regulation of market intermediaries beyond the generally available trade practices and consumer protection regulations.<sup>469</sup>

The NWC then recommended:

The jurisdictions and the ACCC should continue to monitor the actions of market intermediaries and should adopt any further measures considered necessary to preserve

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<sup>467</sup> See ss. 34 and 35 of the Act.

<sup>468</sup> See s. 35 of the Act.

<sup>469</sup> NWC, [Australian water reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative](#), finding 7.12, p. 128; viewed 16 November 2009.

and build user confidence in the water trading system and to advance water market objectives under the NWI.”<sup>470</sup>

The ACCC will continue to monitor complaints it receives about alleged misconduct (e.g. misleading or deceptive conduct) by water market intermediaries and to distribute educational materials to intermediaries and their customers.<sup>471</sup>

If governments (including Basin state governments) wish to introduce further regulation of water market intermediaries, the ACCC notes a range of relevant considerations. These include whether there is significant market failure that is unlikely to be corrected over time by the market itself and whether the government can provide a cost-effective solution that delivers net public benefits.

The ACCC also notes that there is a spectrum of regulatory options available to governments and industry, including:

- **Development and distribution of information** to market participants to increase the skills and knowledge of consumers to reduce the imbalance of information between suppliers and consumers. As noted in the position paper, the ACCC has released a series of brochures to explain water market participants’ rights under the TPA and similar state and/or territory fair trading legislation as it relates to water brokers and exchanges. The ACCC also notes that the provision of greater information about the characteristics of tradeable water rights, allocation announcements, trading rules, processes and prices will lead to more informed water market participants.<sup>472</sup>
- **Self-regulation** includes professional bodies’ codes of conduct, including industry service charters, guidelines and standards, as well as industry-based accreditation and complaint-handing schemes. Self-regulation is initiated and administered by industry and has a number of advantages: it is a flexible way to promote ‘best practice’ in an industry and it has lower compliance and implementation costs than government-imposed regulation. The ACCC notes that the Australian Water Brokers’ Association has developed a Code of Ethics and Standards<sup>473</sup> and the NFF has undertaken to work with intermediaries to develop a code of conduct for adoption by all intermediaries.<sup>474</sup>
- **Regulation**—for example, a prescribed industry code of conduct under Part IVB of the TPA or a state-based licensing regime.

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<sup>470</sup> NWC, position paper submission, p. 2; *ibid.*

<sup>471</sup> See ACCC webpage, Water trading—fair trading rights and obligations for irrigators, brokers and exchanges webpage, available at [www.accc.gov.au](http://www.accc.gov.au).

<sup>472</sup> See chapter 9 of this advice about reporting and availability of information.

<sup>473</sup> Australian Water Brokers’ Association, *Code of ethics and standards*, available at: [https://www.waterexchange.com.au/files/AWBA\\_ethics.pdf](https://www.waterexchange.com.au/files/AWBA_ethics.pdf), viewed 16 November 2009.

<sup>474</sup> NFF, issues paper submission, p. 30.

#### 5.5.4. Draft advice

##### **Recommendation (5–I)**

The Basin Plan water trading rules cannot directly regulate the conduct of water market intermediaries. The ACCC notes that industry-specific legislation is a matter for governments (federal and Basin state) to consider. The ACCC recommends that fair trading agencies also continue to monitor complaints against water market intermediaries.

### 5.6. Approval authorities' other activities

#### 5.6.1. Background

Some approval authorities also engage in other activities that may give rise to a conflict of interest. Where an approval authority is responsible for announcing allocations, managing infrastructure and also trades water, the position paper noted a code of conduct and/or ring-fencing arrangements may be appropriate.<sup>475</sup>

The ACCC also considered that potential or perceived conflicts of interest may occur where an approval authority also acts as a water broker or operates a water exchange in addition to operating water infrastructure, delivering water and/or determining allocation levels.

The ACCC therefore put forward the following preliminary position:

- Approval authorities' other activities may give rise to potential or perceived conflicts of interest that may have the potential to undermine the water market. This is particularly where a conflict of interest is not disclosed to other parties to the transaction. This issue deserves closer attention by government.<sup>476</sup>

The ACCC further considered that where approval authorities recommend specific water brokers or exchanges (especially if operated by the approval authority itself) or process applications particular brokers or exchanges differently, the integrity and confidence in the water market may be placed at risk. These practices may discourage some water market participants from trading in the water market. Competition in the market for water exchanges or brokers may also be lessened, causing transaction costs to rise.

The ACCC put forward the following preliminary position:

- Basin states should consider requiring their trading approval authorities to disclose whether they have any interest in a water access right (other than in their approval role), to all other parties involved in a potential

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<sup>475</sup> For example, SunWater has implemented a code of conduct and ring-fencing arrangements; see ACCC *Water trading rules—Position paper*, section 5.6.3

<sup>476</sup> *ibid.*, p. 112, preliminary position 5–I.

trade of that right. It may also be appropriate to require trade approval authorities to inform the market of any water trade to which they have been a party.<sup>477</sup>

## 5.6.2. Summary of submissions

SunWater submitted:

[A]s the water service provider in many Queensland schemes, we are tasked with determining the ‘announced allocations’ in these schemes. SunWater is concerned that there may be a perception that SunWater can somehow influence the timing and/or percentage of water sharing announcements (‘announced allocations’), particularly in schemes where SunWater is a potential participant in the water market.

Consequently, SunWater is in general agreement with the ACCC statement and is currently discussing this issue with its customers and the Queensland regulator, the Department of Environment and Resource Management in the lead up to their review of the Burnett Basin Water Resource Plan.<sup>478</sup>

The QFF, NFF<sup>479</sup> and VFF<sup>480</sup> submitted they agreed with both ACCC preliminary positions. The QFF also submitted that there is a need to investigate whether SunWater’s role in determining announced allocations may give rise to a potential or perceived conflict of interest.<sup>481</sup>

DERM submitted that ACCC’s preliminary position on approval authorities’ other activities that may give rise to potential or perceived conflicts of interest was not relevant to the Basin Plan water trading rules.<sup>482</sup>

The GVIA submitted:

Concur with the ACCC position, and point to the NSW Office of Water, NSW’s primary water regulatory [body], which is now part of the Department of Environment, Climate Change and Water, which is a very large owner of NSW water entitlements and therefore represents a very real conflict of interest.<sup>483</sup>

WMI submitted that the trading rules need to be clear on what is and is not permitted and what is a conflict that will breach the rules. WMI further submitted that noting the issue deserves closer attention by government is not adequate.<sup>484</sup>

The NSWIC:

... believes that the potential for a conflict of interest is real and present and it must be dealt with via appropriate rules. We submit that rules in respect of disclosure together

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<sup>477</sup> *ibid.*, preliminary position 5–J.

<sup>478</sup> SunWater, position paper submission, pp. 4–5.

<sup>479</sup> NFF, position paper submission, p. 8.

<sup>480</sup> VFF, position paper submission, p. 14.

<sup>481</sup> QFF, position paper submission, p. 7.

<sup>482</sup> DERM, position paper submission, p. 4.

<sup>483</sup> GVIA, position paper submission, p. 6.

<sup>484</sup> WMI, position paper submission, p. 7.

with significant penalties akin to those dealing with market information in equities markets ought to be developed as part of the [water trading] rules.<sup>485</sup>

The ADIC & DA submitted that it agreed with the ACCC's preliminary positions and that the dairy industry considers that perceived conflicts of interest by approval authorities will weaken confidence in their role in the water market and potentially reduce the quality and timeliness of market information to market participants.<sup>486</sup>

The ADIC & DA further submitted:

The dairy industry believes that approval authorities must operate within the principle of competitive neutrality and apply the competitive neutrality rules in the Trade Practices Act 1974. On that basis, ADIC and DA suggests that approval authorities should be required to:

- Process applications from all water intermediaries in the same manner and timeframe;
- Not recommend specific water market intermediaries, especially those operated by the individual approval authority;
- Clearly state any conflicts of interest involved in the approval and/or trade of water access rights, and;
- Abide by a Code of Conduct developed for approval authorities who also announce allocations, manage infrastructure and/or trade water.<sup>487</sup>

State Water submitted that it agreed with both the ACCC's preliminary positions and that approval authorities should be able to clearly demonstrate that they have appropriate mechanisms in place to deal with any actual or perceived conflicts of interest. However, on the ACCC's preliminary position that it may be appropriate to require trade approval authorities to inform the market of any water trade to which they have been a party, State Water submitted:

State Water agrees with this position, assuming that the "parties" referred to by the ACCC refer to actual buyers and sellers, rather than water brokers acting on behalf of a third party.<sup>488</sup>

The South Australian Government submitted:

The Department of Water Land and Biodiversity Conservation is the approving authority for South Australian water licences. The South Australian Government does not operate a water broking service nor does it give preference to one broker over another. The SA Water Corporation has purchased water as the Government's agent, but the licences are processed by Department of Water Land and Biodiversity Conservation. The process is undertaken by two totally separate entities.<sup>489</sup>

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<sup>485</sup> NSWIC, position paper submission, p. 12.

<sup>486</sup> ADIC & DA, position paper submission, p. 8.

<sup>487</sup> *ibid.*

<sup>488</sup> State Water, position paper submission, p. 1.

<sup>489</sup> South Australian Government, position paper submission, p. 10.

### 5.6.3. Discussion

As noted in the position paper, approval authorities' other activities may give rise to potential or perceived conflicts of interest that have the potential to undermine confidence in the water market—particularly when a conflict of interest is not disclosed to other parties to the transaction. A potential or perceived conflict of interest is likely to arise when an approval authority has both regulatory and commercial functions (e.g. where an approval authority owns and trades water access rights, while also approving such trades and possibly announcing water allocations). A potential or perceived conflict of interest may also arise where an approval authority acts as (or owns) a water market intermediary that deals with trades that the approval authority assesses (since there may be a perception that trades dealt with by the intermediary owned or operated by the approval authority may be processed faster or more favourably).

In these cases, the ACCC considers that structural separation or ring-fencing between the approval authority's regulatory functions, water trading activities and operations as a water market intermediary may be options considered by governments. However, in the ACCC view these are not measures that Basin Plan water trading rules could or should require.<sup>490</sup>

However, the ACCC considers that approval authorities should be required to disclose when they have a direct interest (and, if so, the nature of that interest) in a water access right (other than in their approval role), to all other parties involved in a potential trade of that right (such as a prospective buyer or seller).

Trade approval authorities should also be required to disclose their trade approval function in all dealings involving a water market intermediary they own or operate. For example, if a water intermediary is a subsidiary of a trade approval authority, the trade approval authority would be required to ensure that water market participants dealing with that entity are made aware of this relationship.

The ACCC considers these measures are necessary to ensure that water market participants are fully informed of any potential conflict of interest of the trade approval authority.

The ACCC also considers it would be appropriate to require approval authorities to inform the market of any water trade to which they have been a party (as a buyer,

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<sup>490</sup> Structural separation is the total separation of different functions of a trade approval authority. In this context, this could mean separating out the commercial functions into a separate legal entity from the authorities' regulatory functions, with different boards, management teams and objectives. Ring-fencing is the separation of business units and imposition of operational rules on the business units (such as controls on sharing of staff and information). For example, the ring-fenced areas of operation should not have access to the same IT systems or databases and should be in a physically separate location to other parts of the authority. It is important that staff in a ring-fenced area of operation do not report to managers in the non-ring fenced part of the authority. The ACCC notes that SunWater has developed ring fencing arrangements, available at [http://www.sunwater.com.au/watertrading/Ringfencing\\_Arrangements.pdf](http://www.sunwater.com.au/watertrading/Ringfencing_Arrangements.pdf), viewed 17 November 2009.

seller, lessee or lessor). This disclosure should take place on the approval authority's website as soon as possible after the trade has been completed.

#### **5.6.4. Draft advice**

##### **Rule advice (5–J)**

The Basin Plan water trading rules should provide that a trade approval authority must not approve a trade unless it has first informed all other parties to the trade of any direct interest that it has (and, if so, the nature of that interest) in the trade (other than in its approval role).

An interest would include where a trade approval authority owns or operates a water market intermediary involved in the proposed trade.

##### **Rule advice (5–K)**

The Basin Plan water trading rules should provide that trade approval authorities must inform the market of any trade of a water access right to which they have been a buyer, seller, lessee or lessor. This disclosure should be made as soon as possible after the trade has been completed and on the approval authority's website.

##### **Recommendation (5–L)**

The ACCC recommends that approval authorities and Basin state governments develop policies and procedures to identify and appropriately manage potential or perceived conflicts of interest of trade approval authorities.

## 6. Water access rights—location matters

Trades of water access rights often involve changes in the location of extraction. This chapter provides advice on trade involving a change in location.

Water systems can be classified based on the type of water source and the degree to which system operators can control flows. This chapter discusses trade within and between the following water systems:

- **Regulated systems**<sup>491</sup>—characterised by structures such as dams and weirs that can be used to store and control flows, thereby increasing reliability of supply. Water access rights in these systems generally take the form of water access entitlements (which in turn give rise to water allocations). Once made, water allocations usually take the form of a credit in a water allocation account, which can be used at any time, subject only to ordering requirements and delivery constraints.
- **Unregulated systems**—systems where the flow in-stream is dictated by natural events rather than controlled or modulated by structures. Water access rights in these systems tend to be less dependable than those in regulated systems. The ability to access water depends on sufficient water being available at the point of extraction.
- **Groundwater systems**—water beneath the land surface that fills voids between soil particles or in rock fissures. When it stores water, the underground soil or rock formation is referred to as an aquifer. Groundwater supplies are less influenced by climate variability than surface water because of their storage capacity and various sources of recharge.<sup>492</sup>
- **Farm dams**—catchment dams (sometimes referred to as **hillside dams**) that harvest overland flow before it enters a river system. This does not include dams located on waterways. Farm dams vary in size and volume of water harvested. The discussion of farm dams includes harvestable rights in New South Wales. However, it does not include floodplain harvesting (or overland flow) because this is considered a different water product that is more akin to water access rights in unregulated systems.

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<sup>491</sup> In Queensland, regulated and unregulated water systems are referred to as **supplemented** and **unsupplemented** systems respectively.

<sup>492</sup> T Goesch, S Hone and P Gooday, 'Groundwater management: issues affecting the efficient allocation of groundwater', *Australian commodities*, 14(1), Australian Bureau of Agricultural and Resource Economics, March 2007.

Trade involving a change in location requires consideration of a wide range of issues, including a variety of combinations of water systems between which trade may be possible. This chapter accordingly has a number of sections:

- Section 6.1 discusses trade in regulated systems.
- Section 6.2 discusses trade in unregulated systems.
- Section 6.3 discusses trade between unregulated and regulated systems.
- Section 6.4 addresses trade of groundwater.
- Section 6.5 discusses trade between groundwater and surface water systems.
- Section 6.6 discusses trade between farm dams, including trade to surface water.

As discussed in section 2.1.2, many location matters relating to water trade will be best addressed through WRPs rather than through Basin Plan water trading rules.

While the ACCC has made recommendations about the principles it considers are relevant to trades involving certain changes in location, the specific application of these principles would often need to be assessed in the context of WRP areas. Therefore, as well as proposing the development of Basin Plan water trading rules in certain matters, the ACCC advice on a number of location matters also takes the form of recommendations for the MDBA to consider when developing requirements for WRPs. This chapter also recommends a number of areas where further work is required, and therefore a Basin Plan water trading rule is not currently appropriate.

## **6.1. Trade in regulated systems**

### **6.1.1. Background**

Trade between regulated systems includes both interstate and intrastate trade. While the administrative processes of interstate trade have their own complexities, issues relating to the physical movement of water between regulated systems are the same regardless of whether the movement is intrastate or interstate.

#### **Hydrologic connectivity and water supply considerations**

Under the Act, one of the Basin water market and trading objectives is:

to facilitate the operation of efficient water markets and the opportunities for trading, within and between Basin States, where water resources are physically shared or hydrologic connections and water supply considerations will permit water trading.<sup>493</sup>

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<sup>493</sup> Schedule 3, clause 3(a) of the Act.

The ability to deliver water<sup>494</sup> from one regulated system (or zone within a system) to another will depend on hydrologic connectivity and water supply considerations, including:

- the ability to deliver water from the same storage(s) or to adjust water accounts to facilitate the trade (e.g. back trade)
- acceptable levels of transmission losses (and how these are accounted for)
- river or channel capacity and other delivery constraints.

Hydrologic connectivity can be interpreted to mean:

that two water sources are connected in some way for a given period of time, such that water can be diverted from the new diversion location without unacceptable incremental losses or adverse third party impacts.<sup>495</sup>

The existing MDB Agreement and schedules are based on the assumption that there are negligible increases in transmission losses due to trade. Recent events have highlighted that this assumption may not necessarily be appropriate, especially considering the unprecedented dry conditions.<sup>496</sup> As MDB water resources are generally managed on the basis that transmission losses are socialised, some judgement on what level of loss is acceptable for delivery is required. The ACCC's position paper argued that rather than prohibiting trades when transmission losses reach unacceptable levels, it may be preferable to allow a water trade (and delivery of the traded water) as long as the purchaser is willing to incur a loss factor on the trade to account for transmission losses. While accounting for losses at this scale is theoretically possible, there are many difficulties, including:

- the complexity of isolating the impact of trade if there are multiple storages and a complex system operation
- dealing with the margin of error in calculating losses
- deciding on the appropriate time and spatial scale to calculate losses
- incorporating losses into the trade administration process.

In its position paper, the ACCC suggested that the benefits of such an approach would need to be assessed against these difficulties. In any case, reporting information on transmission losses (even in the absence of applying a loss factor to trades) can help assess the scale of transmission losses due to trade and the resulting impact (if any) on other users. Evidence of significant impacts on the interests of third parties could, in turn, prompt further consideration of how transmission losses should be managed.

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<sup>494</sup> This may take the form of an accounting procedure rather than the physical movement of water from one location to another.

<sup>495</sup> Sinclair Knight Merz, *Water Trade and the Hydrological Connectivity of Surface Water Systems*, report prepared for the ACCC, September 2009, p. 17.

<sup>496</sup> As an example, the recent restrictions on allocation out of the Murrumbidgee system because of potential delivery losses.

Capacity constraints are currently managed by placing limits on trade to ensure there is no net trade through the constraint. The impact of these limits depends on the relative size of the limit compared to the level of demand that exists for trade through the constraint. For example, high demand downstream of a (maximum) constraint relative to the upstream area would create a price differential in the two segregated areas.

The ACCC recognised that imposing a trade restriction may not necessarily be the most efficient mechanism to manage capacity constraints. The ACCC position paper identified alternate mechanisms to manage scarce delivery capacity, including issuing delivery rights across the constraint, but noted that adopting this approach would be complex because it would require large-scale adjustments to the way water is managed in the MDB. The ACCC concluded that making these large-scale adjustments is not feasible in the short term and the benefits of such adjustments have not been assessed in sufficient detail.

The ACCC considered in its position paper that, given the current approach to managing constraints through trading restrictions, more information about the conditions under which related trading rules are likely to be suspended or amended, and the likelihood of those conditions occurring in the coming season, would assist market participants to manage their water needs. This would ideally involve authorities developing transparent triggers for suspension or amendment of trading restrictions caused by capacity constraints. The ability to develop transparent triggers will depend on the complexity involved in understanding the drivers of the constraint.

Even where trade from one trading zone to a second trading zone is restricted because of a capacity constraint, back trade may still be permitted to the extent that trade has already occurred from the second trading zone into the first trading zone (thereby freeing up capacity in the constraint). With back trade, the ability to trade water varies continually as trades in the opposite direction occur. The position paper considered that publishing information on the capacity for back trade will improve these trading opportunities and make the process of managing these constraints (and back trade opportunities) more transparent.

In summary, the ACCC position paper put forward the following preliminary positions in relation to hydrologic connectivity and water supply considerations:

- The ACCC supports the following principles in relation to regulated systems (based on the MDBC manual):
  - trades within a trading zone should generally not be restricted
  - downstream trades between hydrologically connected systems should generally be possible
  - where a downstream trade is impeded by a physical constraint to channel capacity (and delivery shares across that constraint have not been created), it should only be approved as back trade
  - where an upstream trade is made into a separate hydrological system, it should only be approved as back trade

- trades should be possible between the upper reaches of regulated river systems that converge downstream, provided that any supply obligations of the original location's river below the point of confluence, which may be affected by the trade, are assumed by the destination location's river
- upstream trades from a location supplied by more than one source to a location supplied by only one of those sources should be possible, but may be subject to special limits and conditions.<sup>497</sup>
- The current and likely future magnitude and variability of river transmission losses in the MDB should be assessed, and, if found to be significant, options to account for these losses should be explored.<sup>498</sup>
- Operators should regularly provide information to market participants about the likelihood of short-term changes to trading restrictions due to changes in hydrologic connectivity. This information should include relevant values (such as trading volumes or storage levels) relative to defined trigger values, estimates of transmission losses, the use of available delivery capacity and back trade opportunities.<sup>499</sup>

Trading zones are often used to improve the clarity of trading rules and to simplify the administration of water access right trades. The ACCC preliminary positions supported the use of trading zones and suggested:

- Water resource plans should define trading zones for regulated systems, on which location-specific trading rules are referenced. The rationale behind each zone should be explicitly stated in the water resource plan (for example, environmental or physical constraint).<sup>500</sup>
- While differences in jurisdictions or management authorities may require different trading zones, they should not (in isolation) limit trade between these two zones.<sup>501</sup>
- Trading zones and water trading rules that refer directly to these zones, should be re-assessed and if necessary amended in the event that hydrologic connectivity, or physical or environmental constraints change.<sup>502</sup>

### **Managing water right characteristics and administrative processes**

Tagged trade and exchange rates are the two mechanisms used to facilitate water access entitlement trades to a new location.

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<sup>497</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 131, preliminary position 6–C.

<sup>498</sup> *ibid.*, p. 132, preliminary position 6–E

<sup>499</sup> *ibid.*, preliminary position 6–F.

<sup>500</sup> *ibid.*, p. 131, preliminary position 6–A.

<sup>501</sup> *ibid.*, preliminary position 6–B.

<sup>502</sup> *ibid.*, preliminary position 6–D.

There are a number of different approaches to defining an exchange rate. However, regardless of the approach adopted, the ACCC considered that exchange rates will never appropriately protect third party interests.

The tagged trading process for interstate trades is complicated because the Basin states' accounting systems are not linked. The processes can be particularly complicated when ordering water from the tagged water access entitlement and reporting and accounting for the water used. The complexity (relative to water allocation trade) of ordering water from a tagged water access entitlement may be a factor in the relatively limited number of tagged trades that have occurred. The ACCC, in its position paper, suggested that there may be merit in establishing a system where holders of a tagged water access entitlement can elect to have water allocations made to that water access entitlement automatically transferred to their account in the area of destination according to preset criteria.

The ACCC also noted that the concept of 'guaranteed delivery' for tagged entitlements may not be appropriate given the changing nature of hydrologic connectivity and water delivery considerations.

The position paper put forward the following preliminary positions:

- Tagging, and not exchange rates, should be used to manage the trade of water access entitlements between trading zones in regulated systems.<sup>503</sup>
- The administrative process associated with tagging should provide irrigators with the option of how they access allocations made to their tagged entitlement, including the option for allocations to be automatically transferred to the irrigator's account in the area of destination according to set criteria.<sup>504</sup>

### **6.1.2. Summary of submissions**

#### **Hydrologic connectivity and water supply considerations**

The ACCC's recommendations for defined trading zones, the reassessment of such zones in the event of hydrological, physical or environmental change and the possibility of trade across zones drew general support from stakeholders. The NSWIC stated its agreement with the ACCC positions but also specifically submitted:

... any rules associated with such zones must be available to all market participants. In our original submission, NSWIC sought equal application of trading zones across state boundaries. Trading zones must not become quasi-barriers to trade.<sup>505</sup>

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<sup>503</sup> *ibid*, p. 135, preliminary position 6–G.

<sup>504</sup> *ibid*, p. 139, preliminary position 6–H.

<sup>505</sup> NSWIC, position paper submission, p. 13.

and further:

... any changes to trading zones or rules associated with them must be well publicised and, preferably, reviews must be undertaken on a regular (but not necessarily) frequent basis to ensure market information is as complete as possible.<sup>506</sup>

Further support came from the ADIC & DA, which submitted:

The dairy industry endorses the requirement for the definition of, and rationale behind, trading zones to be clear, relevant and easily accessible to water market participant [sic].

The ADIC and DA favours water market information in relation to trading zones, such as physical capacity constraints on trades between zones, being regularly updated and reported.<sup>507</sup>

Similarly, the SAFF favoured the use of trading zones, stating:

SAFF supports that the impact of hydrologic constraints in regulated systems is best managed through the use of trading zones. The rules for trading within and among such zones should reflect the physical and environmental constraints in those systems, and that the effect of trade on river transmission losses should be further considered.

The QFF also offered broad agreement for the ACCC preliminary position on trading zones. However, it noted:

... this is addressed in the planning process and should not become a trading rule.

... re-assessment of trading zones and associated rules needs to be conducted in the context of defined arrangements for the monitoring and reporting on the implementation of water resource plans and any arrangements for the review of these plans which in Qld is every 10 years.<sup>508</sup>

DSE questioned whether WRPs were the best instrument to define trading zones:

... [The ACCC position paper] suggests that trading zones (and hence some basic trading rules) should be included in the water resource plan. Again, these are not easily refined and may face timeliness and flexibility issues, due to the proposed lengthy approval process including certification by the Commonwealth Minister. In addition, water resource plans in Victoria are not a single document, but are seen as a compendium of instruments. No evidence is presented that there would be an advantage in setting trading rules through water resource plans.<sup>509</sup>

Similarly, DERM submitted:

While the broad principle is supported, this is water planning matter and not relevant to MDB trading rules.<sup>510</sup>

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<sup>506</sup> *ibid.*

<sup>507</sup> ADIC & DA, position paper submission, p. 8.

<sup>508</sup> QFF, position paper submission, p. 7.

<sup>509</sup> DSE, position paper submission, p. 2.

<sup>510</sup> DERM, position paper submission, p. 4.

The VFF also agreed with the ACCC's position on trading zones, but noted:

Under an unbundled water entitlement system where water is sep [sic] from land as in the Victorian model, the onuses [sic] on the buyer as to where the water can be used i.e geographical, system delivery, physical const. The buyer needs to check with his local water authority or system delivery authority.<sup>511</sup>

All submissions agreed with the principles outlined in relation to regulated systems (as based on the MDBC manual). However, the QFF queried whether all the principles outlined were relevant to their specific area, stating it:

... agree[d] with principles of this nature but it is questioned whether dot points 4 and 6 [relating to upstream trade and backtrade] could be implemented in the QMDB.<sup>512</sup>

DERM questioned the role of the MDB trading rules in applying these principles:

This is generally supported as a principle but such detail is determined through or applied through the water planning process, and is not relevant to the MDB trading rules<sup>513</sup>.

The issue of transmission losses and the proposal for further information and investigation of transmission losses also found general support. Additional comments made by SunWater indicated that accounting for transmission losses should be included as a core principle:

While accepting that river transmission losses may historically not have been considered in the MDB trades, SunWater questions if this assumption is still warranted in a potential drying period. By including such an assessment as a core principle (perhaps subject to periodic review), it ensures that river transmission losses would have to be factored in at a later stage if they become significant.<sup>514</sup>

The South Australian Government noted:

Rigorous accounting for transmission losses should be part of the Basin Plan and be considered in the current system review of River Murray operations. Market impacts of transfers will need to consider transmissions losses and how they are calculated.

The major issue is who actually bears the costs of the transmission losses. Efforts must be taken to avoid any disproportionate cost based solely on location. The transmission losses associated with trades, and especially allocation trades cannot be assessed independently of the interrelationships of the whole package or reforms.<sup>515</sup>

The ADIC & DA also commented, saying:

Conveyance or transmission losses need to be accurately measured and accounted for, especially for river transmission losses. A process for calculating, reporting and options

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<sup>511</sup> VFF, position paper submission, p. 15.

<sup>512</sup> QFF, position paper submission, p. 8.

<sup>513</sup> DERM, position paper submission, p.4.

<sup>514</sup> SunWater, position paper submission, p. 5.

<sup>515</sup> South Australian Government, position papers submission, p. 10.

for apportioning these losses needs to be developed in consultation with water market stakeholders.<sup>516</sup>

The QFF agreed with the assessment of transmission losses but noted it considers:

... any re-assessment of transmission losses needs to be conducted in the context of defined arrangements for the monitoring and reporting on the implementation of water resource plans and any arrangements for the review of these plans.<sup>517</sup>

The NSWIC<sup>518</sup> and SAFF agreed that the issue of transmission losses needs to be further considered.<sup>519</sup> Further, the NSWIC reiterated the position stated in its submission to the issues paper:

NSWIC reiterates its initial submission in respect of socialised delivery losses.<sup>520</sup>

NSWIC remains in favour of socialised delivery losses across connected systems.<sup>521</sup>

On managing channel capacity constraints, the NFF observed:

... for the Murray River, there has been a long outstanding issue that is to be resolved prior to the issue of delivery shares. That is, NSW and Victoria must agree [sic] to the State shares of the channel capacity prior to individual delivery shares being issued. This is long overdue and its resolution has been requested a number of years ago.<sup>522</sup>

DERM submitted that cost recovery would need to be considered before any requirement to provide information to market participants about the likelihood of short-term changes to trading restrictions caused by changes in hydrologic connectivity:

The cost to water users and their willingness to meet these costs would need to be determined before any rules were developed to require the provision of such information.<sup>523</sup>

### **Managing water right characteristics and administrative processes**

The issue of tagging versus exchange rates and the administrative processes associated with tagging also drew a number of comments from stakeholders, with many stating their agreement for the use of tagging rather than exchange rates to manage entitlement trade.<sup>524</sup>

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<sup>516</sup> ADIC & DA, position paper submission, pp. 8–9.

<sup>517</sup> QFF, position paper submission, p. 8.

<sup>518</sup> Note that WMI endorses NSWIC positions for chapter 6, stating, ‘WMI supports the submissions prepared by National Irrigators Council and NSW Irrigators Council on Section (6–A) to (6–U) of the preliminary positions’, WMI, position paper submission, p. 7.

<sup>519</sup> NSWIC, position paper submission, p. 13; and SAFF, position paper submission, p. 4.

<sup>520</sup> NSWIC, position papers submission, p. 13.

<sup>521</sup> *ibid.*, p. 11.

<sup>522</sup> NFF, position papers submission, p. 8.

<sup>523</sup> DERM, position paper submission, p. 5.

<sup>524</sup> NSWIC, position paper submission, p. 13; GVIA, position paper submission, p. 6; and QFF, position paper submission, p. 8.

Sun Water stated:

SunWater favour the use of tagging water entitlements to the originating water supply scheme e.g. the ‘nominal location’ of water entitlements referred to in the Border Rivers ROP.<sup>525</sup>

The VFF made the following submission in favour of tagging:

Tagging provides that entitlements from each system are administered by the jurisdiction in which they were initially created, and retain all of the rights, responsibilities and risks associated with the source system. This ensures that entitlement holders irrespective of where the entitlement is now utilised, still receive the same allocation as the source. Tagging applies to high and low-reliability water shares. This minimises third party impacts of the water trading. The tagging system is fairer than the pre-existing exchange-rates model, especially in light of the expected impacts of climate change.<sup>526</sup>

Further, the SAFF noted:

SAFF acknowledged that exchange rate trading has the potential for significant third party impacts. Tagging should be used to manage the trade of water access entitlements between trading zones.<sup>527</sup>

The ADIC & DA was also in favour of tagging, claiming:

The dairy industry does not support the exchange rate method of managing the trade of water access entitlements between regulated systems, as this does not adequately protect against negative third party impacts.<sup>528</sup>

While DSE generally supported the ACCC position on exchange rates, it called for a couple of exceptions:

- (a) Exchange rates serve a useful purpose in Victoria’s case to allow trade back in to the Goulburn system. This system has a long history of trade **out** using exchange rates, and hence trade back in serves only to correct any third party issues that might have been caused by the original trade out...
- (c) At the time of unbundling, the old ‘sales’ product was rescaled into a low reliability water share in some Victorian systems. This rescaling could perhaps be useful in other hypothetical situations...<sup>529</sup>

A number of submissions addressed the administrative complexity of the current tagging process. The ADIC & DA noted:

The dairy industry believes that the current complexity of administrative processes in relation to tagging is hindering the effective and efficient operation of the water market.<sup>530</sup>

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<sup>525</sup> SunWater, position paper submission, p. 5.

<sup>526</sup> VFF, position paper submission, pp. 15–16.

<sup>527</sup> SAFF, position paper submission, p. 4.

<sup>528</sup> ADIC & DA, position paper submission, p. 9.

<sup>529</sup> DSE, position paper submission, p. 5.

DSE highlighted the tagging system currently used in Victoria and noted the potential for improvement in interstate tagging.

It is worth noting that tagged trade within Victoria is already extensive, and it is done seamlessly in the Victorian water register. There are however opportunities for improvement in interstate tagging processes. Position 6–H (allowing an owner of a tagged entitlement to choose to have allocations moved to the destination account immediately after issue) could be a useful improvement. It would be worth investigating how it could be done and how to design it in a way that can co-exist with the existing approach.<sup>531</sup>

Concerns were raised about the costs of implementing changes to the tagged trading processes or allowing automated allocation trade. The GVIA stated:

[it] cautions on the possible administrative complexity of this, and would need assurance that the any charges of fees associated with the tagged water in it source were paid.<sup>532</sup>

This view was echoed by NSWIC and WMI, which noted they were:

... wary of any increased costs visited upon the collective to develop and implement new systems.<sup>533</sup>

The NFF noted that ‘this may require more work prior to being implemented.’<sup>534</sup>

DERM emphasised the need for consultation relating to changes to the tagged trading processes or allowing automated allocation trade:

This is something that should be developed in consultation with water users.<sup>535</sup>

Further, the South Australian Government’s comment on tagging highlighted that issues of location should not be dealt with through trade constraints:

Water access entitlements do not move between trading zones. Tagging directs the use of the associated allocation to a specific site (or sites) in another trading zone to that of where the water access entitlement is issued.

When setting constraints on trade, it is important to be clear that the trade of entitlements and allocation is just a trade of water rights between persons, not between locations. The location issues need to be managed through either delivery capacity entitlements or take and use approval policies.<sup>536</sup>

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<sup>530</sup> ADIC & DA, position paper submission, pp. 9–10.

<sup>531</sup> DSE, position paper submission, p. 6.

<sup>532</sup> GVIA, position paper submission, p. 6.

<sup>533</sup> NSWIC, position paper submission, p. 13.

<sup>534</sup> NFF, position paper submission, p. 8.

<sup>535</sup> DERM, position paper submission, p. 5.

<sup>536</sup> South Australian Government, position paper submission, p. 11.

### 6.1.3. Discussion

#### Hydrologic connectivity and water supply considerations

There was general support for defining trading zones and specifying trading rules in relation to these zones. However, DSE questioned whether a WRP is the best instrument to define such zones. The ACCC considers that the Act has created a framework where both state and Commonwealth water legislation will have an ongoing role. The role of the WRPs and the requirement that they be consistent with the relevant Basin Plan make them useful and transparent tools to ensure that location-specific trading rules are consistent throughout the MDB.

The ACCC does not consider the Act's requirements for amending accredited WRPs onerous nor does the ACCC consider that the definition of trading zones is likely to require frequent or urgent review. The ACCC has therefore recommended that the MDBA consider requiring trading zones to be defined within WRPs. The role of WRP trading rules is discussed in more detail in section 2.1.2.

The ACCC has recommended that WRPs could require the rationale for any trade restrictions between two zones to be explicitly stated in the WRP. The ACCC considers these restrictions should be based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations. The requirement to state the rationale for inter-zone trade restrictions will increase transparency and allow scrutiny of these restrictions when WRPs are being developed.

The ACCC is also recommending that the MDBA consider the potential to include basic principles about how water should move between zones.<sup>537</sup> These principles ensure that where systems are hydrologically connected or where water supply considerations allow, trade should be permitted. The ACCC recognises that there may be instances where, although systems are connected, back trade will not be possible because of the water management approach in different storages (e.g. where continuous sharing is in place). The ACCC considers that any exemptions should be justified during the development of the WRP.

Interested parties expressed some concern that the principles relating to back trade may limit the ability for trading restrictions to be waived in years where capacity constraints are not binding—for example, across the Barmah Choke. The principle stated that:

where a downstream trade is impeded by a physical constraint to channel capacity (and delivery shares across that constraint have not been created), it should only be approved as back trade.

The ACCC position paper outlined that capacity constraints will not always be static. Triggers for when capacity constraints are or are not in place should be made clear. As an example, these could be linked to the tier 1, 2 and 3 water-sharing arrangements outlined in the Act. If a physical constraint no longer exists (or has been relaxed for a set period of time), then trade can occur freely. In other words, this principle only

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<sup>537</sup> Adapted from the *Permanent interstate water trading manual* produced by the Murray–Darling Basin Commission (now the MDBA).

applies at times where the physical constraint is binding, thus impeding the transfer of water and downstream trade.

Stakeholders generally supported the ACCC position that operators provide information to market participants about the likelihood of short-term changes to trading restrictions because of changes in hydrologic connectivity.

While stakeholder comments again highlighted the difficulties in accounting for transmission losses, there was general support for further work investigating the volume of transmission losses and possible management approaches. The ACCC therefore maintains its position that further investigation into transmission losses is required and considers that the MDBA is best placed to coordinate such work.

### **Managing water right characteristics and administrative processes**

Stakeholder submissions did not support the use of exchange rates to manage trade of water access entitlements in regulated systems. The ACCC has therefore maintained its position that exchange rates should not be used to manage the trade of water access entitlements between trading zones in regulated systems. Furthermore, the ACCC considers that this position should be reflected in a Basin Plan water trading rule.

As submitted by DSE, the ACCC agrees that exchange rates may serve a useful purpose in the specific case of trade back into the Goulburn system in Victoria, where an exchange rate is used to redress the impacts of previous exchange rate trades in the opposite direction. As such, the ACCC considers that a Basin Plan water trading rule should allow exchange rate trades from the Murray system back to the Goulburn system, up to the volume that was historically traded out using exchange rates.

DSE proposed an additional role of exchange rates in allowing ‘rescaling’ processes to occur. The example provided by DSE related to the unbundling process in Victoria and rescaling the ‘sales’ product into a low reliability water share. The ACCC does not view this as an exchange rate trade or trading option, but rather a government policy decision to amend an entire class of water access right. Such a large change in water access rights could potentially impact on the interests of third parties but the ACCC does not consider this a trade matter.

The ACCC position paper recommended that further work be undertaken to improve the administrative processes surrounding tagging. In particular, the ACCC suggested alternatives such as enabling more automated water allocation trading.

An important distinction needs to be made between changing the ownership of a water access entitlement and the process of establishing a tag. The administrative processes around changing the ownership of a water access entitlement are relatively straightforward. However, the process of ensuring that a water access entitlement in one location can be extracted in another location is more complicated when multiple water accounts are involved.

Establishing a tag is simply a method to allow water allocated to a water access entitlement to be used in a new location. The water access entitlement remains in the area of origin but its tag establishes a right to extract water at a new location.

Tagging works effectively in the Victorian water register.<sup>538</sup> However, since introducing the tagged trade system, only a handful of *interstate* tags have occurred.<sup>539</sup> A recent survey of irrigators across the MDB undertaken by Frontier Economics on behalf of the ACCC revealed a number of reasons why take-up of tagged trade may be low.

The survey found that the complexity of establishing a tag and difficulties with ordering are a significant deterrent. For example, one irrigator stated:

The difficulty is not with buying the entitlements, the difficulty is with establishing the tag. Getting the tag established is the big cost. It took 3 or 4 phone calls a week for about 8 weeks. Individual people were helpful during each phone call, but none knew what to do next...the main issue was the number of agencies involved—the MDBA, three NSW agencies and two Vic agencies...

...[we] considered setting up a tag from South Australia, but quickly gave up when confronted with the bureaucratic process involved. [We] could not see enough benefit relative to the cost.<sup>540</sup>

Another irrigator reported:

[It is] just too hard to get the approval through the state authority for interstate. Intrastate is not an issue.<sup>541</sup>

The administrative process for establishing a tag has been reviewed since it initially commenced in 2007, and authorities are perhaps now more familiar with the processes. However, it is likely that the perceived complexities and difficulties from early experiences with tagging will remain until a larger number of successful tags are in place.

Irrigators were also conscious of changing policies and the difficulties in remaining up-to-date on all state water management policy changes as reasons for a relatively low take-up of tagging. One irrigator commented:

The main obstacle is assessing all the risk and making sure they are mitigated. But working interstate means you are dealing with unknown unknowns—you can't plan to mitigate the risks because you don't understand them.<sup>542</sup>

Another noted:

The trouble ... is that you can get tied up in the politics of problems in different states. It's bad enough dealing with it in your own state, but dealing with the chops and changes in policies in other states is worse again. At least you can have some influence in your own state. Sovereign risk is an issue.<sup>543</sup>

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<sup>538</sup> DSE, position paper submission, p.6.

<sup>539</sup> Frontier Economics, *Changing extraction location between water systems—'tagging' and alternatives*, report prepared for the ACCC, November 2009.

<sup>540</sup> *ibid.*, p. 20.

<sup>541</sup> *ibid.*, p. 21.

<sup>542</sup> *ibid.*

<sup>543</sup> *ibid.*

However, irrigators also noted two potential benefits in establishing a tag.

The first potential benefit is that some consider that establishing a tag guarantees delivery. Irrigators have reported receiving conflicting information about whether this in fact occurs. Under protocols made under Schedule D of the MDB Agreement, the only criterion for the delivery of water once a tag has been established is that sufficient credit must be available in the origin allocation account. There is no criterion that hydrological connectivity between the origin and destination must exist under the prevailing conditions.

During the 2009–10 suspension of water allocation trade out of the Murrumbidgee, water was ordered and was able to be extracted under a tag from the Murrumbidgee to the Victorian Murray.<sup>544</sup> Irrigators identified this guarantee on delivery as a potential benefit of establishing a tag. For example, one irrigator commented:

The big advantage [of a tag] is that once it is tagged and on your licence you are no longer bound by potential changes to allocation trade or sharing rules.<sup>545</sup>

However, the ACCC is concerned about the apparent ‘guarantee’ of delivery (between trading zones) resulting from the establishment of a tag. Hydrological connectivity is not static and therefore cannot be guaranteed in all conditions. Where a tag is established yet prevailing hydrological conditions are not conducive to delivery between the origin and destination trading zones (so that water allocation trade is suspended), there are potential third party impacts from allowing water to be extracted under the tag.

Theoretically, a tag can only be established between two connected systems. However, recent years have demonstrated that historically connected systems may not remain so under extreme dry conditions. Therefore, the ACCC recommends that extracting water under a tag should only be possible when water allocation trade is permitted from the tagged water access entitlement’s origin trading zone to the destination trading zone.

Further support for the position that a tag should not guarantee water being available for extraction in the destination trading zone can be found in the way in which tagging has been implemented. Current tagging arrangements would appear to allow any volume of water allocation to be transferred through the tag:

The protocol outlines tagging as a means to arrange extraction of the *allocations that accrue to an entitlement*, where the entitlement is held in a different water system / trading zone....In contrast, the way in which tagging arrangements have been implemented (at least in NSW and Victoria) means that a tag allows more extraction than the amount of water allocated to that entitlement, because *purchased water allocations can also be extracted in the destination system under the tag*.<sup>546</sup>

For example, consider a tag established against a water access entitlement of 100 ML in the origin trading zone: allocations against that entitlement are at 50 per cent, which

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<sup>544</sup> *ibid.*, p. 27.

<sup>545</sup> *ibid.*

<sup>546</sup> *ibid.*, pp. 28–9.

means that 50 ML of water allocation is available, but the tagging arrangements have been implemented to allow not only the 50 ML water allocation to be extracted in the destination trading zone, but also any water allocations traded in to the origin trading zone account.

Under these arrangements, if an additional water allocation of 30 ML is traded into the account in the origin trading zone, the full 80 ML can be extracted in the destination trading zone under the tag. In effect, moving water allocation from one trading zone to another by ordering it under a tagging arrangement could allow water allocations to bypass any restrictions on water allocation trade between the two trading zones.

The second benefit of establishing a tag, as identified by irrigators, is that ordering from a tag does not currently involve a fee. One irrigator noted:

You avoid the trading costs, and paperwork and you get the allocations immediately.<sup>547</sup>

Frontier Economics noted:

While minimising the transaction cost associated with tagged trading is clearly a desirable objective, if such transactions are subsidised this could represent a distortion to the market.<sup>548</sup>

Ordering against a tag currently involves exactly the same process as an interstate water allocation trade process. However, the authorities undertake the paperwork rather than the irrigator. As such, while ordering may be easier under a tag for the irrigator, this would appear to be due to authorities absorbing these costs. It is unclear to what extent authorities would be willing to continue these arrangements if the number of tagged water access entitlements (and therefore orders against a tagged entitlement) were to increase significantly.

The ACCC acknowledges that removing any actual or implied ‘guarantee’ of delivery (a change recommended by the ACCC) would significantly reduce the benefits to a water user in establishing a tag—as would any move by authorities to more fully recover the costs associated with processing orders under a tag.

Water users would be even more likely to use the already common approach of annually trading water allocations between the origin trading zone (where their water access entitlement is located) to the destination trading zone (where they wish to extract the water).

This is not to say that tagging does not have a role. Tagging works well within Victoria where the water register can access information about rights in both the trade origin and destination. The ACCC is **not** proposing the prohibition of tagging as an approach to changing the extraction location between water systems. Rather, the ACCC suggests that such an approach is unlikely to advance significantly until water registers and systems are interoperable, allowing the administrative process to be more efficient and cost-effective for both water access right holders and water authorities.

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<sup>547</sup> *ibid.*, p. 30.

<sup>548</sup> *ibid.*

As foreshadowed in the position paper, the ACCC considered the advantages and disadvantages of introducing automatic water allocation trades. The ACCC commissioned Frontier Economics to investigate various administrative arrangements to facilitate a change in extraction location between water sources. While some irrigators suggested an automated allocation trade could have benefits, the overall costs and resource requirements of implementing such a system would be significant. This approach was supported by surveyed irrigators:

... the ACCC would be better to spend its time trying to make interstate transfers of allocation simpler. Under most circumstances, but not all, you could get the benefits of interstate trade more easily through improvements in allocation trade.<sup>549</sup>

However, the ACCC still considers that automated water allocation trade, as an alternative to tagging, would offer some benefits to irrigators and, ultimately, approval authorities. The priorities of improving communication between authorities and water register interoperability under the NWMS and related projects are likely to improve regular water allocation trading timeliness. Therefore, the ACCC considers that automated water allocation trade should still be considered as an option once these measures are operational. More specifically, current reforms under the NWMS may ease trade approval authorities' concerns about additional administrative costs from enabling automatic water allocation trades. The ACCC therefore recommends that options such as automatic water allocation trades should be reconsidered as these reforms proceed.

#### **6.1.4. Draft advice**

##### **Hydrologic connectivity and water supply considerations**

###### **Rule advice (6–A)**

The Basin Plan water trading rules should provide that trade between regulated system trading zones should only be restricted based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations. While the existence of a Basin state border may necessitate different trading zones, it should not (in isolation) limit trade between these two zones.

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<sup>549</sup> *ibid.*, p. 33.

**Recommendation (6–B)**

The ACCC recommends that the MDBA considers requiring water resource plans to:

- Define trading zones for regulated systems, on which location-specific trading rules are referenced.
- Where trade is restricted between two zones, the rationale behind this restriction should be explicitly stated in the water resource plan and based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations.

Trading zones and water trading rules that refer directly to these zones, should be reassessed and if necessary amended in the event that physical or environmental constraints or water supply considerations change.

**Recommendation (6–C)**

The ACCC recommends that the MDBA considers requiring water resource plans to incorporate the following principles for trade in regulated systems:

- trades within a trading zone should generally not be restricted
- downstream trades between hydrologically connected systems should generally be possible
- where a downstream trade is impeded by a physical constraint to channel capacity (and delivery shares across that constraint have not been created), it should only be approved as back trade
- where an upstream trade is made into a separate hydrological system, it should only be approved as back trade
- trades should be possible between the upper reaches of regulated river systems that converge downstream, provided that any supply obligations of the original location's river below the point of confluence, which may be affected by the trade, are assumed by the destination location's river
- upstream trades from a location supplied by more than one source to a location supplied by only one of those sources should be possible, but may be subject to special limits and conditions.

**Recommendation (6–D)**

The ACCC recommends that river operators and/or relevant infrastructure operators should regularly provide information to market participants about the likelihood of short-term changes to trading restrictions due to changes in hydrologic connectivity. This information should include relevant values (such as streamflow volumes, trading volumes or storage levels) relative to defined trigger values, estimates of transmission losses, the use of available delivery capacity and back trade opportunities. However, the ACCC is not recommending this be a requirement under the Basin Plan water trading rules.

**Recommendation (6–E)**

The ACCC recommends that the MDBA coordinates a study to investigate the current and likely future magnitude and variability of river transmission losses in the MDB and, if these losses are found to be significant, options to account for these losses should be explored.

**Managing water right characteristics and administrative processes****Rule advice (6–F)**

The Basin Plan water trading rules should provide that exchange rates should not be used to manage the trade of water access entitlements between trading zones in regulated systems. The ACCC recommends a transitional exemption to this rule in cases where an exchange rate is being used to reverse the impact of past exchange rate trades (specifically, from the Murray to the Goulburn system up to the historical volume previously traded out using exchange rates).

**Rule advice (6–G)**

The Basin Plan water trading rules should provide that any current restrictions on the ability to trade water allocation between two zones apply equally to the delivery of water allocations pursuant to a tag between the same two zones, at the time when delivery is requested (i.e. when water is ordered against the tag).

### **Recommendation (6–H)**

The ACCC recommends that the MDBA—in consultation with Basin states and other relevant stakeholders—revisits the advantages and disadvantages of various administrative options, such as automated allocation trade and improvements to tagging processes, and assess whether they should be reconsidered following the implementation of the National Water Market System.

## **6.2. Trade in unregulated systems**

### **6.2.1. Background**

The concept of hydrologic connectivity (raised in section 6.1.1 dealing with regulated systems) is also significant in the discussion of trade in unregulated systems. The ability to deliver water<sup>550</sup> from one unregulated system (or zone) to another will depend on hydrologic connectivity and water supply considerations, including:

- degree of continual flow
- river transmission losses
- timing of available flow.

While there are parts of the MDB that have continuous flow (either naturally or through regulation), there are some systems that are only intermittently connected and/or have high river transmission losses. While trade between two continuously connected systems should be possible, it is more complicated to define rules to give effect to trade between two intermittently connected systems. Similarly, a flood event in one part of an unregulated system will take time to travel down the system and the event will attenuate<sup>551</sup> as this occurs. If a trade occurs in an unregulated system, the ability to extract water (e.g. the number of days that flow is available in the flow event) may vary with the distance between the buyer and seller.

Trade is currently allowed between zones where there is considered to be a continual hydrologic connection. It is arguable that trade should also be permitted between systems where there is only intermittent connectivity. However, a clear system or approach to define the timing and frequency of hydrologic connection would be required to allow the buyer to make informed decisions about the likelihood of delivery (or risk of not receiving water). The ACCC, in its position paper, put forward the following preliminary position:

- Water resource plans should consider the potential for trade of water along rivers which are intermittently connected. To inform this process:

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<sup>550</sup> This may be an accounting procedure rather than the physical movement of water from one location to another.

<sup>551</sup> The peak of the event will be a lower volume but the event will be spread over a longer duration as it passes the downstream location.

- more detailed information should be established and publicly reported about delivery losses
- arrangements for better communication between water users about options to minimise delivery losses for such trades should be investigated
- if triggers are used to define hydrologic connectivity, these should be clearly stated, reported against and communicated.<sup>552</sup>

Trading zones can be used to define areas within unregulated systems that are considered hydrologically connected. Some jurisdictions have further refined trading zones to indicate areas within which trade can occur without adverse third party impacts. The ACCC position paper supported the use of trading zones in the following preliminary position:

- Where the likely benefits outweigh the likely administrative costs, trading zones should be established for unregulated rivers, defining areas within which trade can occur without detailed assessment. These trading zones should consider:
  - that hydrology should be homogeneous within the zone
  - the location of important environmental assets and major offtakes
  - the existing volume of available water and likelihood of further development
  - transmission losses and local catchment inflow.<sup>553</sup>

While water access rights are specified in unregulated systems, the reliability of water access rights in unregulated systems varies considerably and can be greatly influenced by the location of extraction. A water access right in an unregulated system does not guarantee a particular volume of water but rather the ability to pump up to a certain volume over a given time period and at a certain pumping rate. Depending on how an unregulated system is managed, an upstream water user pumping water may impact on the availability of water for downstream users. This would need to be considered when allowing upstream trade. Similarly, if trade is allowed downstream (to a different trading zone, for example), a form of ‘shepherding’<sup>554</sup> is required to protect water from other users and allow it to reach the downstream site.

The level of management in unregulated systems varies substantially across the MDB. Unregulated systems that have a high number of users, and a streamflow which does not always meet demand, tend to have more complicated management rules and enforcement processes. In comparison, unregulated systems with a small number of

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<sup>552</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 146, preliminary position 6–I.

<sup>553</sup> *ibid.*, p. 139, preliminary position 6–H.

<sup>554</sup> The concept of ‘shepherding’ was discussed in the ACCC, *Water trading rules—Position paper*, September 2009, p. 147, section 6.2.2.

users, or a small volume of water access rights relative to streamflow, typically have less formal management rules.

In its position paper, the ACCC considered that the level of management and complexity of trading rules for each zone and between zones should be proportional to the level of use within that zone and the demand for trade. In zones where competition for water is high, a more complex management regime with clearly defined property rights and trading rules that tag the characteristics of these rights (such as daily extraction rates) may be appropriate. However, a complex management and compliance regime may not be appropriate in a catchment with only a small number of users. Instead, it may be more appropriate to place restrictions on trade between these smaller, less utilised areas but allow trade subject to a detailed individual assessment (similar to the current approach in Queensland).<sup>555</sup>

Appropriate management structures and definition of property rights to allow trade may not already be in place in many unregulated catchments. To improve the opportunities for trade and provide appropriate protection for third party interests, the ACCC position paper suggested that unregulated systems should move towards a management regime that provides clarity of water access right characteristics. The ACCC put forward the following preliminary positions:

- Options for improving the clarity and excludability of water access rights in unregulated systems should be examined. This should include an investigation of a range of management strategies including rostering, restrictions and options to ‘shepherd’ water through zones, while recognising that different management approaches may be better suited to different stream types.<sup>556</sup>
- In unregulated systems that are heavily used, trading rules should be established with reference to trading zones to enable trade between zones. In other unregulated systems, processes should be implemented to enable the assessment of individual trades between zones on a case-by-case basis.<sup>557</sup>

### 6.2.2. Summary of submissions

The submissions were broadly in favour of local water planning processes considering options to increase trade opportunities in unregulated systems. Most stakeholders indicated that the complexity of the trading system had to be weighed against the demand for trade. However, stakeholders commented that there should be systems in

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<sup>555</sup> In Queensland, a **long form** (section 130) application (including a fee) is submitted by the trading parties. A detailed hydrological investigation to determine potential third party impacts is undertaken by the department. The process involves consultation with potentially impacted parties.

<sup>556</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 155, preliminary position 6–K.

<sup>557</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 155, preliminary position 6–L.

place to assess trades on an individual basis where a more complex trading system does not exist. The ADIC & DA noted:

The dairy industry believes that if there is significant demand for, or clear benefits from, trade between unregulated river systems then it could be improved through the development of trading zones and the accurate measurement and accounting for transmission losses.

For unregulated systems where there is not strong demand for trade between systems, processes should be implemented to enable the assessment of individual trades on a case-by-case basis.<sup>558</sup>

The VFF submitted that it ‘supports a further clarified model of trade within unregulated systems.’ It also noted that:

... rules for trade within unregulated systems should not be so rigid and not to be applied in such a blanket manner. The trade rules for unregulated systems should demonstrate some flexibility in application, as characteristics of each system vary quite greatly. For example, some unregulated systems have a much greater capacity to deliver water upstream, and other[s] do not.<sup>559</sup>

The VFF submission was also endorsed by the ADIC & DA, which stated:

The ADIC and DA support the VFF’s position that the trading rules for unregulated system should demonstrate some flexibility in application, as characteristics of each system vary greatly.<sup>560</sup>

In contrast, the GVIA noted it was:

... wary of inconsistencies occurring/emerging when applications are considered on a case-by-case basis.<sup>561</sup>

The QFF also agreed with the ACCC’s preliminary positions, but questioned ‘the need for this as a trading rule.’<sup>562</sup> While the NFF agreed in principle, it ‘urges caution. Development of trading must be underpinned by water resource plans.’<sup>563</sup>

Submissions questioned the likely benefits compared to costs of allowing trade in intermittently connected systems or systems with high losses. The NFF made the following submission:

Trade in intermittently connected systems may be possible in principle. However, NFF would only support this position providing third party impacts to other water entitlements or rights are avoided.<sup>564</sup>

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<sup>558</sup> ADIC & DA, position paper submission, pp. 10–11.

<sup>559</sup> VFF, position paper submission, p. 16.

<sup>560</sup> *ibid.*, p. 11.

<sup>561</sup> GVIA, position paper submission, p. 7.

<sup>562</sup> QFF, position paper submission, p. 9.

<sup>563</sup> NFF, position paper submission, p. 9.

<sup>564</sup> *ibid.*, p. 8.

DERM noted:

While trading along intermittently connected systems sounds reasonable in principle, in reality intermittently connected systems are so variable that opportunity to establish rules is limited by consideration of third party and environmental impacts. Case by case assessment will be needed in most instances.<sup>565</sup>

The GVIA concurred with the ACCC preliminary position but:

... cautions that the costs and difficulties associated with accurately gathering this information, may in itself outweigh the value of establishing a trading system, particularly between zone where transmission loss allowances are likely to make trade unattractive and/or unviable.<sup>566</sup>

The ADIC & DA supported the use of trading zones and suggested the following information needs to be available relating to trading zones:

- The definition of, and rationale behind, trading zones to be clear, relevant and easily accessible to water market participant;
- The process for updating trading zones must be transparent and trading rules must be reviewed as a system or hydrological connectivity conditions change;
- The definition of hydrological connectivity must be better defined and used in interpretation of future changes to trading zones;
- Water market information in relation to trading zones must be regularly updated and reported, and;
- A process for calculating, reporting and options for apportioning conveyance or transmission losses needs to be developed in consultation with water market stakeholders.<sup>567</sup>

DERM generally supported the use of trading zones; however, it highlighted the difficulties in assessing transmission losses and the costs of implementing such an approach:

This is generally supported as a principle however it should be noted that determination of delivery or system losses in natural and highly variable systems is extremely difficult and resource intensive and the timing of estimates would be unlikely to be of use under market conditions. The cost to water users and their willingness to meet these costs would need to be determined before rules were developed.<sup>568</sup>

DSE described the difficulties in applying trading zones in unregulated systems:

Ideally a trading zone would represent a region within which trade could proceed without restrictions. However, this principle could lead to trading zones being so small and numerous as to be ineffective. The volume and number of entitlements and the trade interest in each zone may be very small. And if each zone was to require a specific gauging point at its bottom end and a set of extraction limits, it may require significant effort for little result.

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<sup>565</sup> DERM, position paper submission, p. 5.

<sup>566</sup> GVIA, position paper submission, p. 6.

<sup>567</sup> ADIC & DA, position paper submission, p. 10.

<sup>568</sup> DERM, position paper submission, p. 5.

Improving the clarity and excludability of water access rights in unregulated systems and establishing trading rules with respect to trading zones also found support among stakeholders. The GVIA submitted that although it concurred with the ACCC on examining the clarity of water access rights, this would be a complicated exercise requiring a ‘great deal of consideration and consultation.’<sup>569</sup>

The South Australian Government noted:

There is limited experience in unbundling water rights in unregulated systems. There is a need to carefully consider how water trade functions in such systems. The language in the position paper still implies that a location for take and use is linked to the water right and that the change in location or manner of taking or using is part of the assessment of the trade. This may be correct, but it implies that unbundling does not occur in unregulated systems.<sup>570</sup>

State Water agreed with the ACCC’s preliminary position in principle but it also submitted:

... the management regime required to implement these strategies is likely to significantly increase the costs of managing these systems. The position paper does not consider how these costs should be recovered.

Currently, the costs of managing unregulated systems in New South Wales are recovered from both users and Government, as determined by the Independent Pricing and Regulatory Tribunal. Users will be the ultimate beneficiary of water trading on these systems, and yet anecdotally, they have limited capacity to pay the higher water charges which would result from cost recovery of these reforms.

State Water believes that the ACCC should carefully consider the cost recovery and user affordability of these reforms before including these in the proposed trading rules.<sup>571</sup>

The NSWIC commented more broadly on trade relating to unregulated systems:

Our submission in respect of trade within unregulated systems, between unregulated systems and between unregulated and regulated systems is that the issue is far more complex than [sic] the ACCC has yet grasped.

Whilst NSWIC is not averse to the concept of trade of unregulated entitlements, far more significant consultation and discussion is required, an expert working group (including industry) must be formed and adequately resourced to identify how such a trading system might work and time needs to be taken to pilot an identified system.

NSWIC submits that statements of intent from the ACCC—that trade ought be investigated—are as far as this matter can currently progress and that inclusion of unregulated entitlement trade in the water market [sic] rules within the timeframe allowed cannot occur.<sup>572</sup>

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<sup>569</sup> GVIA, position paper submission, p. 7.

<sup>570</sup> South Australian Government, position paper submission, p. 11.

<sup>571</sup> State Water, position paper submission attachment, p. 2.

<sup>572</sup> NSWIC, position paper submission, p. 14.

Further, the NSWIC commented on the Toorale transfer example put forward in the position paper that:

It is critical that the ACCC—and stakeholders—understand that these circumstances are unlikely to be regularly replicated to allow an individual transfer, let alone to allow an open market with multiple transfers.<sup>573</sup>

Similarly, DERM commented:

... there are a range of such arrangements in Queensland for managing consumptive take; however, the use of the concept of shepherding outside of the context of environmental water delivery may be misplaced. Shepherding of water held by the Commonwealth Environmental Water Holder is part of a separate, yet to be established agreement between Queensland and the Commonwealth.<sup>574</sup>

DSE noted that in Victorian unregulated systems, a factor is applied to protect third party interests:

If an entitlement is traded downstream, the downstream person may have access to a greater proportion of the entitlement volume than the upstream person would have had (due to inflows that occur between the two points). Victoria addresses that by a general rule requiring a 20% volume reduction. This is not because the river is overallocated, but as a mechanism to prevent third party impacts.<sup>575</sup>

### 6.2.3. Discussion

For a successful market to develop for trade in unregulated systems, clearly defined property rights are required. The ACCC considers that property rights in unregulated systems are not generally clearly defined or excludable at present, and that this will continue to limit trade options. Administrative processes for trade are likely to be simpler once property rights are more clearly defined and the ACCC's position paper set out a proposed framework for doing so.<sup>576</sup>

Concerns were raised about the cost of implementing a more sophisticated trading system in unregulated rivers. While the ACCC acknowledges there will be costs, the process for cost recovery should be no different to existing cost recovery processes for water management and is primarily a water charging issue. Ultimately, the importance placed on enabling more sophisticated trading systems in unregulated rivers will be a function of the likely benefits and costs of doing so. Stakeholders broadly agreed with this assertion, which is reflected in the ACCC's recommendations.

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<sup>573</sup> *ibid.*

<sup>574</sup> DERM, position paper submission, p. 6.

<sup>575</sup> DSE, position paper submission, p. 3.

<sup>576</sup> Trade in unregulated systems was discussed in section 6.2, *Water trading rules—Position paper*. Appendix 8 of the position paper presents an example of trade management in unregulated systems. It presents an extract from a report prepared to the ACCC by Sinclair Knight Merz, *Water Trade Between Water Sources –Water Trade Involving Farm Dams And Unregulated Catchments*, September 2009.

The ACCC considers that where more sophisticated trading regimes are not in place, the option to have a trade application individually assessed should be available, even if this is at the applicant's cost.

In September 2009 the Australian and New South Wales governments signed an MOU, primarily about water purchases by the Australian Government.<sup>577</sup> One aspect of this MOU dealt with developing shepherding protocols:

To implement the commitment made by their respective water ministers to negotiate a bilateral agreement to ensure that all water for the environment can be protected from access by downstream consumptive users, the Commonwealth and New South Wales agree that:

- a. A joint taskforce comprising officials from NSW and the Commonwealth, funded by the Commonwealth, will develop a draft bilateral agreement for consideration by Ministers by 30 November 2009, which provides for water shepherding in NSW.
- b. The bilateral agreement will establish principles for water shepherding and its implementation including:
  - (i) scope, terms of reference and resourcing for the ongoing work of the joint task force
  - (ii) provisions for shepherding throughout NSW and from the Queensland border, for environmental water held by the Commonwealth
- c. The objective of the agreement is to optimise the use of all water for the environment, to provide the capacity to deliver water to high priority environmental assets, and, in the case of in-stream environmental watering, to provide protection for environmental flows to pass through the system as far as transmission losses allow.<sup>578</sup>

The ACCC noted that this may progress the ability to trade in unregulated systems. While some stakeholders have expressed support for developing such measures, they also argue that other water holders should be able to take advantage of the same shepherding opportunities. The ACCC considers that any approach to shepherding that is developed should be available to all market participants, not just to government environmental water holders (refer also to section 3.4).

The ACCC position paper discussed the difficulties in managing trade in unregulated rivers to account for changing hydrology. The position paper noted that water availability for a water access right may change with the hydrology at a new extraction location. The position paper suggested that this should be considered when establishing trading zones.

The DSE submission describes the application of a blanket reduction factor to account for losses and changes in hydrology. The ACCC does not believe that such an approach would effectively address third party impacts and may in fact limit the number of trades

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<sup>577</sup> The Australian Government and the New South Wales Government, *Memorandum of understanding in relation to water for the environment*, 23 September 2009.

<sup>578</sup> *ibid.*, clause 32.

that occur. Instead, the ACCC suggests that where there are considerable losses (or considerable inflows) between the two locations, any loss factor employed should be justified and transparent.

The ACCC recognises that managing unregulated river systems is complex. Therefore, any approach to managing water trade (and the associated costs) must be appropriate to the level of demand for trade (and the associated benefits). Therefore, the ACCC has made a number of recommendations as part of the draft advice, rather than proposing Basin Plan water trading rules to apply throughout the MDB, because many of the detailed aspects of trade in unregulated rivers will best be assessed at the water resource planning scale. However, the ACCC has made recommendations as to how trade in unregulated rivers should be addressed in the water resource planning process. The ACCC has also made recommendations about where further work is required, recognising that this will require much longer timelines than those available in developing the ACCC's advice.

#### **6.2.4. Draft advice**

##### **Recommendation (6-I)**

The ACCC recommends that Basin states should examine options for improving the clarity and excludability of water access rights in unregulated systems. This should include an investigation of a range of management strategies, including rostering, restrictions and options to 'shepherd' water through zones, while recognising that different management approaches may be better suited to different stream types.

##### **Recommendation (6-J)**

The ACCC recommends that where the likely benefits outweigh the likely administrative costs, trading zones should be established for unregulated rivers, defining areas within which trade can occur without detailed assessment. Trading rules should be expressed with reference to these trading zones. Trading zones should consider:

- that hydrology should be homogeneous within the zone
- the location of important environmental assets and major off-takes
- the existing volume of available water and likelihood of further development
- transmission losses and local catchment inflow.

##### **Recommendation (6-K)**

The ACCC recommends that the MDBA considers requiring water resource plans to provide for the assessment of individual trades between zones on a case-by-case basis in unregulated systems where trading zones (and related trading rules) have not been established.

**Recommendation (6–L)**

The ACCC recommends that the MDBA considers requiring water resource plans to explain the rationale behind transmission loss factors where these are applied to trades in unregulated systems.

**Recommendation (6–M)**

The MDBA and Basin states should investigate the potential for trade of water access rights along rivers that are intermittently connected. To inform this process:

- more detailed information should be established and publicly reported about delivery losses
- arrangements for better communication between water users about options to minimise delivery losses for such trades should be investigated.

If triggers are used to define hydrologic connectivity, these should be clearly stated, reported against and communicated.

## 6.3. Trade between regulated and unregulated systems

### 6.3.1. Background

The characteristics of water access rights in unregulated systems differ substantially from those in regulated systems in their reliability and timing of access to water.

In its position paper, the ACCC considered that the main difficulty in allowing trade between regulated and unregulated systems lies in maintaining the characteristics of the traded water access right across different types of systems. The potential for third party impacts when using exchange rates to manage trade in regulated systems was discussed in section 6.1.2 of the position paper. The ACCC noted that similar difficulties and potential third party impacts apply if exchange rates are used to manage trade between unregulated and regulated systems, where the characteristics of the water access right for the two systems are fundamentally different.

Difficulties in shepherding water<sup>579</sup> are relevant when considering trade from an unregulated system to a downstream regulated system. If water management rules in the unregulated system are established to allow trade between unregulated zones, a trade to a downstream regulated system should also theoretically be possible. This is effectively a tagging approach to manage trade between the two resources. The ACCC position paper emphasised that this approach is only possible if adequate management systems are already in place in the unregulated system. If this criterion is met, the

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<sup>579</sup> As discussed in section 6.2 of the ACCC's *Water trading rules—Position paper*.

ACCC position paper suggested that a number of approaches to allowing trade between unregulated and regulated systems could be explored.

It is not possible to provide an equivalent of a regulated system water access entitlement in an upstream unregulated system.<sup>580</sup> However, using a tagging approach to manage trade from an unregulated system to a downstream regulated system (as discussed above) would enable a trade from a downstream regulated system back into an upstream unregulated system in some limited circumstances. In particular, this would be where the water access right in the unregulated system is tagged for extraction in the regulated system, but remains a water access right in the unregulated system. In its position paper, the ACCC suggested it would therefore be possible to move the use of this water access right back to the unregulated river by cancelling this tag (akin to a back trade).

While conceptually an allocation from a regulated river could be released downstream to an otherwise unregulated river reach (a certain distance from storage), it would no longer be possible to ensure the regulated product arrives at the ordered time or without significant transmission losses. Such a process would also require detailed administrative arrangements to ensure the release was protected from other water users in the unregulated system.

In summary, the ACCC position paper put forward the following positions:

- Exchange rates should not be used as a mechanism to manage trade between regulated and unregulated systems.<sup>581</sup>
- Further options to manage trade between unregulated and regulated systems should be considered. The conditions for such trade may vary between catchments. It may be appropriate to have unregulated and regulated trading zones in place for the same river reach. This investigation should be run parallel to any process of investigating trade options within unregulated systems.<sup>582</sup>

### 6.3.2. Summary of submissions

Overall, submissions did not support the concept of trade between regulated and unregulated systems.

The QFF stated:

It is not accepted that there can be trade between regulated and unregulated systems in QMDB.<sup>583</sup>

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<sup>580</sup> The reliability of a regulated water access right is provided by the storage. Upstream of the storage, in the unregulated catchment, these same characteristics (including storage rights) are not available.

<sup>581</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 159, preliminary position 6–M.

<sup>582</sup> *ibid.*, preliminary position 6–N.

<sup>583</sup> QFF, position paper submission, p. 9.

The South Australian Government noted:

South Australia currently does not permit trade between different prescribed water resources. There are complex hydrological, statutory and administrative issues to be considered. The likelihood of third party impacts is high in these circumstances.<sup>584</sup>

DERM submitted:

Trading between unregulated and regulated water is not supported by DERM. Creating new regulated water for example, can only occur through the commissioning of new infrastructure for storing and delivering water. Likewise allowing for more unregulated water would require the decommissioning of existing water storage...

While it is possible to manage priority conversions in regulated water supply schemes where planning has allowed for such changes, trade between unregulated and regulated entitlements is akin to a priority conversion between very differently managed entitlements.<sup>585</sup>

Similarly, the VFF brought attention to potential adverse impacts stating:

The overall rule supported by VFF is that no trade should occur between unregulated and regulated that has the potential to have adverse impacts on current users and the environment.<sup>586</sup>

The GVIA and the ADIC & DA submitted they were in support of ‘further investigation’<sup>587</sup> and ‘work to identify and assess options’<sup>588</sup>, but did not support trade between regulated and unregulated systems. As the ADIC & DA noted:

The dairy industry does not support the general concept of trade between regulated and unregulated systems due to the differences in characteristics and reliability between water access rights and the potential for negative third party impacts.<sup>589</sup>

The GVIA and the ADIC & DA also noted their agreement with the ACCC’s preliminary position that ‘exchange rates should not be used as a mechanism to manage trade between regulated and unregulated systems.’<sup>590</sup>

Both the NFF and State Water agreed in principle with investigating further options to manage trade between unregulated and regulated systems, but separately noted:

... that these may be more appropriate in the relevant water resource plan rather than the Basin Plan.<sup>591</sup>

... the user of water transferred from an unregulated to a regulated system should contribute towards the costs of running the regulated system. This is required to avoid

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<sup>584</sup> South Australian Government, position paper submission, p. 11.

<sup>585</sup> DERM, position paper submission, p. 6.

<sup>586</sup> VFF, position paper submission, p. 17.

<sup>587</sup> GVIA, position paper submission, p. 7.

<sup>588</sup> ADIC & DA, position paper submission, p. 11.

<sup>589</sup> *ibid.*

<sup>590</sup> GVIA, position paper submission, p. 7.

<sup>591</sup> NFF, position paper submission, p. 9.

existing regulated customers cross-subsidising these unregulated users whose charges do not currently include the costs associated with bulk water delivery.<sup>592</sup>

DSE suggested there may be instances where an exchange rate is an appropriate mechanism to manage trade between unregulated and regulated systems:

... [A] useful application of exchange rates is in trade from regulated to unregulated systems. This is a tiny market with significant limitations (eg. Trade can only to a winter fill storage, and no trade of allocation), but it is nevertheless important to relevant diverters. The only available mechanism (despite some flaws) is exchange rates, as tagging up an unregulated stream cannot work. If exchange rates are not permitted, no such trade could be permitted, and no practical alternative is presented in the position paper.<sup>593</sup>

### 6.3.3. Discussion

The ACCC believes that options for increasing trade between regulated and unregulated rivers should be further explored. However, the ACCC acknowledges that many of the issues raised about trade within unregulated systems may need to be addressed before trade between unregulated and regulated systems can be considered.

Some stakeholders raised concerns about the administrative complexities of trade between regulated and unregulated systems, including difficulties in communicating trading rules and managing compliance. The ACCC recognises that it is likely that more complex processes to manage trade may only be viable where there is a high demand for such trades and where such trades are for large volumes of water.

Where the hydrology and nature of water access rights in a system allows it, the ACCC supports the use of overlapping regulated and unregulated trading zones to manage natural flow events and storage releases concurrently along the one river. This allows both unregulated and regulated products to be available in the one reach. While this has been successfully applied in northern parts of the MDB, it may not be appropriate in other parts of the MDB.

The difficulty is that where an unregulated trading zone has limited opportunities for trade within the unregulated system (e.g. because of the small volume of water access rights or small numbers of water users), opportunities are limited for further development of trade. Similarly, opportunities to sell water access rights and move water to a higher value use may also be limited. However, despite the potential benefits of expanding these limited opportunities for trade, the traded volumes of water and number of trades may often not justify the use of a complex trading system allowing trade with the downstream regulated zones.

The ACCC position paper raised a number of options for managing trade between regulated and unregulated systems. The position paper canvassed options such as tagging extraction conditions from the unregulated system to the regulated system or crediting inflows from the unregulated system to storage associated with a regulated

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<sup>592</sup> State Water, position paper submission, p. 2.

<sup>593</sup> DSE, position paper submission, p. 6.

water access right. The ACCC position paper did not advocate the use of exchange rates to manage trade between the two water sources. However, as raised by the DSE submission, the ACCC considers that there may be circumstances under which an exchange rate could be an appropriate substitute for more sophisticated measures, and exchange rates should be included (albeit in an evolving market context) in any further investigations on managing trade between regulated and unregulated water resources.

The difficulties and potential risks of using exchange rates for trade in regulated river systems were discussed in section 6.1. In the case of regulated river systems, the market is highly developed and a significant amount of trade occurs. As such, more complex administrative processes are feasible and justified to ensure that third party interests are appropriately protected.

However, in an unregulated river system, exchange rates may be appropriate where:

- there is relatively low demand for trade;
- the risk to other users has been assessed and is limited by capping the volume tradeable through exchange rates;
- the exchange rate is calculated conservatively; and
- the likely benefits from increased development well exceed the potential negative impacts.

This would need to be assessed on an individual catchment basis and implemented with appropriate protections in place for third party interests. Where trade occurred from an unregulated to a regulated system, consideration of third party interests would need to include consideration of the impacts on storage levels.

The ACCC notes that the most appropriate method to assess trade between specific unregulated and regulated trading zones is likely to be the water resource planning process. The ACCC is not suggesting that trade between the different types of water source should always be possible; rather, the ACCC is recommending further investigations and indicating conditions that should be fulfilled before such trade occurs.

Unless property rights in unregulated systems are unbundled from land, and water access rights take the form of water access entitlements with an associated water allocation, the ACCC recommends that only 'permanent' trade should be permitted between the two water sources. As water access rights for unregulated systems are typically based on opportunistic pumping, it would be difficult to convert these into a water allocation in the regulated system on a seasonal basis. This would be further complicated if considering a 'temporary' trade of part of the unregulated system water access right.

### 6.3.4. Draft advice

#### **Recommendation (6–N)**

The ACCC recommends that trade of water access rights from an unregulated to a regulated trading zone (or vice versa) should not be allowed until:

- property rights are clearly defined and unbundled from land within the unregulated catchment
- it has been demonstrated that third party interests will be appropriately protected
- a range of alternative approaches to managing such trade have been assessed (see recommendation 6–O below).

#### **Recommendation (6–O)**

The ACCC recommends that further options to manage trade between unregulated and regulated systems should be considered by the MDBA and Basin states. The conditions for such trade may vary between catchments. Options such as tagging extraction conditions from the unregulated system to the regulated system, or crediting inflows from the unregulated system to storage associated with a regulated water access right should be considered. Where the market is thin in the unregulated system, the ability to use exchange rates to manage trade should be investigated to assess what conditions are required to ensure third party impacts are appropriately protected. The appropriateness of different methods to manage trade between unregulated and regulated systems would need to be assessed for individual catchments.

## 6.4. Trade in groundwater systems

### 6.4.1. Background

Groundwater in Australia is managed both at a state-wide scale (through the application of state-wide policies) and at a more detailed local scale.<sup>594</sup>

Access to groundwater is rationed through a system of water access rights. These rights usually denote an entitlement to extract a specified maximum volume of water per annum. A groundwater access right may also incorporate additional groundwater extraction conditions, such as a maximum daily pump rate and/or bore depth. In other cases, these extraction conditions are governed by associated use approvals or works licences (which may also include an annual use limit).

The ACCC position paper identified one of the limitations for trade in groundwater systems as the need for a process of defining water access rights that are excludable<sup>595</sup>

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<sup>594</sup> NWC, *Australian water resources 2005—groundwater management plans*, [www.nwc.gov.au](http://www.nwc.gov.au); accessed 14 August 2009.

and which result in minimal third party impacts. The position paper noted that more secure property rights would be provided by defining sustainable diversion limits for groundwater resources (to be determined in the Basin Plan), and ensuring that groundwater access entitlements are defined as a share of the groundwater resource. Under these conditions, allocations made to entitlements would be more transparent and the volume extracted by any one user should not, generally speaking, impact on supply to other users.

There are many similarities between the issues associated with surface water management and the issues associated with groundwater management. As part of the unbundling process, surface water access entitlements have been or will be separated from land. However, in relation to groundwater, there are often location specific issues which complicate the process of unbundling.

In the case of groundwater, there is a maximum pumping rate and volume that can occur without adverse impact on nearby users. Effectively, this caps the volume of water than can be extracted (or ‘delivered’) over a set time period. The ACCC position paper advocated unbundling (or at least partial unbundling)<sup>596</sup> and suggested these restrictions should be governed through a groundwater use licence and / or works approval that together specifies an extraction right. In other words, a water user could hold a water access right, and have an extraction right that governed the pumping rate and actual volume that can be used or extracted at a particular location (which may not be equal to the water access right volume). This would allow the water access right holder to manage the reliability of their water supply without compromising access for nearby users.

The position paper also suggested that where unbundling of the water access right from extraction rights (specifying the location and conditions of use, such as permitted pumping rates or allowances) had occurred, a separate market for extraction rights could develop, similar to potential markets for water delivery rights in surface water systems. This is a separate matter to the trade of the nominal volume of groundwater access rights or entitlements.

In its position paper the ACCC considered that groundwater trading zones should be defined within the same aquifer, and used to define areas within which trade of groundwater access rights is permitted without detailed investigation. Given the Basin water market and trading objectives outlined in the Act, the ACCC took the position that trade should only be permitted between hydraulically connected zones where there is spare capacity (for additional entitlement) in the buyer’s zone. While trade should be permitted between hydraulically connected groundwater trading zones, it may be difficult to assess third party impacts in an efficient and cost-effective way. Localised impacts would need individual assessment.

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<sup>595</sup> A good is excludable if the benefits generated from the good can be confined to those willing to pay for the provision of the good.

<sup>596</sup> It may not be practical to fully unbundle rights into use, works (delivery) and water access rights. However, while use and delivery may be intrinsically linked to location, it is possible to unbundle the water access right.

In summary, the ACCC position paper put forward the following preliminary positions:

- Trade of groundwater access rights should be allowed within groundwater trading zones.<sup>597</sup>
- Trade should not be permitted between groundwater trading zones that are not in the same aquifer.<sup>598</sup>
- Consideration should be given to assessing groundwater extraction rights (which specify location and conditions of use) as a separate process to trade of groundwater access right. Impacts on neighbouring bores and surface water users could be assessed as part of the groundwater extraction right assessment.<sup>599</sup>
- The MDBA and state authorities should investigate the feasibility of tradeable extraction rights (pumping rates) in groundwater zones that are heavily utilised.<sup>600</sup>

#### 6.4.2. Summary of submissions

All submissions supported the ACCC positions outlined for trade in groundwater systems. The ADIC & DA noted its agreement by stating:

The dairy industry supports the availability of trade in groundwater for both risk management and production management options.<sup>601</sup>

The NSWIC, endorsed by WMI, submitted:

NSWIC concurs with the positions of the ACCC in respect of trade within groundwater systems.<sup>602</sup>

However, some additional issues were raised. The GVIA cautioned that ‘this is a complex area that would require a lot of consultation and consideration.’<sup>603</sup>

While the ADIC & DA submitted:

... water trading of groundwater access rights should not exacerbate any issues of overallocation or overuse or compromise the reliability of existing entitlements in groundwater systems.<sup>604</sup>

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<sup>597</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 164, preliminary position 6–O.

<sup>598</sup> *ibid.*, preliminary position 6–P.

<sup>599</sup> *ibid.*, preliminary position 6–Q.

<sup>600</sup> *ibid.*, preliminary position 6–R.

<sup>601</sup> ADIC & DA, position paper submission, p. 11.

<sup>602</sup> NSWIC, position paper submission, p. 14.

<sup>603</sup> GVIA, position paper submission, p. 7.

<sup>604</sup> ADIC & DA, position paper submission, p. 11.

It also noted:

The issues of impacts from groundwater extraction rights should be considered separately from those related to trade in groundwater access rights—in the same way that water delivery rights are considered separately from water access rights on regulated surface irrigation systems.<sup>605</sup>

The QFF submitted that the principles of groundwater trade and zones should be ‘addressed through the water resource planning process.’<sup>606</sup>

Further, the South Australian Government recognised the potential for a secondary market to develop for take or use approvals and stated:

It is very important to realise that in an unbundled system, as soon as the volume that can be taken or used in an area is capped, this creates a secondary market for take or use approvals. In South Australia the approvals are not tradeable, but are managed through conjunctive applications to vary two approvals, one to reduce the right to take or use, one to increase the right to take or use.<sup>607</sup>

DERM submitted while ‘generally supported as a principle...this is a planning matter and not relevant to the MDB trading rules.’<sup>608</sup>

### 6.4.3. Discussion

The submissions highlight that trade of groundwater can be a positive step in the management of water resources in the MDB. However, as noted by the GVIA, groundwater management and, in particular, trade in groundwater is a complex area and levels of understanding differ.

The ACCC position paper stated that groundwater trade should be allowed within groundwater trading zones. Clearly defined zones will be necessary to provide clarity and transparency as to where and how groundwater trades can occur. The ACCC considers that groundwater *trading zones* should be established so that trade can occur, with minimal assessment, within each trading zone. A groundwater trading zone should reflect the physical realities of water movement and supply within that zone. In other words, factors such as significant hydrogeological variation which results in lower connectivity between two locations, and intensity of groundwater use or variations in groundwater quality, may provide logical trading zone boundaries.

Currently, aquifers in the MDB are divided into groundwater management units (GMUs) or otherwise included in unincorporated areas. The GMUs are primarily based on density of usage and jurisdictional boundaries, while unincorporated areas make up remaining areas.

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<sup>605</sup> ADIC & DA, position paper submission, p. 11.

<sup>606</sup> QFF, position paper submission, p. 10.

<sup>607</sup> South Australian Government, position paper submission, p. 11.

<sup>608</sup> DERM, position paper submission, p. 6.

However, as part of the Basin Plan development, water resource plan areas are being defined. The ACCC notes that this process is still underway and there has been no finalised definition of water resource plan areas. Once defined, each water resource plan area may be managed as a number of separate areas, potentially each with separate SDLs (these areas will be referred to as SDL units in this draft advice). It is likely that the current GMU boundaries will guide the development of groundwater SDL units within each water resource plan area in the Basin Plan.<sup>609</sup> Again, the ACCC notes that this process not decided and will be finalised through the Basin Plan.

Currently, GMUs are often further sub divided into smaller management areas. These smaller management areas may reflect particular characteristics within an area, such as water availability, usage requirements and restrictions, and water quality. SDL units may be divided in a similar way.

As SDL units have not yet been defined, it is difficult for the ACCC to make recommendations on whether these zones represent appropriate ‘trading zones’, or whether trade between zones is appropriate. As already stated, the ACCC considers that groundwater trading zones should be established so that trade can occur, with minimal assessment, within each trading zone. The ACCC considers that the precise definition of groundwater trading zones is a matter more appropriately managed through the development of water resource plans. As such, the ACCC is not recommending a Basin Plan water trading rule that requires set groundwater trading zones.

Once groundwater trading zones have been established, there are a number of more complex issues that arise when considering trade between zones. These include, but are not limited to, assessing the degree of connectivity, levels of capacity and local usage concerns. These are discussed below.

### **Connectivity**

Just as surface water systems can be hydrologically connected (discussed in section 6.1) so too can groundwater systems. In groundwater systems this is referred to as hydraulic connectivity. The term connectivity can be defined and used in different ways. The ACCC considers hydraulic connectivity to describe the ability of groundwater or pressure impacts to be transferred between two locations or trading zones. This connection would eventually enable water levels between two zones to reach equilibrium. The time it takes for the effects of groundwater extraction to be observed a certain distance within, or between, hydraulically connected trading zones is known as the ‘lag time’. This typically describes the time taken for a change in water levels (for example due to groundwater extraction) to impact existing groundwater users or the environment. High hydraulic connectivity implies that the impacts of extraction are observed relatively quickly, while low hydraulic connectivity implies that impacts will take a longer time (e.g. decades) to be observed at another location.

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<sup>609</sup> Section 22(1) item 2, of the Act specifies that WRP areas identified in the Basin Plan must, as far as possible, be aligned with the areas provided for in or under the relevant water management law in that State.

No hydraulic connectivity means that a barrier exists which prevents the impacts of extraction being transferred.

The ACCC considers that trade should be permitted *within* appropriately set groundwater trading zones, and *between* groundwater trading zones that are highly or moderately hydraulically connected, provided certain conditions are met.<sup>610</sup> However, trade should not be permitted *between* groundwater trading zones that have *low*, or *no*, hydraulic connectivity. The ACCC believes that these positions are sound, regardless of where the relevant groundwater trading zones are in the MDB, and that a Basin Plan water trading rule is appropriate in this regard.

### **Capacity and local usage concerns**

Capacity and local usage concerns relate to two different aspects:

- the volume of water access rights on issue relative to the specified SDL (i.e. the remaining capacity to issue additional water access rights within the SDL unit).
- the local extraction capacity in a particular trading zone, which is determined by the potential for interference to existing groundwater users.

These two aspects are now discussed in turn.

#### *Groundwater trade and SDLs*

It should be noted that the Basin Plan approach to defining SDLs has not been finalised.<sup>611</sup> This discussion will therefore remain broad and encompass different approaches to setting the SDL and their implications for groundwater trade. However, the ACCC considers it important that the SDL is established in a manner that allows trade between zones that are highly (or moderately) hydraulically connected. Where there are local extraction capacity limits in a particular trading zone, these should be managed through a separate process to the SDL (as the SDL will most likely be established for the entire SDL unit based on the recharge to the resource as a whole).

Where two highly (or moderately) hydraulically connected groundwater trading zones are subject to the same SDL (i.e. they are in the same SDL unit), trade would be possible between the zones without exceeding the SDL (providing allocation announcements or water availability is the same for both zones, or extraction conditions are tagged as part of the trade process). This remains the case even if the trading zones are overallocated, because trade will not exacerbate overallocation. However trade would also need to be assessed against local extraction limits (see below).

However, where two hydraulically connected groundwater trading zones are subject to different SDLs, these SDLs would need to be adjusted to reflect any trades between the

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<sup>610</sup> Even if the two trading zones are highly (or moderately) connected, they may be in different SDL units or aquifers.

<sup>611</sup> The implications for this in terms of establishing appropriate Basin Plan water trading rules are discussed in section 2.2.3.

two zones, for example, by debiting the SDL in the selling zone and crediting the SDL in the buying zone. If this adjustment is not possible and trade is permitted, there will be negative impacts on other users in the destination zone, especially if the destination zone is fully allocated or overallocated. In this instance, the ACCC considers that where the trading zones are connected, adjusting SDLs to reflect trades should be possible to avoid creating an artificial barrier to trade. If SDLs *can not* be adjusted to reflect trade, trade should not be permitted where the destination trading zone is fully allocated or overallocated.

#### *Groundwater trade and local extraction capacity*

There may be reliability impacts at certain times within a particular trading zone if extraction within that zone exceeds a certain volume. While total groundwater storage volumes between two hydraulically connected zones may equilibrate if a trade occurs, the increased extraction rate in a particular trading zone due to the trade may impact on the pumping capacity of other users in that zone.

Local drawdown impacts from increased extraction in a particular trading zone may require a limit on extraction for that particular trading zone, administered separately to any SDL that would also apply. Therefore while trade could occur within the SDL unit without impacting on the overall extraction (diversion) from the area, extraction limits set to control local drawdown impacts may reasonably restrict trade.

**Where unbundling has not occurred**—that is, where water access rights and extraction rights remain tied—the trade of the water access right must consider not only SDLs, but also potential local extraction limits. In this situation, trade should only be permitted between zones where the water access right is moving to a trading zone where there is spare extraction capacity under the local extraction limit (providing, as discussed above, the criteria of connectivity is met). If a trading zone cannot accommodate additional extraction rates, trade should not be permitted into that zone. This effectively means that in zones where the groundwater usage is in excess of the zone’s local extraction limit, trading into that zone will be prevented.

For example, consider two highly connected trading zones, zone 1 and zone 2. The two zones comprise an SDL unit with a single SDL of 2000ML, but local extraction limits are capped at 1200 ML for each zone. At the time of trade, zone 1 has 1200 ML of water access rights on issue (and is therefore at the local extraction limit), while zone 2 has 600 ML of water access rights on issue (and is therefore at 50 per cent of the local extraction limit). Taken together, the SDL unit is not yet fully allocated.<sup>612</sup> Under this scenario, trade could only occur within zones, or from zone 1 to zone 2. The total volume that zone 2 could purchase from zone 1 would be 600 ML (so as not to exceed the zone 2 local extraction limit). In this scenario, new water access rights of up to

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<sup>612</sup> Recall that a water resource plan area is considered overallocated if, with full development of water access rights in relation to the water resources of the area, the total volume of water available to be extracted by the holders of water access rights at a given time exceeds the environmentally sustainable level of take for those water resources. See s.4 of the Act and section 2.2.3 of this draft advice.

200 ML could also be issued in zone 2 without exceeding the SDL (or the local extraction limit for zone 2).<sup>613</sup>

**Where unbundling (or partial unbundling) has occurred**, the potential for trade is increased. As the ACCC position paper noted, it is feasible that groundwater access rights could be separated from extraction rights (i.e. the annual use limit and maximum daily pump rate).

Under this scenario, similar to that discussed above, extraction for each zone would be limited to ensure that local extraction limits are not exceeded and third party interests are appropriately protected. However local extraction limits could be managed via separate extraction rights rather than limiting the trade of water access rights. This would allow for a situation where water access rights can be bought and sold without affecting extraction rights in a particular area.

Continuing the example from above, a water user in zone 1 may hold a groundwater access right in the form of a water access entitlement with a nominal volume of 100 ML and an extraction right of 100 ML. Over the past few years, the water access entitlement has yielded only 50 per cent allocation (or 50 ML). In a bundled system, the water user would be unable to purchase from zone 2 to improve their reliability as their zone (zone 1) is already at its local extraction limit. If partial unbundling occurs, the water user could purchase an additional 100 ML water access entitlement from zone 2 (as well as zone 1) and so have 200 ML of entitlement in total, while retaining an extraction right of 100 ML. If allocations remain at 50 per cent, the water user would be able to extract the full water allocation volume. However, if allocations rise above 50 per cent, the water user would still only be able to extract 100 ML of water at that location unless they secured additional extraction right.

Thus the advantage of partial unbundling is that users could manage their groundwater reliability without significantly exacerbating third party impacts. This point was supported by the ADIC & DA which noted that

the issues of impacts from groundwater extraction rights should be considered separately from those related to trade in groundwater access rights.<sup>614</sup>

It may remain necessary in some situations to assess any proposed change in extraction right on a case-by-case basis, as is currently the case for issuing new extraction rights. Unbundling, as submitted by the South Australian Government, can result in the development of a secondary market for extraction rights.<sup>615</sup> However, the development of any such market will be driven by local community demand.

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<sup>613</sup> Consider where there are 1600 ML of water access rights on issue in zone 1, instead of 1200ML, while there remains 600 ML of water access rights on issue in zone 2. In this case, the SDL unit as a whole would be overallocated (as the SDL is 2000 ML). In this situation, trade could still occur from zone 1 to zone 2 as the trade would not be exacerbating overallocation. However, no new water access rights could be issued in zone 1 or in zone 2 as the SDL unit as a whole is overallocated.

<sup>614</sup> ADIC & DA, position paper submission, p. 11.

<sup>615</sup> South Australian Government, position paper submission, p. 11.

Unbundling would necessarily involve amendments to Basin state water access right regimes, and would need to be considered with reference to the likely costs and benefits, which may vary between groundwater systems. Therefore, the ACCC does not consider a Basin Plan water trading rule appropriate in this matter.

### Summary

Regardless of whether unbundling has occurred, the ACCC considers that a number of criteria should be met before trade is permitted between groundwater trading zones, as reflected in its recommendation.

The above discussion speculates on different approaches to managing groundwater resources as the exact formulation of the SDL and water resource plan areas is not yet known. This discussion demonstrates some of the aspects of managing the resource that need to be considered to ensure that trade is possible where appropriate.

Finally, the ACCC notes that groundwater metering and compliance is of particular concern due to the difficulties in monitoring groundwater usage, particularly over vast areas. The draft advice addresses metering issues in section 3.11.

### 6.4.4. Draft advice

#### Rule advice (6–P)

The Basin Plan water trading rules should provide that trade of water access rights should be permitted within appropriately set groundwater trading zones, and should not be permitted between groundwater zones that have low, or no, hydraulic connectivity.

#### Recommendation (6–Q)

The ACCC recommends that the MDBA considers requiring water resource plans to ensure that trade of water access rights is not permitted between highly or moderately connected groundwater trading zones unless the following can be demonstrated:

- lag times are clearly understood
- where the zones have separate SDLs, accounting for trades can occur between the SDLs of the two zones
- water access rights in the two zones have substantially similar extraction conditions, or a tagging approach is in place
- where unbundling has not occurred, local extraction issues have been considered and extraction capacity is available in the destination zone and third party interests are appropriately protected.

While the existence of a Basin state border may necessitate different trading zones, it should not (in isolation) limit trade between these two zones.

**Recommendation (6–R)**

The ACCC recommends that the MDBA considers requiring water resource plans to include definitions of groundwater trading zones and the levels of hydraulic connection within and between those zones.

**Recommendation (6–S)**

The ACCC recommends that Basin states consider unbundling water access rights from extraction rights (or ‘partial unbundling’) within a trading zone. Impacts on neighbouring bores and surface water users could be assessed as part of the extraction right assessment process, rather than as part of a water access right trade assessment.

## 6.5. Trade between groundwater and surface water

### 6.5.1. Background

The characteristics of surface water access rights are substantially different from those of groundwater access rights in the majority of situations. Reliability and extraction conditions vary significantly between surface water and groundwater. The ACCC position paper considered that using an exchange rate to convert one water access right to another is not possible without the risk of negative and ongoing third party impacts. On the other hand, the ACCC also considered that a tagged approach was problematic because there is no ability to control the timing of flows between the two resources. This means that, even with the same extraction conditions applying to both surface and groundwater, there is likely to be some impact on the water resources and other users.

The concept of conjunctive management for highly connected groundwater and surface water systems is supported by various government agreements. However, a clear definition of ‘highly connected’ and a high level of confidence in this understanding of connectivity are required. Factors such as lag time for flow between the groundwater and surface water systems must be considered.

The ACCC position paper suggested that, if groundwater and surface water in highly connected areas are truly managed as a single resource, trade would appear feasible (without unduly threatening third party interests). This would require a single set of extraction conditions (with regard to timing and rate) as well as a diversion limit covering both the surface water and groundwater resources. While administrative requirements may be complex, it is implementing conjunctive management, rather than such trades per se, which is adding this complexity.

The ACCC put forward the following preliminary position:

- Trade between groundwater and surface water would only appear feasible when:

- there is a high level of connectivity and well defined and clearly understood lag time
- the groundwater and surface water systems are managed as a single resource (that is, with a common water access right governed by common extraction conditions, and a single diversion limit).<sup>616</sup>

### 6.5.2. Summary of submissions

Generally submissions supported the ACCC position. The NSWIC submitted that it:

... concurs with the positions of the ACCC in respect of trade between groundwater and surface water systems.<sup>617</sup>

Others, while still supporting the ACCC position, raised individual concerns. The South Australian Government stated that the position put forward by the ACCC was hydrologically sound, but noted further:

The trading value would need to be considered against the total cost of the WAP revision and administrative requirements to establish such inter resource trading.<sup>618</sup>

The GVIA also agreed with the position but submitted that ‘its application should be extremely limited at the moment.’<sup>619</sup>

DERM submitted:

Although this is supported in principle, such trade should only be enabled where the connectivity is well understood and appropriately incorporated into water resource planning processes. It should be noted that there is insufficient connectivity between surface and groundwater to allow this to occur in the Queensland part of the MDB.<sup>620</sup>

The ADIC & DA and the QFF agreed in principle with the ACCC’s preliminary positions but raised concerns over the practicalities. In particular the ADIC & DA noted:

... the current understanding of the complexity of hydrological connectivity between most groundwater and surface water systems is poor. ADIC and DA support the view that there is insufficient work being undertaken to provide clearer, more accessible and more transparent information on the interactions between groundwater and surface water systems.

On that basis, the dairy industry does not support trade between groundwater systems and surface water systems. Significant additional research and sophisticated

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<sup>616</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 169, preliminary position 6–S.

<sup>617</sup> NSWIC, position paper submission, p. 14.

<sup>618</sup> South Australia Government, position paper submission, p. 11.

<sup>619</sup> GVIA, position paper submission, p. 7.

<sup>620</sup> DERM, position paper submission, p. 6.

understanding of the interaction between these two types of systems is required before any trading could be contemplated.<sup>621</sup>

The QFF submitted that ‘this principle should be addressed through the water resource planning process.’<sup>622</sup>

The VFF did not agree with the ACCC position, stating that it ‘does not support trade between groundwater and surface water systems.’<sup>623</sup>

### 6.5.3. Discussion

The ACCC’s position supported trade between groundwater and surface water as long as certain criteria were met. This was generally endorsed by submissions; however, many stakeholders raised concerns over the practicalities and complexities involved in trade between groundwater and surface water systems.

In particular, defining levels of connectivity between groundwater and surface water can be complex. There would need to be decisions made on what would constitute high, moderate and low connectivity. High connectivity could be defined as one where the impacts of groundwater extraction on surface water (and vice versa) occur within a short time frame, such as a single irrigation season, while a moderate connectivity may show impacts over a greater period of time, such as a few years. However, it is important to note that currently there is no standard guideline for classifying the connectivity of surface water and groundwater systems. The NWC is currently conducting a project aimed at developing methods to quantify the connectivity between surface and groundwater systems.<sup>624</sup>

The ACCC position paper proposed that, for trade to be permitted between a groundwater and surface water system, they must be managed as a single resource. This would require that there be common water access rights governed by common extraction conditions for both surface and groundwater, and a single diversion limit. After further consideration, the ACCC considers this preliminary position may have been too specific. The intent of the ACCC position was to ensure that there was no double taking permitted due to trade and discrepancies in extraction conditions, and that third party interests would be appropriately protected. However, having a common water access right and extraction conditions and a single diversion limit may not be the only means of achieving this.

Current research in the Upper Ovens Valley indicates that managing groundwater and surface water as a single water access right can be as administratively complex as continuing to operate under two separate licences.<sup>625</sup> For instance, even with high

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<sup>621</sup> ADIC & DA, position paper submission, p. 12.

<sup>622</sup> QFF, position paper submission, p. 10.

<sup>623</sup> VFF, position paper submission, p. 17.

<sup>624</sup> NWC, [Interconnection of surface water and groundwater systems—river losses from losing/disconnected streams—NSW](#), viewed November 2009.

<sup>625</sup> D Lovell, ‘Conjunctive management of groundwater and surface water in the Upper Ovens River Valley’, Masters thesis (unpublished), the University of Melbourne, 2009.

connectivity, lag times and low flow conditions make it necessary to tightly monitor extraction rates of both surface water and groundwater individually. This is done to ensure that groundwater levels are not being decreased below the levels required to sustain the river during low flow conditions.<sup>626</sup>

This view is further supported by the MDBA issues paper *Development of Sustainable Diversion Limits for the Murray–Darling Basin*, which indicates that distinct SDLs will be set for groundwater and surface water systems, even where surface water and groundwater are highly connected.<sup>627</sup>

As groundwater and surface water systems are co-dependent and extraction from one system impacts over time on the other, accounting between the two systems becomes complex. The issue of double accounting also needs to be addressed. As the NWC commented:

Traditionally groundwater and surface water have been managed separately in Australia. This has led to the same water being recorded twice - once in the groundwater management plan, and again in the surface water management plan. This has contributed to the overallocation of water resources.<sup>628</sup>

Accordingly, while trade between groundwater and surface water systems is feasible, trade will need to be considered on a system-by-system basis to accommodate the particularities of groundwater and surface water relationships in each local area. Specifically, for a trade to be approved the level of connectivity and lag time would need to be well understood. The ACCC is proposing that trade where there is **high** connectivity should be possible where certain criteria are met—such as integrated water resource plans, a solid understanding of the nature of lag times, appropriate protection for third party interests and the necessary accounting and compliance arrangements are in place.

However, the ACCC's recommendation would also allow for the potential for trade to be investigated where there is **moderate** connectivity. This proposal allows for development in understanding of groundwater and surface water interactions in the coming years. Rather than limiting trade to highly connected systems alone, trade could be permitted between any systems where the listed criteria are met. However, the ACCC notes that these criteria are less likely to be met where connectivity is considered moderate (as opposed to high).

The ACCC considers that, as a prerequisite for any trade between highly or moderately connected groundwater and surface water, integrated WRPs must be developed,

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<sup>626</sup> When managing as a single resource, additional triggers for groundwater restrictions may be required to 'provide for maximum base flow to the river in low-flow periods with highest priority given to preventing groundwater extraction lowering groundwater levels below the stream base. D Lovell, 'Conjunctive management of groundwater and surface water in the Upper Ovens River Valley', Masters thesis (unpublished), the University of Melbourne, 2009, p. 158.

<sup>627</sup> MDBA, *Development of Sustainable Diversion Limits for the Murray–Darling Basin*, issues paper, p. 35. Refer to chapter 2 of this publication for a more detailed discussion on SDLs and the implications for water trading.

<sup>628</sup> NWC, [Groundwater – surface water connectivity](#), viewed November 2009.

including arrangements to ensure there will be no double accounting of the surface water and groundwater in that system. The risks associated with trade between groundwater and surface water also need to be clearly identified, particularly in relation to the effects of time lag.

A trade from surface water to groundwater will increase the drawdown of groundwater, and thus in dry seasons may reduce the levels of groundwater available to maintain surface water flow. This issue needs to be considered in the integrated WRPs and specific trading rules, and extraction conditions may need to be adjusted appropriately. The ACCC does not consider a Basin Plan water trading rule as the best mechanism to give effect to these recommendations. Rather, it considers that WRPs would be a more appropriate tool to apply these considerations to particular water resources.

At this stage, this discussion relates to the ‘permanent’ trade of water access rights. There may be added complexities in managing ‘temporary’ or allocation trades. This is especially the case for trade to unregulated surface water systems where unbundling has not occurred. Lag times also pose an added complexity for managing water allocation trade and ensuring there is no double accounting.

The ACCC does not consider trade between surface water and groundwater feasible if there is **low** or **no** connectivity between these two systems, while providing appropriate protection for third party interests. The ACCC considers that this position would be appropriate throughout the MDB—that is, regardless of the particular characteristics of the surface and ground water systems under consideration. As such, the ACCC considers it appropriate for this position to be reflected in a Basin Plan water trading rule.

#### **6.5.4. Draft advice**

##### **Rule advice (6–T)**

The Basin Plan water trading rules should provide that trade between surface water and groundwater systems with a low level of connectivity (or that are not connected) is prohibited.

**Recommendation (6–U)**

The ACCC recommends that the MDBA considers requiring water resource plans to only permit trade of water access rights between highly or moderately connected surface water and ground water systems when it can be demonstrated that:

- lag times are clearly understood
- WRPs are integrated and specifically consider the relationship between the two water systems
- there is a process to ensure no double accounting of surface and ground water
- accounting for trades can occur between the SDLs of the two systems
- water access rights in the two systems have substantially similar extraction conditions, or a tagging approach is in place
- third party interests are appropriately protected.

The ACCC notes that meeting the above criteria will be more difficult—and therefore trade less likely to be permitted—in relation to moderately connected surface water and ground water systems.

## 6.6. Farm dam trade

### 6.6.1. Background

#### Trade between farm dams

The definition of a ‘farm dam’ varies across the MDB. Farm dams, for the purposes of the following discussion, are private dams used to intercept catchment runoff that would otherwise have contributed to streamflow (or recharge to aquifers), rather than dams that are filled using extractive water access rights to other surface or groundwater resources. Farm dam trade is the trade of water access rights associated with farm dams. Water access rights in relation to farm dam are sometimes referred to as a harvestable right. However, this section does not discuss floodplain harvesting.<sup>629</sup>

The ACCC in its position paper considered that only farm dams on the same drainage path can be considered physically connected. Downstream trade on the same drainage path is theoretically possible while still providing appropriate protection for third party interests. However the ACCC suggested that trade of farm dam water access rights within a wider area would require further consideration to ensure that the volume of water harvested remains the same and that there were no adverse impacts on other individual users because of the location of the new (or expanded) farm dam.

The ACCC position paper considered that trading zones could be used to define areas with similar evaporation, seepage and harvesting conditions. Assuming that the

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<sup>629</sup> Refer to section 3.5 for a brief discussion of floodplain harvesting.

catchment area of the new and old farm dam is similar, trade within the zone should be possible. However, a trade to a new drainage path, even if within the same zone, would effectively require cancelling and reissuing a water access right in the new location. This would require spare development capacity in the new location (to allow for the new water access right) based on an assessment of existing downstream dams and their harvesting conditions.

In the position paper, the ACCC considered that farm dams constructed with low flow bypass structures (allowing low flows to pass around the storage) should be considered differently because their impact on downstream users is very different. If there is a low flow bypass on the existing farm dam, it should arguably also be a requirement for the new farm dam where trade occurs.

The ACCC position paper put forward the position that:

- Trade of farm dam water access rights within the same catchment should be assessed on an individual basis and—in order to provide appropriate protection of third party interests—would need to consider the following:
  - the farm dam has been duly authorised under the law of the basin state
  - the new location is in the same zone as the original farm dam
  - new dam construction in the zone is capped for that particular water use type
  - the size of the dam is comparable
  - the catchment areas (or inflow volume) of the two dams are similar in size
  - third party impacts are assessed at the new location, and potentially impacted parties are consulted.<sup>630</sup>

Once a water access right for a farm dam is traded, decommissioning is the only way to ensure that the farm dam no longer harvests catchment runoff and provides an easy way to assess compliance. However, a landowner may wish to retain the dam itself for stock and domestic use (which may not require a licence). In this case, if the size of the farm dam was within the range acceptable for domestic and stock purposes, no action would be required. If this is not the case, the ACCC considered it may be reasonable to:

- reduce the size of the existing farm dam
- place a bypass on the existing farm dam or
- reduce the size of the new farm dam.<sup>631</sup>

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<sup>630</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 175, preliminary position 6–T.

<sup>631</sup> *ibid.*, p. 173.

### **Trade between farm dams and surface water**

The characteristics of water access rights in unregulated systems differ considerably from those of a farm dam. This complicates water trade between the two as it is difficult to make adjustments required to generate a comparable water access right. The differences include the fact that the annual volume of extractions made by a farm dam are not reliably known, are not restricted to a maximum daily extraction rate and the timing of their extractions may differ considerably from extractions from an unregulated system.

Given the difficulty in understanding farm dam and surface water relationships and ensuring a comparable reliability level, the ACCC considered that it would be difficult to ensure appropriate protection of third party interests if trade between farm dams and unregulated surface water systems were allowed. Therefore, the ACCC position paper put forward the following position:

- Trade does not appear feasible between farm dams and surface water systems while providing appropriate protection to third party interests.<sup>632</sup>

### **6.6.2. Summary of submissions**

The South Australian Government raised a general concern about the differentiation between unregulated systems and farm dams:

The differentiation appears linked to the definition of a watercourse and the line between surface water and watercourses is quite blurred ... the distinction between unregulated systems and farm dams is unclear. It almost implies that the water trade in any system dominated by farm dams is not feasible while providing appropriate protection to third party interests. The third party interests are protected by the conditions for taking and using the water, and these are inevitably linked to the water trade in the case of dams.<sup>633</sup>

### **Trade between farm dams**

Submissions on the trade of farm dam water access rights did not generally support the ACCC's preliminary position that trade between farm dams may be possible.

The NSWIC noted that it 'does not support the trade of farm dam water access rights.'<sup>634</sup>

Similarly, the GVIA submitted that although farm dam trade may be feasible, it was not in support of trade at this point. The GVIA noted:

... this in part due to the Basic Right nature of farm dams in NSW, and in ensuring there was no 'double-dipping' of this water source by landholders.<sup>635</sup>

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<sup>632</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 175, preliminary position 6–U.

<sup>633</sup> South Australian Government, position paper submission, p. 12.

<sup>634</sup> NSWIC, position paper submission, p. 15.

<sup>635</sup> GVIA, position paper submission, p. 7.

Concerns were also raised over the complexities and feasibility of trading farm dam access rights. The South Australian Government commented that there ‘may never be a truly unbundled system.’<sup>636</sup>

DERM submitted:

This is supported in principle. However, although the focus is on works these are a proxy for the entitlement to water. The key consideration is that the take of water should not result in impacts on the water entitlement’s of other water users or the environment. In practice this means that trade in entitlements to take overland flow will need to be considered on a case by case basis in most instances.

Assessment and enforcement of the decommissioning or downsizing of farm dam capacity that had been traded would have significant cost implications and the willingness of water users to meet these costs would be a consideration for those contemplating such trades.<sup>637</sup>

The ADIC & DA noted:

... the lack of clear definition of the characteristics of water access rights in relation to farm dams and the potential for negative third party impacts.<sup>638</sup>

The NFF stated:

It is the initial position of the NFF to disagree with this ACCC position. The administrative costs of individual assessments may very well be cost prohibitive. Likewise, transmission losses will be significant. Further, it will increase water use within individual catchments unless provisions can be made to bypass the original dam.

Farm dams are considered one of the major interception issues in the Basin. Allowing trade between farm dams will exacerbate rather than ameliorate this issue. Furthermore, where State Governments have legislated voluntary compliance measures, the ability to effectively govern such trade will be non-existent and place more pressure on already constrained resources.

NFF notes that there may also be issues around such as allowing trade only from legally compliant farm dams (and how to efficiently monitor compliance). Furthermore, if trade is to be permitted between farm dams, a cap must be applied to allow trade. To do otherwise will result in third party impacts due to the significant risk of increased interception.<sup>639</sup>

In contrast, the submission from the QFF supported the proposed ACCC position.

### **Trade between farm dams and surface water**

Submissions from the NSWIC, WMI, the GVIA and the QFF agreed with the ACCC position that trade between farm dams and surface water does not appear feasible while providing appropriate protection to third party interests. The ADIC & DA stated:

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<sup>636</sup> South Australian Government, position paper submission, p. 12.

<sup>637</sup> DERM, position paper submission, p. 7.

<sup>638</sup> ADIC & DA, position paper submission, p. 12.

<sup>639</sup> NFF, position paper submission, p. 9.

It is very difficult to trade between farm dams and unregulated surface water systems due to the differences in definition, characteristics and reliability of water access rights and the potential for negative third party impacts.<sup>640</sup>

However, the VFF submitted:

Trade should be allowed between farm dams and regulated water system[s] subject to no third party impacts.<sup>641</sup>

### 6.6.3. Discussion

As noted earlier, the term ‘farm dam’ is interpreted in different ways across the MDB. It can be used to encompass both on-stream and off-stream storages. The distinction between an on-stream and off-stream storage depends on the definition of the watercourse itself (as recognised by the South Australian Government in its submission).

It is difficult to provide a definition of farm dam that will apply consistently across all states as the legislation, terminology and hydrology vary significantly across the MDB.<sup>642</sup> However, in the context of the trading rules and recommendations outlined in this paper, a farm dam refers to a private dam that:

- intercepts catchment runoff
- is not filled using extractive water access rights from other water resources
- is not located on a registered or defined watercourse.

The ACCC also recognises that there are significant difficulties in defining the water access right associated with a farm dam. The various jurisdictions have approached this in different ways. The ACCC noted in its position paper that even once a water access right has been defined, it may be that only a portion of this right can be traded (e.g. where the original dam is not decommissioned and is therefore still accruing evaporation losses).

The ACCC acknowledges that, before trade of water access rights in relation to farm dams is permitted, it is essential that the relevant property rights are defined<sup>643</sup> and there is a cap on the construction of new dams. As an example, many farm dams are used for stock and domestic purposes, and the construction of new dams for this purpose is not limited in most jurisdictions. Therefore, it would not be feasible to enable trade of these particular water access rights. A discussion of stock and domestic rights, including those sourced from farm dams, is provided in section 3.5. This section focuses on licensed farm dams used for commercial and irrigation purposes.

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<sup>640</sup> ADIC & DA, position paper submission, p. 12.

<sup>641</sup> VFF, position paper submission, p. 18.

<sup>642</sup> Note that the NWC has further definitions of farm dams in each state—see [Australian water resources 2005—Baseline assessment for water resources for the National Water Initiative—Level 2 assessment, water availability theme, National Perspective](#), May 2007.

<sup>643</sup> Refer to chapter 2 for a discussion of defining property rights to support the water market.

### **Trade between farm dams**

The ACCC acknowledges that there are many complexities when considering the trade of farm dam water access rights. The ACCC preliminary position set out criteria that would need to be considered before such trade can be permitted. These factors are necessary to provide appropriate protection of third party interests, ensure that an equivalent water access right is available at the new location and that the water access right traded is licensed and capped.

The ACCC considers that, if these criteria are met, the concerns raised by stakeholders would be addressed. However, it should be emphasised that these conditions may not currently be met in many areas of the MDB. In fact, some of these issues are likely to be under consideration for many years. As such, the ACCC does not consider it appropriate for trade between farm dams to be regulated through a Basin Plan water trading rule at this time. However, the ACCC considers that where WRPs seek to enable such trades, it is important that this is done in a way that appropriately protects the interests of other water users.

In response to stakeholder concerns regarding the trade of stock and domestic rights, the ACCC notes that where farm dams exist for stock and domestic purposes, the ACCC's arguments in section 3.5 are equally relevant.<sup>644</sup>

The conditions relating to the location (and catchment characteristics), relative size and catchment areas of the old and new dams would help to ensure that the water access right is comparable at the new location.

The final condition, requiring that 'third party impacts are appropriately protected at the new location and potentially impacted parties are consulted' before the trade is approved, ensures that the interests of other water users are considered.

The ACCC's proposed approach would require individual assessments of trading applications. This may be a resource intensive process, but is required due to the location-specific issues associated with farm dam water access rights. This process also allows potentially impacted third parties to respond. The ACCC acknowledges that water authorities may pass on the administrative costs of processing such a trade and, depending on the transaction cost, this may limit the number of trade applications.

### **Trade between farm dams and surface water**

The ACCC has a number of concerns regarding trade between farm dams and surface water. Fundamentally, the two water access rights are distinctly different in reliability and pumping (extraction) conditions. It is therefore difficult to appropriately protect third party interests if such trades are permitted. In addition, because of the catchment characteristics of farm dams and their intermittent connectivity to defined watercourses,

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<sup>644</sup> In short, for such trade to be appropriate, the ACCC recommends that stock and domestic rights (of any kind) would need to be turned into volumetric water access entitlements that are tradeable. In addition, no new stock and domestic rights should be issued and adequate safeguards should be in place to meet critical human water needs.

it is difficult to ensure that water traded is available at the new location. These concerns are relevant for trade to or from both unregulated and regulated surface water systems.

One possible approach is to determine an exchange rate between the two products. The arguments in favour of this approach are similar to the arguments about trade between unregulated and regulated systems. Where the potential demand for such trade is small, there may be some merit in having an administratively simple approach to allowing trade. However, due to the location-specific nature of farm dam water access rights, the exchange rate would need to be calculated individually for each case. The ACCC considers that with current knowledge, it is not feasible to accurately calculate such an exchange rate for trade to or from surface water systems. Accordingly, the ACCC recommends that such trades should not currently be permitted.

It is possible that new information will become available following the commencement of the Basin Plan (e.g. better modelling of individual farm dams, metering, property rights definition and ‘shepherding’ arrangements). The ACCC has structured its recommendation to make room for this new information. The approach taken by the ACCC is to recommend that trade between farm dams and surface water should not be permitted unless certain prerequisites are met. The ACCC does not anticipate that these can be fulfilled in the immediate future.

#### **6.6.4. Draft advice**

##### **Recommendation (6–V)**

The ACCC recommends that the MDBA considers requiring water resource plans to provide that—where a water resource plan permits trade of farm dam water access rights—applications must be assessed on an individual basis and the following conditions met before such a trade is approved:

- the farm dam water access right is licensed
- the new location is in the same catchment as the original farm dam (to ensure similar characteristics)
- the size of the (current or proposed) dams is comparable
- the catchment areas (or inflow volume) of the two dam locations are similar in size
- third party interests are appropriately protected at the new location, and potentially impacted parties are consulted.

**Recommendation (6–W)**

The ACCC recommends that the MDBA considers requiring water resource plans to only enable trade between farm dams and surface water systems if it can be demonstrated that:

- the hydrological connectivity between the two specific locations and water sources is well understood
- the nominal volume, timing and reliability of supply in the destination mimics that in the origin
- water access rights in the two systems have substantially similar extraction conditions, or a tagging approach is in place
- third party interests are appropriately protected at the new location, and potentially impacted parties are consulted
- an assessment has been made to determine the maximum volume that can move between farm dams and surface water systems while providing appropriate protection for third party interests
- such trade will not jeopardise the provision of planned (or ‘rules-based’) environmental water.

## 7. Water delivery rights

The Act states that a ‘water delivery right means a right to have water delivered by an infrastructure operator’.<sup>645</sup> Given this definition, water delivery rights could exist:

- within the irrigation networks of IIOs
- more generally, in areas serviced by the water service infrastructure of an infrastructure operator.

Given this definition, water delivery rights could potentially include implied delivery rights for private diverters within a river system or implied delivery rights between surface water sources. However, at this stage, the ACCC has not considered such rights and has instead focused its analysis on water delivery rights against IIOs in relation to irrigation networks<sup>646</sup> and on the significance of impediments to the trade of water delivery rights held against IIOs. The ACCC notes that, where water is not delivered through irrigation networks, delivery rights are not typically in place and capacity constraints tend to be managed through trading rules rather than delivery rights.

In addition to relevant provisions in the Act, state legislation and the former MDB Agreement, provisions about water delivery rights are also contained in the water market rules. The water market rules relate to the transformation of irrigation rights against an IIO into a water access entitlement held by someone other than the IIO.<sup>647</sup> Under the water market rules, an IIO must provide details of the contractual terms and conditions of an irrigator’s delivery right within 20 business days if that irrigator requires the continuation of that delivery right after transformation.<sup>648</sup>

The ACCC considers that two broad issues are relevant to a discussion of water delivery rights:

- the clear specification of water delivery rights (separately from irrigation rights or water access rights) and the definition of those rights
- the arrangements for the trade of water delivery rights.

Although interrelated, given that specification and separation of water delivery rights are to some extent precursors to facilitating trade of water delivery rights, it is appropriate to consider these two areas separately.

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<sup>645</sup> See section 4 of the Act.

<sup>646</sup> This would exclude private river diverters.

<sup>647</sup> These provisions are discussed in ACCC, *A guide to the water market rules 2009 and water delivery contracts*, June 2009, chapter 6.

<sup>648</sup> Water market rules 2009, part 4.

## 7.1. Specific and separate water delivery rights

### 7.1.1. Background

Water delivery rights can take a number of forms:

- rights supported by legislation, such as Victorian delivery shares (which are a right to delivery in an irrigation area)
- explicit delivery entitlements issued by an IIO (such as a MIL or WMI delivery entitlement)
- other contractual arrangements in place with an infrastructure operator.

Furthermore, the way water delivery rights are defined can vary between operators. Some water delivery rights may simply be an annual volumetric limit. Others may be defined based on both the quantity of water and the time over which that water may be delivered. This could include defining the right as a certain share of capacity in the network, an amount of water in a certain time or a maximum pumping rate. Water delivery rights may also be defined with reference to a particular part of an IIO's area of operation (as opposed to the entire area of operation) or even to a particular property.

In many cases, water delivery rights remain bundled with either water access rights or irrigation rights (i.e. there is no water delivery right defined independently of the volume of an irrigation right or water access right).

The ACCC noted in its position paper that separately and clearly defined water delivery rights are able to serve a number of functions for an IIO and for irrigators served by an IIO's irrigation network:

- First, they can be used as a basis for determining liability for annual access fees and casual usage charges for access to the irrigation network, and for determining termination fees when access is terminated.<sup>649</sup>
- Second, separate water delivery rights may be relevant as a method for an IIO to define the level of delivery capacity in the network and manage congestion. The ACCC considered that, in constrained networks, the possession of clearly defined water delivery rights may provide IIOs with a method to allocate limited capacity to irrigators and allow irrigators to better understand their ability to access the limited capacity of the network. However, the ACCC noted that this was unlikely to be an issue in unconstrained networks and even in constrained networks may only be relevant for a limited part of the year. The ACCC also noted that access to delivery in constrained networks

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<sup>649</sup> The water charge (termination fees) rules cap this termination fee at a multiple of 10 times the annual total network access charge, unless an additional termination fee is approved by the ACCC; see Water Charge (Termination Fees) Rules 2009, part 3.

may still simply be allocated on a first come first serve basis even where water delivery rights exist.

- Third, where a person has transformed their right to water under an irrigation right under the water market rules and wishes to retain delivery, a clear definition of water delivery rights is required to establish the person's right to have water delivered.
- Fourth, if water delivery rights are separately tradeable within an IIO's area, it would be necessary for these to be separately defined.

The ACCC noted that irrigation rights or water access rights are in many cases still bundled together with water delivery rights, either because no separate right exists or because of IIO requirements that a certain volume of water delivery rights must be held for a given volume of irrigation right or water access right. The ACCC considered that this bundling could limit the ability of irrigators to trade water. Bundling the rights to water with the rights to delivery will mean that a person who wishes to trade water must also adjust their right to delivery through obtaining or terminating water delivery rights. This will deny them the ability to use trade to manage water access and delivery independently.

Overall, the ACCC considered in its position paper that there would be significant benefits to having clearly and separately defined water delivery rights. The ACCC considered that the increased flexibility and certainty from explicit water delivery rights would outweigh any administrative simplicity of having bundled rights, and would better facilitate efficient water markets. The ACCC did not consider that specifying water delivery rights would place an onerous additional cost burden on IIOs.

The ACCC also considered in its position paper that, where rights to water are unbundled from rights to delivery, it would not be appropriate that termination of the right to delivery is required when the trade of a water access right or an irrigation right occurs.<sup>650</sup> Changes in the volume of a water delivery right must be allowed to occur separately from changes in the amount of an irrigation right or water access rights held.

Given the above considerations, the ACCC reached the following preliminary positions in relation to having clearly and separately defined water delivery rights:

- IIOs should clearly specify the volume/unit share of their customers'/members' access to their irrigation network under a water delivery right. The water delivery right should be explicitly provided for in a contract or agreement for delivery services.<sup>651</sup>

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<sup>650</sup> Requiring termination of access to an irrigation network upon the transformation of an irrigation right (which would then become a tradeable water access entitlement) is already prohibited under the water market rules.

<sup>651</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 182, preliminary position 7–A.

- An IIO may not require a person to obtain, terminate or vary the volume of a water delivery right as a result of, or condition for approval of, a trade of a water access right or an irrigation right.<sup>652</sup>

### 7.1.2. Summary of submissions

The NSWIC stated that it:

... supports the development of specific and separate water delivery rights for irrigators within an IIO area.<sup>653</sup>

The VFF also said that it agreed with the ACCC's preliminary positions.<sup>654</sup>

The ADIC & DA stated that it agreed with the ACCC's preliminary positions and:

... supports the establishment, where practicable, of shares of delivery capacity and the 'unbundling' of water rights in those water systems where the right to water, its use, delivery and associated works approvals has not previously been separated.<sup>655</sup>

WMI stated that the ACCC's preliminary positions about specific and separate water delivery rights:

[support] the water market rules and the larger operators in the Basin have already defined delivery rights. It is understood that there cannot be forced termination of a delivery right.<sup>656</sup>

### 7.1.3. Discussion

There were limited submissions on the ACCC's preliminary positions about specific and separate water delivery rights. Those submissions that were received agreed with the ACCC's preliminary positions.

#### **Benefits of specific and separately defined water delivery rights**

As outlined in the background, the ACCC's position paper set out a number of potential benefits to having specific and separate water delivery rights. In summary, these are:

- providing a basis for charging
- defining the level of delivery capacity and managing capacity in the network
- facilitating the definition of delivery for transformed irrigators
- facilitating trade of water delivery rights.

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<sup>652</sup> *ibid.*, preliminary position 7–B.

<sup>653</sup> NSWIC, position paper submission, p. 16.

<sup>654</sup> VFF, position paper submission, p. 18.

<sup>655</sup> ADIC & DA, position paper submission, p. 12.

<sup>656</sup> WMI, position paper submission, p. 7.

The ACCC remains of the view that these benefits could be derived from having specific and separately defined water delivery rights. Accordingly, it considers that its preliminary position 7–A would appropriately be a Basin Plan water trading rule. The ACCC considers that the rule is a fundamental principle that would not require substantial or frequent revision over time. Under this rule, IIOs could define these rights as either a volume (e.g. 200 ML per year or 20 ML per month) or as some sort of unit share (e.g. 10 per cent of the capacity of a section of the network).

The ACCC considers that, in addition to defining the volume or unit share of the water delivery right, there may be other relevant characteristics of a water delivery right that would be important for a member or customer irrigator to know. For example, in networks where the water delivery rights may be used to manage capacity issues, water delivery rights may be specified to relate to a particular part of the IIO's area of operation and trade of the water delivery right may be restricted as a result. The ACCC considers that it would be appropriate to specify those characteristics as well.

### **Application of the rule**

The ACCC has further considered the specifics of how such a rule could be defined. First, the ACCC has considered whether such a rule should appropriately apply to all or to only a limited class of IIOs. Costs will be involved in defining water delivery rights and establishing either written contracts or a register of the water delivery rights held by each member or customer. Smaller IIOs will generally be less able to absorb such compliance costs.

The ACCC notes that, as submitted by WMI, many larger IIOs have already defined water delivery rights. In addition, most IIOs in New South Wales and South Australia will need to define, or at least have a method of defining, their water delivery rights to facilitate transformation under the water market rules. As such, the ACCC does not expect that such a rule will lead to significant additional costs for IIOs. The ACCC also notes that specific and separately defined water delivery rights will lead to benefits for IIOs. As such, the ACCC considers that the rule should apply to all IIOs.

Given the lead time before the Basin Plan will commence, and that most IIOs will need to consider the definition of water delivery rights as a result of the water market rules taking full effect from 1 January 2010, the ACCC considers that such a rule should take effect from the commencement of the Basin Plan.

The ACCC has considered whether there is any need for such rules to apply differently for irrigators who have remained members of an IIO compared to irrigators who have transformed and are customers (but not members) of the IIOs. The ACCC does not consider there is any need for different approaches for these two different classes of irrigators because both will have similar rights and obligations against the IIO.

### **Benefits of unbundling**

The ACCC considers that its preliminary position 7–B<sup>657</sup> is necessary as a complement to principles defined in the water market rules and water charge (termination fees) rules, and unbundling reforms more generally.

Given these unbundling processes, it would not be appropriate that changing the volume of one right be linked to the volume held of another right. The ACCC notes that the water market rules apply only in the context of a person seeking to transform their entitlement to water under an irrigation right into a water access entitlement. The water market rules do not govern the actions of an IIO (in relation to water delivery rights) when a person trades their right to water under an irrigation right internally or transfers a water access right to their IIO in return for a larger entitlement to water under their irrigation right. The ACCC considers that an IIO should not be permitted to require the person to obtain, terminate or vary the volume of a water delivery right in these circumstances.

Also, where a person holds a water access right (such as a water access entitlement) rather than an irrigation right, and is located within an IIO's network, it is important that they are able to deal with their water access right independently of their water delivery right against the IIO.

As such the ACCC considers that preliminary position 7–B would also appropriately be reflected in the Basin Plan water trading rules.

#### **7.1.4. Draft advice**

##### **Rule advice (7–A)**

The Basin Plan water trading rules should provide that IIOs are required to specify in writing the following for each member or customer who holds a water delivery right against them:

- the volume or unit share of the member's/customer's access to the irrigation network under the water delivery right
- where they have been determined, other characteristics that could restrict trade of that water delivery right to another person (including whether the water delivery right can be transferred to all or only part of the IIO's network).

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<sup>657</sup> Preliminary position 7–B is that 'An IIO may not require a person to obtain, terminate or vary the volume of a water delivery right as a result of, or condition for approval of, a trade of a water access right or an irrigation right'.

**Rule advice (7–B)**

The Basin Plan water trading rules should provide that IIOs are prevented from requiring a person to obtain, terminate or vary the volume of a water delivery right as a result of, or condition for approval of, a trade of a water access right or an irrigation right.

## 7.2. Trade of water delivery rights

### 7.2.1. Background

In some IIO areas, water delivery rights may be tradeable subject to certain conditions. Such conditions may include:

- restrictions on the parties that can purchase water delivery rights
- limitations on the areas within which water delivery rights may be traded
- requirements in relation to the volume of water access rights/irrigation rights that must be held
- other conditions.

In other areas, the trade of water delivery rights may be prohibited entirely (except perhaps where water delivery rights are traded with landholdings). The ability to trade water delivery rights will depend on the approach taken by the relevant IIO.

The ACCC considered in its position paper that the two main purposes for water delivery rights—to provide a basis for charging annual access fees (and therefore termination fees) and to provide a basis for managing capacity in constrained networks—may be assisted by the ability for water delivery rights to be traded between customers/members.

The ACCC also considered that there would be benefits in allowing water delivery rights to be traded between customers/members.

First, the ACCC considered that where a person is unable to trade water delivery rights, they will be limited in the possible actions they can take upon sale of their water access right or right to water under an irrigation right. In comparison, where trade was possible, a person would have increased flexibility in dealing with their water delivery rights. In particular, in a situation where one person was seeking to increase their water delivery right and another was seeking to decrease their water delivery right, trade would allow both to agree on a price for the trade of the water delivery rights.

In contrast, where trade was prevented, one person would need to terminate, incurring a termination fee, while the second person would need to obtain additional water delivery rights from the IIO. This would essentially mean that the IIO would receive a windfall gain (the termination fees), with no change in the volume of water delivery rights held against it.

The ACCC also considered that there would be benefits to IIOs in assessing capacity constraints and receiving more accurate investment signals: if the location aspects of water delivery rights are moved or are attempted to be moved within an IIO's network towards particular areas and away from other areas, the IIO will better be able to see where greater delivery of water is needed and, accordingly, where greater investment may be needed. Conversely, where less delivery of water is needed, rationalisation may take place.

Trade allows the free movement of water delivery rights and would mean that irrigators would not have to unnecessarily retain water delivery rights, as they may be inclined to do if required to terminate. The ACCC noted that this investment-signalling benefit of trade in water delivery rights may be limited in certain circumstances, such as for unconstrained networks or where water delivery rights were not directly used to manage capacity.

While the ACCC considered that trade in water delivery rights could have benefits, it noted in its position paper that there may be legitimate reasons for such trade to be restricted. The ACCC considered that:

- It would be appropriate that a water delivery right against one IIO could not be converted into a water delivery right pertaining to another irrigation network. Such an outcome would not make sense as the water delivery right is related to delivery through the IIO's infrastructure.
- It may be necessary to restrict the trade of water delivery rights within an IIO network to reflect legitimate capacity constraints, such as where a part of the network was constrained and additional water delivery rights could not be traded into that part of the network without significant third party impacts on existing irrigators. The ACCC noted that this restriction should not be used as an excuse to prevent trade in water delivery rights generally, and that the use of zones for the trade of water delivery rights may be appropriate.
- A restriction on holding a water delivery right in the absence of owning or occupying land serviced by the IIO's irrigation network may be appropriate.
- It may be appropriate to limit trade of water delivery rights to a person where this would result in a volume of water delivery rights in excess of the amount reasonably required to irrigate the land owned or occupied by that person and able to be serviced by the water delivery infrastructure.
- There may be a need for restrictions that account for security risks or where access fees are in arrears.
- It may also be appropriate to prohibit trades of water delivery rights into areas of an irrigation network which are being decommissioned or where significant reconfiguration is taking place.

The ACCC considered two possible ways to facilitate the trade of water delivery rights:

- It would be possible to develop a detailed approach which defined physical delivery zones within an irrigation network to manage capacity issues (between which the trade of water delivery rights may be restricted), and then allowed trade to otherwise occur freely within these zones. Zones would be defined to reflect valid capacity constraints, and water delivery rights would generally be tradeable to persons located anywhere within a delivery zone with spare capacity. For areas which were at capacity, water delivery rights could not be traded into the area and new rights could not be granted.
- Recognising that there are significant differences in the operation and composition of irrigation networks, and that the detailed approach may therefore be overly prescriptive in many cases, the ACCC also considered that it may be appropriate to adopt a less prescriptive position that IIOs must not unreasonably prevent, delay or deter trades of water delivery rights.

The ACCC considered that it might be too early to require a more detailed approach surrounding the trade of water delivery rights, and accordingly reached the following preliminary position:

- IIOs should not unreasonably prevent, deter or delay the trade of water delivery rights between persons who own or occupy land that is serviced by their irrigation network. Factors that may inform whether a trade has been unreasonably prevented, deterred or delayed include:
  - overall capacity in the network
  - capacity in the parts of the network where the water delivery rights would potentially be traded to
  - connectivity of the network (i.e. whether there is one large network or several component networks that are not physically connected)
  - payment of previous water access fees or security for future water access fees and other relevant charges
  - the amount of water delivery rights reasonably required to irrigate a person's property
  - ensuring the necessary administrative arrangements are in place to assess and give effect to a trade in water delivery rights.<sup>658</sup>

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<sup>658</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 190, preliminary position 7–C.

## 7.2.2. Summary of submissions

The VFF and the ADIC & DA both stated they agreed with the ACCC's preliminary positions.<sup>659</sup> The ADIC & DA said that trade in water delivery rights must take into account system capacity constraints and modernisation upgrade plans. The QFF similarly said that it agreed with the ACCC's preliminary positions 'with the proviso that it is feasible to implement tradeable delivery rights in specific schemes'.<sup>660</sup>

The NSWIC stated it:

... concurs with the approach of the ACCC and supports the "reasonableness" approach to restricting trade of water delivery rights.<sup>661</sup>

The NSWIC also suggested that the ACCC needed to directly engage with 'very large number of small operators in NSW who may, in many instances, not recognise that they are operators'.

DSE supported the ACCC's conclusions in the position paper and stated that:

[Delivery rights] are currently tradable within irrigation areas, but there is little market interest in these times of low allocations, low flow, and generally adequate delivery capacity.<sup>662</sup>

The South Australian Government submitted that issues about water delivery rights are 'essentially an issue for the Irrigation Trusts' and that it 'is in the Trusts own interests to maximise delivery and operational flexibility'.<sup>663</sup>

In contrast to the submissions supporting trade of water delivery rights, CIT disagreed with having tradeable delivery rights in piped systems:

As a general position, CIT does not support the trade of water delivery rights in modern pressurized pipeline systems due to the quite limited opportunities to move irrigation demand around pipeline networks.

...

It is very important to CIT that our pipeline design parameters that have finally provided service equity between customers are not eroded by your introduction of trading in water delivery rights.<sup>664</sup>

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<sup>659</sup> VFF, position paper submission, p. 18; ADIC & DA, position paper submission, p. 12.

<sup>660</sup> QFF, position paper submission, p. 11.

<sup>661</sup> NSWIC, position paper submission, p. 16.

<sup>662</sup> DSE, position paper submission, p. 7.

<sup>663</sup> South Australian Government, position paper submission, p. 12.

<sup>664</sup> CIT, position paper submission, p. 1.

In particular, CIT commented on the ACCC's consideration of a detailed approach to the trade of water delivery rights involving the use of delivery zones:

... requiring CIT to establish delivery zones and making known to irrigators the amount of spare capacity in each delivery zone does not recognise the core principles of water delivery in modern systems to deliver daily replenishment for drip irrigation.

...

Faced with a shrinking sales base we will be keen to encourage any opportunity for new business as a result of water delivery rights being taken up in a new or different location. However each application must be shown to be capable of being delivered at a new location without measurably impacting on our ability to meet existing Water Delivery Rights...

...

Zoning will create a lot of work and confine decision processes to trading within very small clusters. In short it will not produce the best solution for either the Trust or the customer.<sup>665</sup>

WMI stated that it did not consider that the water trading rules should deal with trade of delivery rights:

WMI does not support the interference and regulation of delivery entitlements by water trading rules and believe delivery falls outside the scope of the definition of water trading.

Delivery entitlements are operator and district specific and have nothing to do with the Basin as a whole. WMI agrees with clearly defining the entitlement but does not agree with pre-determined rules about how an infrastructure operator must approve or not approve delivery entitlement transactions.<sup>666</sup>

WMI stated that it was pleased to note the ACCC's discussion that owning or occupying land might be a reasonable prerequisite for holding water delivery rights, and concurred that it may be appropriate to limit trade of delivery rights based on a reasonable volume needed to irrigate a property

The NFF also addressed particular factors raised in the ACCC's position.<sup>667</sup> In particular, it considered that the provision for security in termination fees meant that such a factor was unnecessary in the trading rules. In contrast to WMI's submission, the NFF did not consider that it would be appropriate to consider the amount of delivery rights that would reasonably be required to irrigate a property, noting that 'this may change from year to year or from commodity to commodity'.<sup>668</sup>

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<sup>665</sup> *ibid.*, pp. 1–2.

<sup>666</sup> WMI, position paper submission, p. 7.

<sup>667</sup> NFF, position paper submission, p. 9.

<sup>668</sup> *ibid.*

SunWater submitted that capacity considerations were an issue:

SunWater operates the St George irrigation area in south west Queensland. We have found that in a finely balanced delivery system that is operated close to design limits, it has proven difficult to offer an absolute right to trade delivery rights between different parts of the irrigation area. Hence, SunWater agrees that dot points outlined in the ACCC statement need to be considered when deciding to approve, or refuse, a delivery right trade.<sup>669</sup>

It also suggested that consideration of whether an additional factor could be added to the ACCC's list, such as 'consideration of whether the proposed trade is likely to result in negative impacts on third parties, not involved in the trade'.

### 7.2.3. Discussion

The ACCC notes that submissions on trade in water delivery rights were mixed. A number of submissions supported rules on trade in water delivery rights. However, the South Australian Government said that this should be an issue for IIOs, and CIT and WMI opposed the idea of water trading rules dealing with trade in water delivery rights. Certain parties also commented on specific factors identified in the ACCC's preliminary positions.

#### Threshold issues

Firstly, the ACCC notes WMI's submission that it believes 'delivery falls outside the scope of the definition of water trading', because '[d]elivery entitlements are operator and district specific and have nothing to do with the Basin as a whole'.<sup>670</sup>

First, the ACCC notes that water delivery rights are clearly contemplated as tradeable water rights under the definitions in the Act. Second, the fact that water delivery rights are operator- and district-specific does not mean that they are not relevant to the MDB as a whole. Restrictions on the manner in which water delivery rights can be dealt with could be barriers to water trade generally in the MDB. For example, if an irrigator was required to terminate delivery when it traded water access entitlement, this may limit the likelihood of trade in water access entitlements taking place. Accordingly the ACCC does not agree with WMI's submission on this issue.

The ACCC also notes that CIT's submission discusses the introduction of zoning of delivery rights. CIT submits that zoning would create a lot of work and not be the best solution for either the trust or the customer.<sup>671</sup> The ACCC notes that the preliminary positions in its position paper decided against a zoning approach in favour of the less prescriptive reasonableness approach. For the reasons discussed in its position paper, and given that no interested parties submitted that a more prescriptive approach would be desirable, the ACCC does not propose to pursue the zoning approach further at this stage. Given the significant differences in the operation and composition of irrigation

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<sup>669</sup> SunWater, position paper submission, p. 6.

<sup>670</sup> WMI, position paper submission, p. 7.

<sup>671</sup> CIT, position paper submission, p. 2.

networks, the ACCC considers that a reasonableness approach would be more suitable at this time.

### **Benefits of trade**

As discussed in the ACCC's position paper, trade in water delivery rights may lead to two main benefits:

- People will have greater flexibility when dealing with their water delivery rights, allowing water delivery rights to move between two parties for an agreed price rather than requiring termination and the payment of termination fees by one person and then acquisition of water delivery rights from the IIO by the other.
- IIOs will be better able to manage the capacity of their network and assess capacity constraints and likely investments. While IIOs will already have some ability to make such assessments, the use of surveys or estimates may be less reliable than movement of water delivery rights, which provides a greater commitment by the irrigator to likely future delivery needs.

If trade in water delivery rights is prohibited (so that the only way to voluntarily reduce the amount of water delivery right held would be to terminate and incur termination fees), signals regarding capacity constraints and future investment needs will be distorted.

For these reasons, the ACCC considers it would be appropriate to encourage trade in water delivery rights. The ACCC considers that the reasonableness approach to trade in water delivery rights remains appropriate and that it would be appropriate for the Basin Plan water trading rules to incorporate this approach.

### **Application of a Basin Plan water trading rule**

Certain submissions raised issues about the appropriate application of the preliminary position about trade in water delivery rights. CIT submitted that there was a potential distinction to be drawn between piped and channel irrigation networks, although this was largely in the context of a discussion about zoning.<sup>672</sup> The NSWIC also noted that smaller IIOs may have different information needs to larger IIOs, and the ACCC considers that it is also relevant to consider whether different rules should apply to different sizes of IIOs.<sup>673</sup>

The ACCC recognises that there are likely to be practical differences in the operation of piped networks as compared to predominantly channel networks. Most notably, there may be flow rate and delivery pressure parameters that differently restrict capacity issues in piped systems to the constraints operating in channel networks. CIT's submission notes that computer simulation programs may facilitate an assessment of those parameters. However, while there are practical differences between the types of

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<sup>672</sup> CIT, position paper submission, pp. 1–2.

<sup>673</sup> NSWIC, position paper submission, p. 16.

delivery systems, the ACCC considers that the less prescriptive reasonableness approach can already encompass such differences. For example, it may be reasonable to restrict a trade of water delivery rights in a piped system where the appropriate pressure parameters would not be met, while this would not be a relevant consideration in a channel system. As such, the ACCC does not consider that there would be a need for the Basin Plan water trading rules to differ between channel and piped systems.

Equally, the ACCC considers that the reasonableness approach should have relatively low compliance costs, because it would not require IIOs to set up a detailed zoning regime for the trade of water delivery rights. Therefore, the ACCC does not propose to define different sets of rules for different operators. This is consistent with the application of the water market rules to all IIOs. The reasonableness of actions taken by IIOs may also be informed by their size.

### **Factors for considering reasonableness**

The ACCC notes that some further consideration should be given to the appropriate factors that may inform whether a trade in water delivery rights has been unreasonably prevented, deterred or delayed. It should be noted that while the ACCC considers the factors discussed below to be critical, there may be other factors that will inform whether a trade of water delivery rights has been unreasonably prevented, deterred or delayed.

The ACCC continues to consider that overall capacity, capacity in relevant parts of the network and connectivity are all relevant factors for consideration. In general, if a part of a network was at capacity, it would be reasonable for an IIO to prevent a trade of delivery rights into that area. This is because increased water delivery rights may have third party impacts on existing irrigators in that area, who may have a reduced ability to have water delivered. Similarly, where two networks were totally unconnected, even if administered jointly, it would generally be reasonable to prevent the movement of water delivery rights between them, reflecting the fact that delivery is typically related to a particular irrigation network.

The ACCC notes the NFF's submission that it would not be necessary to address issues relating to security for payment of fees in light of the operation of rules about termination fees. The ACCC notes that issues of security and termination fees are already considered in the context of the water market rules, but considers that it is still appropriate to have security as one of the factors relevant to consideration. Having issues of security listed as a relevant factor does not abrogate from the operation of the water market rules and confirms that it is a relevant consideration in relation to trade in water delivery rights.

The ACCC notes that two submissions were received on the inclusion of 'the amount of water delivery rights reasonably required to irrigate a person's property' as a factor for consideration. The ACCC included this factor on the basis that this may prevent

irrigators moving water delivery rights and their associated termination fee obligations onto one piece of land, which may provide a security risk for the IIO.<sup>674</sup>

WMI submitted it concurred that it may be appropriate to limit the volume of delivery rights to a reasonable amount. In comparison, the NFF stated that the inclusion of such a factor was not warranted because the amount of delivery rights that would reasonably be required to irrigate a property may change from year to year or from commodity to commodity.

The ACCC agrees that a person's on-farm delivery infrastructure could change, or they could switch to crops that may require more or less water to be delivered. The ACCC notes that an irrigator may also seek to obtain additional water delivery rights in anticipation of such changes. There would be the risk that including this factor may lead to IIOs inappropriately restricting the movement of water delivery rights based on past water delivery or past levels of infrastructure. The ACCC is not advocating that such infrastructure or crop production changes could or should be prevented. To some extent, such behaviour by IIOs should be prevented by the fact that the consideration is of an amount 'reasonably required' for irrigation. Where the irrigator had a valid reason for expanding its water delivery rights holdings, the IIO would not be allowed to prevent trade. However, the ACCC considers that the wording of this factor should be revised to better reflect the fact that water delivery rights may be needed in anticipation of future production and infrastructure investment decisions.

Finally, the ACCC notes that SunWater submitted that a more general factor of:

consideration of whether the proposed trade is likely to result in negative impacts on third parties, not involved in the trade' should be considered.<sup>675</sup>

The ACCC considers that this factor seems overly broad and that the significant third party impacts in relation to trade of water delivery rights would relate to capacity issues. As such, it does not consider that an additional factor is warranted.

The ACCC also notes that its position paper discussed that it may not be appropriate to trade water delivery rights into an area where significant reconfiguration or decommissioning was taking place. The ACCC considers that this should also be a relevant factor for consideration.

### **Overall**

The ACCC considers that it would be appropriate for there to be a Basin Plan water trading rule that deals with trade in water delivery rights. The ACCC considers that trade in water delivery rights would have benefits for both IIOs and irrigators.

The ACCC considers that a less prescriptive approach based on reasonableness criteria and a non-exhaustive list of relevant factors for consideration is the best form for such a rule at this time. While it is less prescriptive for market participants, the ACCC notes

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<sup>674</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 187.

<sup>675</sup> SunWater, position paper submission, p. 6.

this approach is consistent with various aspects of, for example, trade practices law such as unconscionable conduct.

The ACCC considers there is a need to somewhat revise the factors that inform the consideration of reasonableness from those contained in the position paper.

#### 7.2.4. Draft advice

##### **Rule advice (7–C)**

The Basin Plan water trading rules should provide that an IIO cannot unreasonably prevent, deter or delay the trade of water delivery rights (in part or in full) between persons who own or occupy land that is serviced by the IIO's irrigation network. Factors that may inform whether a trade has been unreasonably prevented, deterred or delayed include, but are not limited to:

- overall capacity in the network
- capacity in the parts of the network where the water delivery rights would potentially be traded to
- reconfiguration or decommissioning work in the parts of the network where the water delivery rights would potentially be traded to
- connectivity of the network (i.e. whether there is one large network or several component networks that are not physically connected)
- payment of previous water access fees or security for future water access fees and other relevant charges
- the amount of water delivery rights reasonably required to irrigate a person's property for both current and expected future water use
- whether the necessary administrative arrangements are in place to assess and give effect to a trade in water delivery rights.

## 8. Irrigation rights

Among other things, the water trading rules may deal with the imposition or removal of restrictions on, and barriers to, the trade of tradeable water rights and the availability of information to enable the trade of tradeable water rights.<sup>676</sup> Section 4 of the Act provides that a tradeable water right includes an irrigation right. In turn, an irrigation right is defined as a right that a person has against an irrigation infrastructure operator (IIO) to receive water that is not a water access right or a water delivery right.<sup>677</sup>

The Water Market Rules 2009 came into effect on 23 June 2009 and prohibit operators from preventing or unreasonably delaying transformation arrangements (subject to some permitted restrictions). Transformation arrangements occur when the share component of an IIO's water access entitlement is reduced to allow for the permanent transformation of a person's irrigation right into a water access entitlement held by someone other than the IIO. The water market rules also deal to a limited extent with the trade of transformed water access entitlements.

Where irrigation rights exist,<sup>678</sup> most of the larger IIOs have written contracts outlining irrigators' irrigation rights. However, many IIOs provide limited information to irrigators about their irrigation rights or, in some cases, have not made a formal determination about irrigation rights. The position paper therefore considered the issue of whether IIOs should be required to specify the volume / unit share of irrigation rights (see section 8.1).

The extent to which current arrangements between IIOs and irrigators who hold an irrigation right permit various forms of trade of irrigation rights varies across IIOs. The position paper therefore considered whether the water trading rules should regulate the trade of irrigation rights (see section 8.2).

### 8.1. Specifying the volume / unit share of irrigation rights

#### 8.1.1. Background

The position paper noted that in some instances irrigators' irrigation rights remain insufficiently defined. For example, some operators have not formally determined all irrigation rights held against the water access entitlement the operator holds. In that case, irrigators may still receive a volume of water each season but this may vary or not be guaranteed in a written contract.

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<sup>676</sup> See ss. 26(1)(h) and 26(2) of the Act.

<sup>677</sup> Unlike a water access entitlement, irrigation rights are not rights by or under the law of a state. Some IIOs may refer to an irrigator's entitlement to water under an irrigation right as a water entitlement.

<sup>678</sup> IIOs in Victoria and Queensland are unlikely to be subject to the water market rules or any water trading rules specifically dealing with irrigation rights because most irrigators in those jurisdictions hold water access entitlements in their own name, rather than irrigation rights.

Under the water market rules, where an irrigator intends or seeks to transform their entitlement to water under an irrigation right, an IIO must provide them with details of their irrigation right when the irrigator submits to the IIO a written request for those details. However, the water market rules cannot compel an IIO to take a holistic approach and make a determination of all irrigation rights held against it.

Where an IIO has not defined all irrigation rights, a determination of the first irrigator's irrigation right and subsequent transformation may be higher than is reasonable because no other irrigator's rights have been 'crystallised'. As more irrigators transform, remaining irrigators may not realise the full value of their irrigation right because the IIO's water access entitlement has already been reduced by previous transformations.

In its position paper, the ACCC considered that requiring IIOs to make a determination of the volume of water or unit share of all irrigation rights held against them will significantly facilitate the availability of information to irrigators who do not currently have written contracts with their IIOs outlining their individual entitlement to receive water under their irrigation right.

The position paper therefore proposed that where an IIO does not have a written contract with each of its irrigators outlining each irrigator's individual entitlement to receive water under their irrigation right, the IIO should make a determination of the volume of water or unit share of all irrigation rights held against that IIO.<sup>679</sup>

In addition, the position paper proposed that in order to facilitate informal and possible formal negotiations in the event of a dispute between the parties, IIOs should provide written details to support the determination of the volume of water or unit share of all irrigation rights held against the IIO.<sup>680</sup>

### 8.1.2. Summary of submissions

The South Australian Government advised in its submission that under the *Irrigation Act 2009* and *Renmark Irrigation Trust Act 2009* South Australian irrigation trusts are required to define irrigation rights.<sup>681</sup>

The ADIC & DA stated that it favours irrigation rights being formally defined and made explicit by IIOs to their irrigators.<sup>682</sup>

The NSWIC submitted that having all IIOs specify the volume / unit share of irrigation rights is a 'worthy aim'. However, it was concerned that:

... the very large number of small operators will make this a difficult proposition ... [and that] financial and administrative assistance to comply must be provided.<sup>683</sup>

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<sup>679</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 193, preliminary position 8–A.

<sup>680</sup> *ibid.*, preliminary position 8–B.

<sup>681</sup> South Australian Government, position paper submission, p. 12.

<sup>682</sup> ADIC & DA, position paper submission, p. 13.

<sup>683</sup> NSWIC, position paper submission, p. 17.

### 8.1.3. Discussion

In general, submissions to the ACCC's issues paper and position paper supported the proposal that entitlements to water under irrigation rights should be explicitly defined.

In its submission the NSWIC raised the issue of whether smaller New South Wales IIOs will have sufficient resources to be able to comply with water trading rules that require all IIOs:

- to have made a determination of the volume of water or unit share of all irrigation rights held against the IIO; and
- to hold a written contract with each of the IIO's irrigators outlining each irrigator's individual entitlement to receive water under their irrigation right.

However, those IIOs who are able to give effect to transformation arrangements will already be required to determine irrigation rights under the water market rules for those irrigators seeking to transform.

The ACCC takes the view that it would be more efficient for an IIO to make an initial determination of irrigation rights for **all** irrigators than to determine irrigation rights upon each application for transformation. Furthermore, it would be prudent for IIOs to make an initial determination of all irrigation rights because, as noted previously, a determination of the first irrigator's irrigation right and subsequent transformation may affect other irrigator's rights that have not been formally determined.

Furthermore, it is important that details of how a determination of an entitlement to water under an irrigation right are provided by the IIO to the irrigation right holder. This information should be available to the IIO in any case, as it would be necessary to make an informed determination in the first place. Requiring the IIO to provide this information to irrigation right holders will help ensure that both parties are satisfied with the determination.

The ACCC also notes that a person seeking to trade or transfer their entitlement to water under an irrigation right will require information about the exact nature of their right. Basin Plan water trading rules requiring an operator to advise irrigation right holders of the details of their entitlement to water under an irrigation right will therefore remove a significant barrier to trade involving irrigation rights by improving the availability of information to enable such trade.

Any Basin Plan water trading rules about specifying irrigation rights will predominantly affect South Australian IIOs and smaller IIOs in New South Wales.<sup>684</sup>

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<sup>684</sup> Most irrigators in Victoria and Queensland hold water access entitlements in their own name, rather than irrigation rights. Larger IIOs in New South Wales already have explicitly defined irrigation rights that are held against them.

The South Australian Government has already introduced legislation requiring its trusts to fix irrigation rights. Therefore, the proposed water trading rules will only require South Australian IIOs to provide a written notice to their irrigators if they have not already done so for all their irrigation right holders.

### **Conveyance losses**

Some IIOs do not hold a separate conveyance water access entitlement for water losses that occur during distribution of water in their networks. In these circumstances, the water market rules permit an IIO to withhold a portion of an irrigator's irrigation right upon transformation to account for fixed network conveyance losses. If the transforming irrigator retains their right to have water delivered, the volume of water withheld from transformation remains a part of the irrigator's irrigation right.

In developing rule advice 8–A (below), the ACCC considered whether the determination and subsequent written notice from the IIO to each of its irrigator right holders should include, where relevant, details of the portion of each irrigator's entitlement to water under an irrigation right that the IIO would withhold upon transformation to account for fixed network conveyance losses.<sup>685</sup>

Calculation of fixed conveyance losses may change over time. For example, upgrades to the irrigation network may significantly reduce conveyance losses in the future. The ACCC therefore decided that the determination and subsequent written notice need not specify details about fixed conveyance losses. That is, as is provided for under the water market rules, IIOs are free to defer their decision about fixed conveyance losses until they receive an application for transformation. However, the ACCC notes that IIOs may choose to provide details about fixed conveyance losses at the time of making a determination specifying entitlements to water under irrigation rights.

#### **8.1.4. Draft advice**

##### **Rule advice (8–A)**

The Basin Plan water trading rules should provide that, for each person who holds an irrigation right against an IIO, the IIO must make a determination of that person's entitlement to water under their irrigation right, expressed as either a volume of water (denominated in megalitres) or a unit share of the IIO's water access entitlement(s), and provide a written notice of this determination to that person.

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<sup>685</sup> The water market rules consider fixed conveyance losses against the total of the IIO's entitlement, not as a proportion of water delivered (which, by definition, would vary each year).

**Rule advice (8–B)**

The Basin Plan water trading rules should provide that, to facilitate negotiations in the event of a dispute between the IIO and irrigation right holders, the IIO must provide each irrigation right holder with written details to support the determination of the volume of water or unit share of their entitlement to water under an irrigation right.

**Rule advice (8–C)**

The Basin Plan water trading rules should provide that both (8–A) and (8–B) should not apply to an IIO that has given a written notice to each person who holds an irrigation right against that IIO, specifying that person’s entitlement to water under their irrigation, expressed as either a volume of water (denominated in megalitres) or a unit share of the IIO’s water access entitlement(s).

## 8.2. Trade of entitlements to water under irrigation rights

### 8.2.1. Background

The position paper noted that while some IIOs have developed internal arrangements to allow for the trade of an entitlement to water under an irrigation right, such trades are governed by the particular policies and procedures of each IIO.

Trades that do not result in a reduction of an operator’s water access entitlement are not covered by the water market rules. This includes the ‘temporary’ trade of water allocated under an irrigation right as well as the trade of entitlements to water under irrigation rights within an operator’s irrigation network. The water trading rules may deal with these types of trades.

On the ‘temporary’ trade of water allocated under an irrigation right, the position paper found that:

- An IIO has incentive to allow the trade of water into the IIO’s area of operation as it will receive additional revenue from delivering that water. Similarly, IIOs have no incentive to restrict internal trades of water allocated to an irrigation right because water is retained in the IIO’s network.
- In general, if an operator places unreasonable restrictions on an irrigator in the temporary trade of water allocated to an irrigation right, the irrigator may seek to transform that right.<sup>686</sup> Once transformed, an

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<sup>686</sup> This includes the situation where an IIO makes a negative adjustment to the state-issued allocation by an amount estimated to cover fixed and variable network losses, but the IIO fails to make a positive adjustment for variable network losses to non-transformed irrigators’ allocations when they are traded out of its network.

irrigator is free to trade the water allocated to their water access entitlement.

- Allowing the sale of water allocated to an irrigation right at a time of financial difficulty may enhance an irrigator's ability to remain irrigating in the IIO's area of operation in the long term.

The position paper noted that there may be valid restrictions related to the ability of IIOs to deliver a person's entitlement to water under their irrigation right—for example, because of legitimate capacity constraints. However, the ACCC considered that such restrictions should be sufficiently encompassed within the person's water delivery right (see chapter 7) and should not be used to restrict the trade of water allocated under an the irrigator's irrigation right.

On the trade of entitlements to water under an irrigation right, the position paper found that:

- An IIO has an incentive to allow an irrigator to increase their entitlement to water under an irrigation right by amalgamating a water access entitlement that they hold with the water access entitlement of an IIO because it would increase the IIO's revenue from delivering water.
- An IIO has little incentive to restrict an irrigator from trading their entitlement to water under an irrigation right to another irrigator (who has not transformed) within the IIO's area of operation because the IIO's water access entitlement is not reduced.
- Where a person wishes to trade their entitlement to water under an irrigation right to a party outside of their IIO's area, this would involve a transformation arrangement and would therefore be covered by the water market rules.

The position paper noted that an unreasonable restriction on the trade of entitlements to water under irrigation rights may be a condition requiring the 'seller' to trade or terminate that part of the water delivery right attributable to the entitlement to water under an irrigation right traded. Alternatively, an IIO may seek to impose conditions on the buyer requiring the possession or acquisition of additional rights to water delivery.

The ACCC concluded in chapter 7 of the position paper that changes in the entitlement to water under an irrigation right (or water access right) should be allowed to occur separately to changes in the entitlement to delivery under the water delivery right held. In the case of the transformation of an irrigation right and trade of the transformed water access entitlement out of an IIO's area, such conditions are prohibited under the water market rules.

The ACCC considered that a reasonable restriction may be that an IIO withholds its approval to trade an irrigator's entitlement to water under an irrigation right until outstanding water charges are discharged. The water market rules permit an IIO to not approve an application for transformation because there are outstanding fees or charges payable.

The position paper noted that significant regulation has been imposed on IIOs in the MDB with the commencement of the water market rules and water charge (termination fees) rules in 2009. Further regulation of similar conduct under the water trading rules may be in excess of what is required to contribute to achieving the Basin water market and trading objectives and principles of the Act.

The position paper therefore concluded that IIOs have significant incentives not to restrict the trade of entitlements to water under irrigation rights. In addition, there is a strong countervailing threat of irrigators seeking to transform their entitlement to water under an irrigation right and employing the protections offered under the water market rules. Therefore, there did not appear to be a compelling need to specifically prohibit IIO restrictions on the permanent or temporary trade of entitlements to water under irrigation rights within, outside or into an IIO's network.<sup>687</sup>

### 8.2.2. Summary of submissions

Most submissions did not address the ACCC's preliminary position regarding the trade of entitlements to water under irrigation rights.

The VFF stated that if permanent trade can be delivered without affecting existing users, there should be no restrictions on permanent trade.<sup>688</sup>

The NSWIC concurred with the position of the ACCC.<sup>689</sup> WMI submitted that irrigation rights are covered by the water market rules and should not be repeated in the water trading rules.<sup>690</sup>

### 8.2.3. Discussion

As discussed in the ACCC's position paper, IIOs do not have an incentive to unreasonably restrict the trade of entitlements to water under irrigation rights that do not result in less water being delivered through their network. Many IIOs already allow such trades.

In response to the VFF's submission, the ACCC notes that the water market rules already prohibit IIO's from unreasonably restricting the permanent trade of irrigation rights to outside of the IIO's network by allowing for transformation of an entitlement to water under an irrigation right into a water access entitlement to occur.

The ACCC therefore maintains its position that there does not appear to be a compelling need for the water trading rules to specifically prohibit IIO restrictions on the trade of entitlements to water under irrigation rights.

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<sup>687</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 198, preliminary position 8–C.

<sup>688</sup> VFF, position paper submission, p. 19.

<sup>689</sup> NSWIC, position paper submission, p. 17.

<sup>690</sup> WMI, position paper submission, p. 8.

#### 8.2.4. Draft advice

**Recommendation (8-D)**

IIOs have significant incentives not to restrict the trade of entitlements to water under irrigation rights that do not involve transformation. In addition, there is a strong countervailing threat of IIO customers/members seeking to transform their entitlement to water under an irrigation right and employing the protections offered to them under the water market rules.

In light of these considerations, the ACCC recommends against making Basin Plan water trading rules relating specifically to either the trade of water allocated under an irrigation right, or the trade of entitlements to water under irrigation rights.

## 9. Reporting and the availability of information

The water trading rules may relate to the availability of information to enable the trading or transfer of tradeable water rights, and the reporting of trades and transfers.<sup>691</sup> This chapter considers issues relating to information and reporting requirements.

Access to timely and accurate information is critical to a well-functioning water market because it allows participants to make informed decisions about managing their water access and delivery needs. A lack of information can inhibit otherwise beneficial trades from occurring and can raise transaction costs for market participants.

Although irrigators and other water users may be familiar with the terminology, general level of prices, product characteristics and trading rules associated with tradeable water rights in their own area, they may lack this information as it applies in other areas, particularly interstate. While relevant information is generally available at present, there may be issues about its accessibility, timeliness and, in some cases, accuracy and clarity. This chapter considers these issues in more detail, as well as how the reporting of trades could assist market participants and others.

Government processes that will affect the reporting and availability of information about water trading are already underway. First, DEWHA, in conjunction with the states and territories, is developing a National Water Market System (NWMS), which will have several elements, including a National Portal, development of a common registry system and enhancements to existing register systems, and greater interoperability between registers.

The National Portal is planned to be completed in April 2010, and is planned to provide a national market information service and links to state- and territory-based information on water licences and seasonal allocations.<sup>692</sup> Under the Act the Bureau of Meteorology (BOM) also has an obligation to collect water information, including ‘information about rights, allocations and trades in relation to water’. The BOM is developing the Australian Water Rights Information Service (AWRIS), which will present the collected water information.

This chapter addresses reporting and information issues relating to:

- characteristics of tradeable water rights
- trade in tradeable water rights
- trading volume and pricing data
- allocation and policy change announcements.

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<sup>691</sup> See ss. 26(1)(h) & (i) of the Act.

<sup>692</sup> The Minister for Climate Change and Water (Senator the Hon. Penny Wong), *\$56 million for development of a national water market system*, media release PW324/09, 9 November 2009.

## **9.1. Information regarding tradeable water right characteristics**

### **9.1.1. Background**

Tradeable water rights are rights by or under the law of a state or are otherwise granted relevant to a specific water system or area within a Basin state. As such, the characteristics of tradeable water rights differ considerably between (and often within) Basin states.

The most obvious example of this variation is the terminology used to describe the tradeable water rights and related trades. In its position paper the ACCC considered there was no obvious need to address the issue of consistent terminology because it did not seem to be causing significant concern to participants wishing to trade in the market.

A more significant difference relates to the actual characteristics of the tradeable water right, rather than the terminology used. Characteristics of a water access right that may be important to a person's decision to trade would include the priority class, reliability profile, carryover policies, fees and charges payable, and other terms and conditions. Such characteristics could vary between particular types of rights within a water system, between water systems and between Basin states. This may make it difficult to assess the merits of different tradeable water rights, particularly water access rights, and the benefits of trading them.

The ACCC noted in its position paper that the characteristics of water access rights (other than water allocations) are highly significant to water market participants (for water access entitlement trade in particular). The ACCC considered that not being able to access information on water access right characteristics would make trade difficult for water market participants.

As such, the ACCC considered that there would be merit in developing a consistent information framework for licensed water access rights (other than water allocations), to allow ready comparison across different products, jurisdictions and geographic regions. The ACCC considered that standard information statements used in the private health industry could provide an example of a similar pre-existing template. The information would be available at a central location such as the National Portal.

The ACCC's preliminary position was that:

- The ACCC considers that state governments should provide information about the different licensed water access rights (but not 'temporary' water allocations) available under the water management regime in their state.

The information would be provided according to a template and could contain the following information (if applicable):

1. location (water source name)
2. water source type (regulated, unregulated, groundwater)
3. priority class
4. total entitlement on issue of that kind
5. reliability profile (both long-term and more recent)
6. fees and charges payable by the holder of the entitlement
7. applicable carryover policy
8. dates of allocation announcements etc.
9. information on how allocation levels are determined (for regulated systems)
10. links to applicable trading rules, especially applicable trading zone rules
11. areas where the entitlement, and where allocation made against that entitlement, can be traded (tagged) to
12. areas from which water can be traded to the water source location.

For some of these categories of information, it may be sufficient for a link to be provided, as long as this is to a readily accessible source of information. The ACCC considers that links may be appropriate for item 6 and onwards.

The templates should be available at a central location (e.g. the NWMS National Portal or as determined by the MDBA).<sup>693</sup>

### **9.1.2. Summary of submissions**

The VFF stated that it agreed with the ACCC's position and also reiterated its support for a 'national exchange model similar to the stock exchange model.'<sup>694</sup> The GVIA, SAFF and State Water similarly stated that they agreed with the ACCC's position.<sup>695</sup>

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<sup>693</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 207, preliminary position 9–A.

<sup>694</sup> VFF, position paper submission, pp. 13 and 19.

<sup>695</sup> GVIA, position paper submission, p. 8, SAFF, position paper submission, p. 4; Statewater, position paper submission, p. 2.

The South Australian Government submitted that the development of the NWMS and BOM reporting obligations will ‘ensure that most if not all this information will be available’.<sup>696</sup> It also submitted:

A number of the items listed miss the concept of unbundled water rights. The reporting discusses entitlement information, but the requesting of allocation levels, dates of allocation announcements and carryover applies to the allocation component, not the entitlement.<sup>697</sup>

The NSWIC questioned the cost implications of the ACCC’s preliminary positions:

NSWIC does not disagree with the provision of information in a standardised format via a template, but requires clarification of who will pay for the collation and publication of this information. At base level, irrigators—as sophisticated investors—know where to find this information and how to interpret it at present. As a result, they ought not be expected to pay (via water planning and management charges) for the provision of information to unsophisticated, new entrants to the water market.<sup>698</sup>

SunWater agreed with the ACCC’s position but also raised a concern about the cost of providing information about reliability profiles:

SunWater agree that it would be advantageous from a trading point of view for centrally accessible data of this type to be made available. However, SunWater is concerned about the inclusion of dot point 5 which is listed as ‘reliability profile (both long-term and more recent)’. Care should be taken that this does not imply that frequent assessments of hydrologic reliability would be required for individual entitlements, or groups of entitlements. SunWater suggests that this could instead be replaced with a simple link to a (web) location where information on past water sharing determination results is available.<sup>699</sup>

The ADIC & DA submitted:

A National register, not unlike how information is presented on the Stock Exchange, may be an effective approach that could address all transparency issues surrounding water trading.

...

The dairy industry supports the view that state governments should provide information about the different licensed water access rights available<sup>700</sup>

WMI stated generally that it:

... agrees with the positions noted about improving information but cautions against the additional costs that may be imposed on irrigators for “extra information”.<sup>701</sup>

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<sup>696</sup> South Australian Government, position paper submission, p. 12.

<sup>697</sup> *ibid.*

<sup>698</sup> NSWIC, position paper submission, p. 18.

<sup>699</sup> SunWater, position paper submission, pp. 6–7.

<sup>700</sup> ADIC & DA, position paper submission, p. 13.

<sup>701</sup> WMI, position paper submission, p. 8.

The QFF, while broadly accepting the ACCC's preliminary positions, also raised cost issues.<sup>702</sup> The QFF also questioned how the information requirements might overlap with BOM functions.

Similarly, DERM submitted that it supported the position but considered that the NWMS was the appropriate forum for such issues to be addressed:

[The ACCC's preliminary position] is generally supported as a principle but not relevant to the MDB trading rules. Access to information relevant to trading decisions is being advanced through the National Water Market System.<sup>703</sup>

### **9.1.3. Discussion**

Interested parties generally submitted in favour of the ACCC's preliminary position that Basin states should provide information on the characteristics of certain tradeable water access rights in a template form. However, a number of parties raised concerns about the costs of implementing such a recommendation.

#### **Benefits of increased information about water access rights characteristics**

The ACCC continues to consider that the provision of such information in a template form would help to facilitate trade. A lack of information about the differences in characteristics of water access rights (and their associated water trading rules) may operate as a disincentive or barrier to trade between different water sources or interstate. This is because a number of factors, such as the reliability profile of the product and the ability of water to be traded to different locations, will be significant to the purchaser. The ACCC considers that not being able to readily access this information will make it difficult for water market participants to assess whether to conduct a potential trade. A consistent format for reporting such information will make the assessment more straightforward.

#### **Information types to be included in the template**

The ACCC has considered the 12 characteristics proposed in its preliminary position and considers that all of them remain relevant and informative to water market participants.

Information on location, water source type and priority class provides the basic identifiers for the water access right. The total entitlement on issue, reliability profile, dates of allocation announcements and information on how allocation levels are determined provide relevant information on the water allocation that might be obtained from holding that water access right.

Similarly, the fees and charges and applicable carryover policy provides information about the implications of holding that water access right. Finally, links to trading rules, and information on where water access rights can be traded to and from are important

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<sup>702</sup> QFF, position paper submission, p. 12.

<sup>703</sup> DERM, position paper submission, p. 7.

for the use of that water in different geographic regions, which is likely to be a major driver for trade.

The ACCC disagrees with the South Australian Government's submission that information on allocation levels, dates of allocation announcements and carryover is not appropriately included due to unbundling of water allocations and water access entitlements. Given that water allocations are announced as an amount of water given against a water access entitlement, and that the ability to access carryover is typically a function of the volume of water access entitlement held, the ACCC considers that this information is appropriately included.

The ACCC notes that not all categories of information would be applicable to all types of water source. For example, allocation announcements may not be a relevant consideration for unregulated systems. The ACCC therefore notes that the amount or specifics of information provided would need to be considered in context.

### **Role of AWRIS and NWMS**

The South Australian Government also submitted that 'most if not all this information will be available' under the NWMS and BOM reporting processes. The ACCC notes that it is true that some of the information identified above, or related information, will be collected by the BOM under the Water Regulations 2008. For example, the BOM will collect information on the following subcategories of information:

- 6a For Australian water access entitlements — the type, volume of water, and the water management area in which the entitlement exists
- ...
- 6d For formal announcements of Australian water allocations made to Australian water access entitlements and formal announcements of reductions to allocations already made — a copy of the announcement, plus details of the water management area to which the allocation announcement applies and the type of entitlement affected
- ...
- 10c Description of Australian water access entitlements — the name of the entitlement, its reliability and security characteristics, any special conditions that apply to it, and the geographic area in which the entitlement is valid, described so that it can be accurately mapped.<sup>704</sup>

However, the ACCC notes that the categories of information to be collected by BOM do not cover all the information proposed for the information templates; moreover, neither the subsequent reporting format for the BOM information nor the way it will be published under the NWMS are yet known. At this stage, it is unclear whether the information from these projects will lead to the gathering of this information into a standard template. As such, the ACCC considers that its preliminary position is still an appropriate one. To the extent that such information is already gathered or reported by

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<sup>704</sup> Water Regulations 2008, Schedule 3, parts 7 and 11.

either BOM or the NWMS, the ACCC notes that the cost implications of implementing the preliminary position should be lower.

### **Cost issues**

The ACCC notes that concerns about costs were raised by a number of parties in response to the position paper. The ACCC does not consider that there should be significant cost implications from the creation and reporting of standard information statements about water access right characteristics.

The information the ACCC proposes should be included in the templates is not new information that would need to be generated or researched by governments. Instead, it is information that should be available already to state governments, but is not currently provided in aggregated form and may instead be contained in a number of different documents or sources. Accordingly, the ACCC's preliminary position essentially requires consolidating existing information and will not lead to significant costs for state governments.

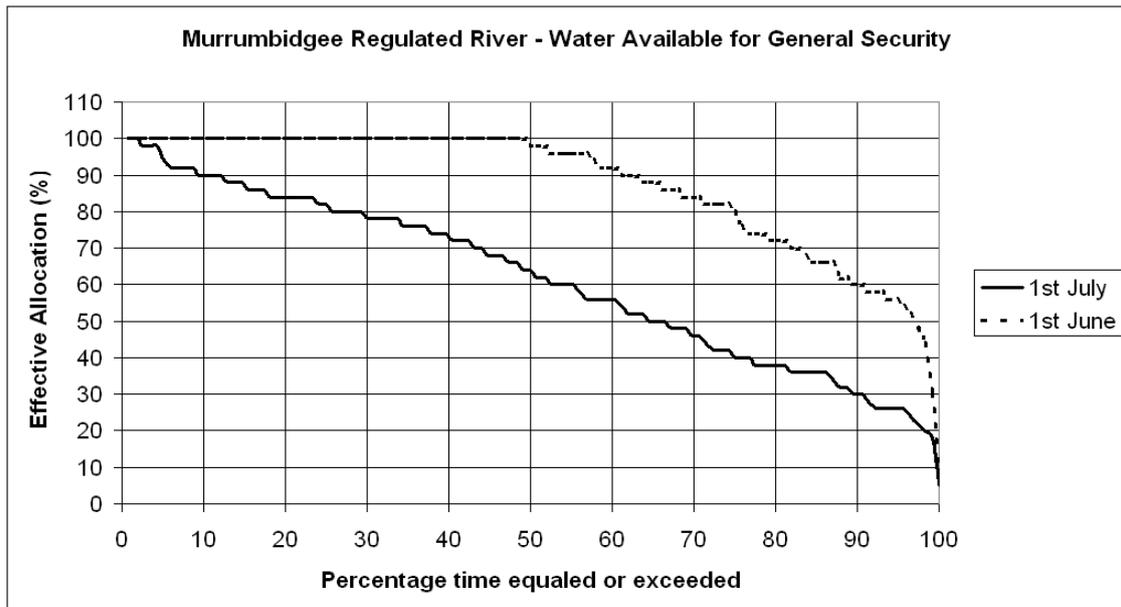
The ACCC also notes that the information to be provided is not generally information that would require frequent updating or review. For information that may be more readily altered, such as where fees and charges may change, a link may be provided to another information source, rather than requiring frequent review of the template. The ACCC notes that it considered that items 6 to 12 in its preliminary position might be suitable for provision by link.

On SunWater's specific comments on the reliability profile, the ACCC is not recommending that frequent forward-looking reliability studies would be required. Instead, the ACCC considers it would be appropriate that state governments provide a profile of announced past allocations in regulated systems. This information should already be known to state governments.

The ACCC notes that information is already provided by some state governments on historical allocation amounts. For example, New South Wales has provided the following graph that presents information on the effective allocation available in its regulated river systems (although the example given presents information for the Murrumbidgee, information is presented for seven different valleys):<sup>705</sup>

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<sup>705</sup> DWE, *Water availability in New South Wales Murray–Darling Basin regulated rivers*, April 2009.



The ACCC considers that the above graph presents relevant information about the long-term allocations received by water access entitlements. The ACCC notes that additional information could be provided by including intermediate timeframes into the graph—for example, the effective allocation at 1 January—where this information is available.

The ACCC also notes that, given the effects of recent drought and possible climate change, more recent information may also be useful to water market participants. One method of presenting more recent information might be a graph of announced allocation percentage against the months of the year. Such a graph would give information on the announced allocation in July, August, September etc., and could give such graphs for a number of recent years (e.g. the five years up until the current water year) as well as an average of those years.

The ACCC has also considered the potential cost implications of publishing this information in a central location. Given the National Portal will be active by April 2010, the ACCC does not consider that there would be significant additional costs in publishing this information centrally.

### Application of the rule

Given the potential benefits of a standard template for information on tradeable water rights characteristics, the ACCC considers that its preliminary position should become a water trading rule. The ACCC considers that the obligation to provide information should be on state government agencies, which will already have the relevant information to hand or should be able to readily derive it.

As set out in its position paper, the ACCC does not consider that the information is relevant or necessary for water allocation or for rights that do not require a specific licence, such as some stock and domestic or riparian rights.

#### 9.1.4. Draft advice

##### **Rule advice (9–A)**

The Basin Plan water trading rules should provide that state government agencies must provide information about the different licensed water access rights (but not water allocations) available under the water management regime in their state.

The information should be provided according to a standard template and available at a central location (such as the NWMS National Portal).

The information to be provided should include (if applicable):

1. location (water source name)
2. water source type (regulated, unregulated, groundwater)
3. priority class
4. total entitlement on issue of that kind
5. reliability profile (both long-term and more recent)
6. fees and charges payable by the holder of the entitlement
7. applicable carryover policy, if any
8. dates of allocation announcements, method for announcing allocations and any other applicable regular policy announcements (e.g. link to appropriate allocation determination website)
9. information on how allocation levels are determined (for water access rights in regulated systems)
10. links to applicable trading rules, especially applicable trading zone rules
11. areas where the water access right, and where any water allocation made against that water access right if it is a water access entitlement, can be traded (tagged) to
12. areas from which water can be traded to the water source location.

For some of these categories of information, it may be sufficient for a link to be provided. The link should be to a readily accessible source of information and not simply to master documents such as water resource plans. The ACCC considers that links may be appropriate for item 6 and onwards.

## 9.2. Information about trading rules and processes

### 9.2.1. Background

Trading rules and procedural requirements are located in a variety of instruments and are administered by a range of approval authorities and other entities. These rules relate to where trades can be made from and to, as well as the administrative steps required for a trade to be carried through. Having ready access to information about these rules and processes is clearly critical to a well-functioning water market.

Information on trading rules and administrative processes can be obtained from water market intermediaries, which also facilitate trades. Such information may also be available from Basin state government departments and approval authorities, typically through websites, but may be difficult to locate or interpret, or may not give a complete picture of all relevant rules and procedures. This reflects the large number of different documents that can contain applicable rules.

The ACCC considered in its position paper that a large number of trading rules are currently in operation throughout the MDB, which creates the potential for significant uncertainty about the possibility of, and procedures for, trade. The ACCC considered that such rules are not necessarily accessible and may be in a variety of different documents, including in large and complex documents. This complexity leads to increased costs for water market participants.

The ACCC considered in its position paper that a more centralised source of information about trading rules and process would tend to facilitate trade, particularly trade in water access entitlements. The ACCC considered that such rules should be provided in a compiled form to a central location. It also considered that IIO trading rules were similarly significant and should be made publicly available.

The ACCC's preliminary positions were:

- Governments should provide all applicable rules regulating the trade of water access rights to a central information point (which could be provided by the MDBA or the NWMS National Portal).<sup>706</sup>
- IIOs should have to provide their own internal trading rules to the same central information point, on their website and/or upon request.<sup>707</sup>

### 9.2.2. Summary of submissions

The NSWIC, GVIA, the ADIC & DA, QFF and VFF all stated that they agreed with the ACCC's positions.<sup>708</sup> The ADIC & DA further submitted:

Improved transparency on, and availability of, rules and processes related to water entitlement sales is favoured by the dairy industry. ADIC and DA support the NFF submission that there is insufficient work being undertaken to provide clearer, more accessible and more transparent information on trading rules. ADIC and DA support the NFF suggestion that a single portal for water trade lodgement may be an appropriate mechanism to easily access applicable water trade rules.<sup>709</sup>

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<sup>706</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 211, preliminary position 9–B.

<sup>707</sup> *ibid.*, preliminary position 9–C.

<sup>708</sup> NSWIC, position paper submission, p. 18; VFF, position paper submission, p. 20; GVIA, position paper submission, p. 8; ADIC & DA, position paper submission, p. 14; and QFF, position paper submission, p. 12.

<sup>709</sup> ADIC & DA, position paper submission, p. 14.

As noted in section 9.1.2, WMI raised a general point about the cost of improving information.<sup>710</sup>

### **9.2.3. Discussion**

Few submissions dealt with the provision of centralised trading rules information; those that did were generally in favour of greater centralisation of trading rules.

#### **Benefits of increased information about trading rules and processes**

The ACCC remains of the view that there would be benefits from a more centralised source of information about trading rules and processes. There is the potential for significant uncertainty at present about the possibilities for trade and the procedures to be followed in making trades. This arises because trading rules are not necessarily accessible and can be contained in a variety of large and complex documents. A more centralised location would improve the provision of information and reduce search costs for water market participants.

The ACCC also considers that IIO trading rules are significant. These rules may contain restrictions on the ability to trade water within that IIO's irrigation network and/or moving water on and off the IIO group entitlement. These rules will be directly relevant to member/customer irrigators as well as to other water market participants seeking to purchase water from or sell water into an IIO area. The ACCC accordingly considers that it would be appropriate to have these rules more accessible to the market.

The ACCC therefore considers that it would be appropriate to have a water trading rule that requires state governments and IIOs to make their trading rules more accessible.

#### **Form of the compilation**

As noted above, water trading rules tend to be distributed over a number of documents, including water resource plans, forms, legislation (including Acts, regulations and other legislative instruments), interstate trading protocols and IIO contracts and constitutions. Given that water trading rules can be highly dispersed, the ACCC has considered the ways in which a more compiled version of trading rules could be provided.

For state government water trading rules, the ACCC notes that certain water trading rules can be changed rapidly when government policy changes. For example, the New South Wales Government recently made access licence dealing principles orders under s. 71Z of its *Water Management Act 2000* on 29 May, 9 July and 23 September 2009 to (respectively) establish, modify and replace with an MOU the embargo on sales of water to the environment. The ACCC therefore considers it may not be appropriate to require all water trading rules to be repeated in full in a centralised document because this would lead to potential inconsistencies between source documents and compilations where the relevant rules were frequently updated.

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<sup>710</sup> WMI, position paper submission, p. 8.

Instead, the ACCC considers state governments should have the option to cross-reference other documents. This would allow frequently updated rules to be incorporated by reference. However, the ACCC does not consider it would be appropriate to simply have a series of links in the consolidated trading rules document. Instead, state governments should have to explain the context in which the linked documents relate to other water trading rules. For example, a link to the New South Wales access licence dealing principles orders would need to explain that such instruments are made by the New South Wales minister within the provisions of the New South Wales Act regulating dealings in water access licences.

Links would also have to identify the relevant sections of a document—it would not be enough to merely link to a water resource plan, for example. Where a water trading rule was not likely to be changed suddenly, it would be more appropriate to actually repeat the relevant water trading rules in the compiled document.

The ACCC considers it unlikely that IIO water trading rules would be distributed across as many documents as would occur for state government rules. Water trading rules applicable at the IIO level would be likely to be presented in irrigator contracts or in IIO constitutions or policy documents. The ACCC accordingly considers that it would be likely to be simpler for those rules to be compiled into a single document. If necessary, IIOs may also cross-reference other documents but, consistent with the approach outline above for state governments, would need to explain the context for the linked documents.

#### **Application of the rules and cost implications**

In its position paper the ACCC recognised some costs would be attached to the compilation of information about trading rules and processes and its provision to some central location. However, the ACCC does not consider this cost burden would be significant for state governments. Applicable water trading rules should be known to those state governments in order for trades to be assessed. Accordingly, it should not be difficult to identify the relevant rules for compilation. Furthermore, given the ability to include certain rules by cross-reference to other documents, costs of ongoing updates of the documents should also be relatively low.

The ACCC considers that it would be appropriate to specify a lesser burden for IIOs. Given the varying sizes of IIOs, the ACCC considers it would not be appropriate to require all IIOs to meet the compliance costs of providing compiled trading rules to a central location, given that the number of interested parties may be small. As such, the ACCC considers it appropriate that while IIOs may provide the rules to a central location, they can additionally or alternatively provide them on their websites or on request.

The ACCC considers it would be appropriate for larger IIOs to provide the information centrally, given that more external parties could be expected to benefit from access to this information at a central point. The water market rules impose different information requirements on IIOs based on whether the IIO has a total water access entitlement of

10 GL or more for irrigation purposes.<sup>711</sup> The ACCC considers it would be appropriate to use the same threshold for this requirement so that IIOs with a total water access entitlement over 10 GL for irrigation purposes would be required to provide their trading rules to a central information point. All IIOs would be required to provide their trading rules on their websites and/or on request.

#### 9.2.4. Draft advice

##### **Rule advice (9–C)**

The Basin Plan water trading rules should provide that IIOs must provide their trading rules for:

- trade internal to the IIO’s irrigation network
  - trade to and from water market participants external to the IIO’s irrigation network
- to:

- for IIOs with a total water access entitlement of 10 GL or more for irrigation purposes, the same central information point as for government water trading rules in rule advice (9–B)
- for all IIOs, on their website and/or upon request.

The rules should be provided in a compiled form but may use cross-references to other documents. Where cross-references are used, the document must explain the context in which the linked document relates to rules contained in the compilation.

##### **Rule advice (9–B)**

The Basin Plan water trading rules should provide that state governments must provide all applicable rules regulating the trade of water access rights to a central information point (which could be provided by the MDBA or the National Water Market System’s National Portal).

The rules should be provided in a compiled form but may use cross-references to other documents. Where cross-references are used, the document must explain the context in which the linked document relates to rules contained in the compilation.

### 9.3. Trading volumes and prices

#### 9.3.1. Background

It is important that information about water trades is made publicly available to provide clarity and transparency to the water market. The way that price and volume

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<sup>711</sup> Water market rules 2009, r. 6.3.

information may be collected from water market participants and then conveyed to the market is therefore a relevant consideration.

Trading volume and price data is currently collected by a range of entities, including Basin state governments, IIOs, approval authorities and intermediaries. However, the extent to which this data is collected, and the method by which it is collected and disclosed may differ between jurisdictions and entities. There may also be concerns about the quality and timeliness of the data collected.

Currently, Basin state governments collect price data on trades of water access entitlements in Queensland, New South Wales, Victoria and South Australia, and on trades of water allocations in New South Wales, Victoria and South Australia. Data on trading volumes is necessarily collected as part of the trade approval process.

Some pricing and trading volume information is available from water market intermediaries and IIOs. Water registers also often include trading volume data and, to a lesser extent, pricing data. Some pricing and volume data is provided in annual market summary reports.

Even when available, this pricing and volume information may not necessarily be current or complete. It may also be difficult or costly to access. This can inhibit confidence in the market and impose transaction costs, thereby hindering the efficiency of the market.

The ACCC considered in its position paper that pricing and volume information is fundamental information for water market participants to be able to make informed decisions in the water market, and that such information needs to be both available and timely. While some information on price is already collected by a variety of sources that make some reporting back to the market, this information is not necessarily comprehensive, comparable or reported back to the market consistently.

The ACCC considered that the best way to facilitate collection of comprehensive information on price would be a requirement on buyers and sellers to report trading prices to the appropriate government approval authority or IIO as required. The ACCC considered that this would be unlikely to be an onerous burden and would largely involve an existing or additional section on a trading application or registration form. Such information would then be reported to the BOM under the water regulations. The ACCC noted a potential issue with the timeliness of water access entitlement price data reporting, which is only provided to the BOM on a yearly basis.

The ACCC considered in its position paper that this reporting requirement should apply to all trades of water access entitlements and water allocations and to all market participants. It did not consider that such a requirement was necessary or appropriate for water delivery rights or irrigation rights.

The ACCC's preliminary position was:

- Trading parties should be required to accurately report to approval authorities or registers on the consideration paid for all trades of water access entitlements and water allocations.<sup>713</sup>

### 9.3.2. Summary of submissions

The QFF stated it agreed with the ACCC's preliminary position.<sup>712</sup> The VFF also stated that it agreed with the ACCC's preliminary position and also reiterated its support for a national exchange where:

temp and perm trades are listed in the daily paper similar to the stock exchange. e.g water system are listed, high-low prices, average for the year, no of ML traded for the day and daily price, etc.<sup>713</sup>

The NSWIC stated it concurred with the ACCC's position, but considered that there must also be:

a requirement on the authority to whom reports are made to publish that information in a timely and accurate manner.<sup>714</sup>

Similarly, the GVIA said that 'the price information once provided must be published in a timely, accessible and consistent manner' and ADIC & DA also stated that prices and volumes should 'be available in a timely fashion'.<sup>715</sup>

The NWC noted 'the importance of price disclosure' and referred to a 2006 PriceWaterHouseCoopers report on behalf of the NWC that dealt with pricing disclosure.<sup>716</sup>

The South Australian Government submitted:

While the recording of volumes and prices of water access entitlements and water allocation is a sound concept, there are concerns about how this is to be monitored, verified and enforced. Many of the trades to be reported on are between trade zones, and between states.<sup>717</sup>

DSE submitted on the use of the word 'accurately' in the ACCC's preliminary position:

Position 9-D suggests that trading parties be required to 'accurately' report price of a trade. They are currently required to report such data for trade in regulated systems in

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<sup>713</sup> ACCC, *Water trading rules position paper*, September 2009, p. 218, preliminary position 9–D

<sup>712</sup> QFF, position paper submission, p. 12.

<sup>713</sup> VFF, position paper submission, pp. 13 and 20.

<sup>714</sup> NSWIC, position paper submission, p. 18.

<sup>715</sup> GVIA, position paper submission, p. 8; ADIC & DA, position paper submission, p. 14.

<sup>716</sup> NWC, position paper submission, pp. 2–3; PriceWaterHouseCoopers, *Pricing and personal information disclosure consultancy project final report*, August 2006.

<sup>717</sup> South Australian Government, position paper submission, p. 13.

Victoria, but there is no strong mechanism to check or enforce accuracy. Legislative change to create such a mechanism may not be easy to justify.<sup>718</sup>

As noted previously, WMI raised a general point about the cost of improving information.<sup>719</sup>

### **9.3.3. Discussion**

The ACCC notes that submitting parties were generally in favour of requiring that price be reported by trading parties. However, some parties raised issues about subsequent reporting obligations, the costs of collecting the information and the accuracy of information collected.

#### **Benefits of price reporting**

The ACCC continues to believe that pricing and volume data is fundamental information that will allow water market participants to make informed decisions on water trade. While volume data must be collected for trades to be approved and registered, price would not necessarily need to be collected. However, at the present time price information is generally required by Basin states, other than for trade of water allocations (seasonal water assignments) in Queensland.

The ACCC considers that the best way to ensure continued comprehensive collection of price information is to establish a Basin Plan water trading rule requiring buyers and sellers to report trading prices to the appropriate government approval authority, register or IIO (as appropriate). While information is currently provided from a number of different sources, this information is not necessarily comprehensive or reported back to the market consistently. Placing a requirement at the state and IIO level should better ensure that more complete data is collected and available centrally.

#### **Subsequent reporting obligations**

Certain parties submitted that as well as requiring the provision of price data the water trading rules should require agencies collecting this information to report subsequently on the data. The ACCC's preliminary position largely left the role of subsequent reporting to the market to be facilitated through the BOM's data collection role under the Water Regulations 2008, the AWRIS reporting functions and, potentially, the NWMS. The ACCC anticipated pricing data would be provided back to the market through these reporting functions rather than each collecting authority then publishing the information separately. However, the ACCC notes that reporting is still open to those authorities, should they wish to report separately.

The ACCC notes that the subsequent reporting of information would need to be timely to provide the market with better information. At present, the form of and time frames for publishing of information back to the market once collected by BOM under the water regulations are unknown. While water allocation trade price data is to be

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<sup>718</sup> DSE, position paper submission, p. 7.

<sup>719</sup> WMI, position paper submission, p. 8.

collected by BOM on a weekly basis, water access entitlement trade price data is only collected annually. Even if that information were then published immediately, the potential lag of up to a year between trade and reporting back to the market would appear significant. The ACCC considers that a more frequent reporting period might be beneficial.

The ACCC does not consider it necessary to specify subsequent reporting periods for price and volume data to be reported back to the market at this point, given that the reporting functions for data to be collected by BOM are still yet to be settled. However, the ACCC considers that reporting back to the market would need to be relatively timely if it is to be valuable to market participants. Ideally, pricing information would be able to be reported back in real time as collected. However, where this was not feasible, the ACCC considers that a reporting period of no more than a month for water allocation and water access entitlement trade may provide useful information to the market.

### **Accurate reporting**

Both the South Australian Government and DSE submitted on the difficulty of monitoring and verifying the accuracy of pricing information. Currently, as noted in the ACCC's position paper, some Basin states legislatively require parties to provide accurate price information, and may include statements to this effect on application and registration forms. However, the ACCC agrees it may be hard to verify pricing information given the number of trades that occur and the difficulties of comparing the amount entered on the trade form with, for example, actual amounts transferred in a cheque. The legislative requirements do not necessarily ensure any particular level of accuracy, although equally it is not clear that there are currently significant inaccuracies in any case. The ACCC does not see a need for further mechanisms to check accuracy in the water trading rules at this time. However, the ACCC understands that certain jurisdictions report back the provided price to both the buyer and seller in a transaction once the trade is approved or registered. This may be a mechanism that would allow for reported prices to at least be confirmed by both buyer and seller.

The ACCC also notes that negotiated prices may change between a price being reported by the trading parties on an application or registration form for a trade, and that trade being finally settled. This may particularly be true when approval times for a trade are long. Where the price changes, this will introduce inaccuracies into the collected data. However, the ACCC considers that requiring an update of the price would impose an unnecessary burden on trading parties compared with simply entering the agreed price on a form that needs to be completed in any case. Accordingly, the ACCC does not propose to require trading parties to update reported prices should these subsequently change.

### **Application of the rule and cost implications**

The ACCC notes that an obligation under such a rule is placed on trading parties. The ACCC does not consider that this would be an onerous burden, as it would simply require parties to enter the agreed price on a form. The ACCC considers that the obligation should equally apply to water access right holders where representatives such as brokers or lawyers act on their behalf in seeking approval or registration.

Similarly, the ACCC does not consider there would be any significant burden on the approval authorities and registers that would collect this information. In many cases the information is already being collected and the subsequent reporting obligations are already established under the water regulations. The ACCC considers that, to complement the requirement on trading parties, there should equally be a requirement on approval authorities and registers to request this information as a condition of approval or registration.

#### 9.3.4. Draft advice

##### **Rule advice (9–D)**

The Basin Plan water trading rules should provide that:

- water access right holders participating in a trade must ensure that the agreed price, for all trades of water access entitlements and water allocations, is accurately reported to approval authorities or registers at the time of seeking trade approval or registration
- approval authorities and registers must require pricing information to be provided as a condition of seeking approval and registration.

##### **Recommendation (9–E)**

The ACCC recommends that the Bureau of Meteorology considers increasing the frequency with which it collects and reports water access entitlement price information.

## 9.4. Allocation and policy announcements

### 9.4.1. Background

Water in regulated systems is made available for use through regular allocation announcements from the relevant Basin state authority or infrastructure operator. The size of these allocation announcements depends on the amount of water currently available (or forecast to be available), storage levels, the amount of water access rights issued (and their priority), other water commitments and management decisions. The rules for calculating the figure may be contained in the relevant water resource plan.

State governments and other authorities will also make announcements from time to time about various government policy decisions that affect the water market. Policy changes could include things such as changes to carryover conditions, changes to the ability to trade between particular zones (such as the rules relating to trades across the

Barmah Choke or the moratorium on trade of water allocations out of the Murrumbidgee<sup>720</sup>) and other market-sensitive changes to trading rules.

In its position paper the ACCC considered that allocation announcements may affect prices because of their implications for the demand for and supply of water access rights. Where the available water increases, or is different from the increase expected, the demand and supply in the market would be expected to change. Accordingly, the ACCC considered there would be merit in allocation announcements occurring on a predictable basis and in ensuring that water authorities disclose how allocations are calculated. This would provide more transparency in the market and reduce the risk of announcements taking the market by surprise.

The ACCC position paper also noted that policy announcements such as changes to carryover conditions, or embargos or restrictions on water trade could particularly alter the trading behaviour of parties. The ACCC stated in the position paper that any allocation announcements and policy changes should be widely communicated to the market and that it would be appropriate to report all allocation announcements and policy changes to all market participants at the same time, adopting equities market principles relating to insider trading and disclosure.

The ACCC's preliminary positions accordingly were:

- Water authorities should disclose how allocation levels are calculated whenever an announcement is made.<sup>721</sup>
- Allocation announcements and announcements of market-sensitive policy changes (including changes to carryover conditions and changes in the ability to trade between trading zones), along with amendments to announcements, should be made to the entire market at the same time. Parties privy to these policy changes before such an announcement should not be permitted to trade relevant water access rights until the announcement is made.<sup>722</sup>

#### 9.4.2. Summary of submissions

On the ACCC's preliminary positions about both allocation and policy announcements, the South Australian Government submitted:

Having the calculation framework for allocation considerations clearly identified on a website is sufficient, rather than disclosing how the allocation is determined each time it is announced.

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<sup>720</sup> DWE, [2009–10 New South Wales water trade rules for the southern rivers](#), media release, 1 July 2009.

<sup>721</sup> ACCC, *Water trading rules—Position paper*, September 2009, p. 225, preliminary position 9–E.

<sup>722</sup> *ibid.*, preliminary position 9–F.

Post unbundling in South Australia, allocation announcements now take immediate effect and are made public with press releases and web based coverage.<sup>723</sup>

The SAFF submitted that allocation announcements should be easy to understand and that it would be appropriate to know how allocations are calculated.<sup>724</sup>

The GVIA also agreed with the ACCC's positions, but in relation to calculation of allocation announcements stated 'it may take some fine tuning to determine the level of detailed [sic] actually required'.<sup>725</sup> The NSWIC stated it concurred with the ACCC's position and 'in particular, reiterates its support for replication of continuous disclosure and insider trading rules'.<sup>726</sup> The VFF similarly stated it agreed with the ACCC's preliminary positions.<sup>727</sup>

The ADIC & DA concurred with the ACCC's preliminary position and further submitted:

The improper disclosure of allocation announcements and policy announcements should be treated with the same principles that apply to insider trading. Similarly, trading halts may be required pending the announcement of major policy announcements.<sup>728</sup>

The QFF stated it agreed with the principles in the ACCC's preliminary positions but considered that 'it is unclear what arrangements will be adequate to cover the "entire market at the same time"'.<sup>729</sup>

SunWater noted it had roles where it was possible a perception of conflict of interest could arise.<sup>730</sup>

As noted previously, WMI raised a general point about the cost of improving information.<sup>731</sup>

### 9.4.3. Discussion

The ACCC considers each of its two preliminary positions in turn.

#### Details of allocation announcements

The ACCC remains of the view that a greater level of information about allocation announcements would provide more transparency in the market about allocations and would reduce the chance of such announcements taking the market by surprise. This is

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<sup>723</sup> South Australian Government, position paper submission, pp. 12–13.

<sup>724</sup> SAFF, position paper submission, p. 4.

<sup>725</sup> GVIA, position paper submission, p. 8.

<sup>726</sup> NSWIC, position paper submission, p. 18.

<sup>727</sup> VFF, position paper submission, p. 20.

<sup>728</sup> ADIC & DA, position paper submission, p. 15.

<sup>729</sup> QFF, position paper submission, p. 12.

<sup>730</sup> SunWater, position paper submission, p. 7.

<sup>731</sup> WMI, position paper submission, p. 8.

significant because of the potential effects of allocation announcements on the market price for water access rights (particularly for water allocations).

The ACCC notes the South Australian Government's submission that it is sufficient that the general allocation framework be known, rather than the detail of each allocation calculation. The ACCC agrees that market participants are unlikely to be interested in the full details of calculations for all allocation announcements, with the headline number most likely to be the significant factor for most market participants. To that extent, the ACCC does not consider it is necessary for detailed information or calculations to be provided at all times. However, it would be beneficial for the allocation framework to be explained, with information being provided on the major relevant inputs considered under that framework.

The ACCC does not consider it is necessary to recommend that a water trading rule be made requiring greater information on water allocation calculations to be made. It notes that the headline allocation announcement is likely to be the most relevant factor for trade.

### **Approach to making allocation and policy announcements**

Submitting parties generally agreed with the ACCC's preliminary position concerning the process for allocation announcements and announcements of market-sensitive policy changes.

The ACCC's preliminary position essentially draws on approaches to 'insider trading' in equities markets. The ACCC continues to consider that its position is an appropriate one. Prohibiting insider trading helps to ensure that the market operates freely and fairly, with all water market participants having equal access to relevant information. It also maintains the general market confidence that improper use of confidential information is not occurring in water markets. Accordingly the ACCC considers its preliminary position would appropriately be reflected in a Basin Plan water trading rule.

Such a rule should have two aspects:

- agencies making allocation or policy announcements would have to provide information to the entire market at the same time
- any party that sees relevant information before an announcement is made publicly should not be permitted to trade.

Provisions in Division 3, Part 7.10 of the *Corporations Act 2001* deal with insider trading in financial products. That regime addresses insider trading through the use of provisions dealing with the second aspect identified above. In broad terms, under s. 1043A of the *Corporations Act*, where a person possesses inside information, that person must not apply for, acquire, or dispose of relevant financial products, or enter into an agreement to do so, or get another person to do so. The regime only applies when the information would be expected to have a 'material effect' on the price of financial products.

The ACCC considers that the regime set out in the Corporations Act would clearly provide an appropriate basis for the introduction of similar rules for water trading, with minimal change required. The ACCC notes that the trade approval authority will generally not be able to tell whether an applicant is aware of inside information when that applicant lodges an application. As such, it would not be appropriate to place the obligations on the approval authority.

The ACCC also notes that the Basin Plan water trading rules do not apply to all entities,<sup>732</sup> but considers that the majority of parties to which such information would be relevant would be likely to fall into the category of a ‘holder of a water access right’. Where there were suspicions of insider trading-type behaviour, such suspicions could be reported to the MDBA as the appropriate enforcement agency for further investigation.

On the obligations on agencies making allocation or policy announcements, the ACCC agrees with the QFF submission that the definition of the ‘entire market at the same time’ may be difficult. The ACCC understands that allocation announcements are typically made by use of email mailing lists, media releases and press advertisements. The ACCC considers that such methods would be appropriate ways to make allocation or policy announcements known to the entire market—that is, once the information could be accessed by any interested member of the public, that information is provided to the entire market.

The ACCC position paper identified allocation announcements and market-sensitive policy announcements, including changes to carryover conditions and changes in the ability to trade between trading zones, as categories of information to which the reporting obligation should apply. Changes to carryover conditions can have significant impacts on trading behaviour in the past, particularly if they occur towards the end of the trading year. The recent moratorium on allocation trade out of the Murrumbidgee is an example of a change in the ability to trade between trading zones that had a significant impact on water market participants and trading decisions.

The ACCC also notes that significant changes to fees and charges payable might be market-sensitive information. The ACCC has included carryover and trading zones change announcements as examples of relevant announcements that should be declared to the entire market at the same time.

The ACCC notes finally that, while an allocation or market-sensitive policy announcement should be announced to the entire market at the same time, it may be current practice to consult with community consultative groups. To the extent that such consultation does not constitute a final decision, but contains market-sensitive information, such information should be disclosed generally.

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<sup>732</sup> See section 2.1.1 of this draft advice.

#### 9.4.4. Draft advice

##### **Rule advice (9–F)**

The Basin Plan water trading rules should provide that governments (or their delegates) making:

- allocation announcements
- announcements of market-sensitive policy changes or information, including but not limited to:
  - changes to carryover conditions
  - changes in the ability to trade between trading zones
  - amendments to previous announcements

should make those announcements to the entire market at the same time by methods such as, for example, email mailing lists, media releases and press advertisements.

##### **Rule advice (9–G)**

The Basin Plan water trading rules should provide that parties privy to allocation announcements and announcements of market-sensitive policy changes should be prohibited from trading relevant water access rights until the announcement is made to the entire market.

##### **Recommendation (9–H)**

The ACCC recommends that water authorities should provide information on how allocation levels are calculated, including:

- disclosing the framework for making allocation announcements
- providing information on the major inputs (such as dam storage levels) for calculating allocation levels whenever an announcement is made.

# Appendix 1 Rule advice and recommendations

This appendix contains the ACCC's rule advice and recommendations.

## Rule advice

### Rule advice (3-A)

The Basin Plan water trading rules should provide that there are no specific restrictions on the ownership of water access rights based on the characteristic of a particular class of entity such as non-landholders (unless use has not been unbundled from water access rights), environmental water-holders and urban water authorities.

### Rule advice (3-C)

The Basin Plan water trading rules should provide that approval of an application to trade a water access right should not be conditional on the purchaser holding, obtaining, trading or terminating:

- a water delivery right, or
- a works approval, or
- a water use approval

where these rights or approvals are governed through separate instruments or processes.

### Rule advice (3-D)

The Basin Plan water trading rules should provide that approval of an application to trade a water access right should not be conditional on the purchaser being the owner or occupier of land where water access rights are unbundled from land.

### Rule advice (3-E)

The Basin Plan water trading rules should provide that, in the case of tradeable water access rights:

- there should be no restrictions on trade due to the purpose for which the water has, is currently, or will be used
- fees or charges should not be charged by an IIO solely for the reason that a water access right has been traded and will be used outside the IIO's irrigation network
- the purpose for which water arising from a trade is used should not be restricted as part of the trade approval process (water use on land should be separately addressed through use approvals).

**Rule advice (3–I)**

The Basin Plan water trading rules should provide that a water access right trade should not be refused on the basis that the water will be used in an area outside the MDB (and the use of water inside the MDB should not be restricted solely because it was taken from a water resource outside the MDB).

**Rule advice (3–K)**

The Basin Plan water trading rules should provide that water access right trades should not be conditional on a reduction in the trade volume to address overallocation.

**Rule advice (3–L)**

The Basin Plan water trading rules should provide that trade within an overallocated system should not be restricted solely on the basis that the system is overallocated.

**Rule advice (3–N)**

The Basin Plan water trading rules should provide that there are no restrictions on trade specific to water carried over, nor should there be any specific exclusion of traded water from having access to carryover (assuming other criteria, such as the possession of a water access entitlement, are met).

**Rule advice (4–A)**

The Basin Plan water trading rules should provide that:

- if not already removed, a limit on the volume of trade out of an area (other than a limit for environmental or physical reasons) should only be applied on permanent trades of water access entitlements (of any priority class) out of an irrigation area as defined in the NWI (i.e. the area under control of an individual water service provider (e.g. an irrigation corporation, cooperative or trust, or water authority), rather than a number of particular areas under the control of the one water service provider).
- if not already removed, any such limit should be raised according to the following minimum transition path:
  - 1 July 2011—raised to 6 per cent of the total water entitlement of the applicable irrigation area
  - 1 July 2012—raised to 9 per cent of the total water entitlement of the applicable irrigation area
  - 1 July 2013—raised to 12 per cent of the total water entitlement of the applicable irrigation area

and must be completely removed by 1 July 2014.

**Rule advice (5–G)**

The Basin Plan water trading rules should provide that approval authorities are required to accept duly completed applications to trade a water access right submitted by email to an email address established by the approval authority for this purpose. This requirement would not apply to situations where an approval authority offers a web-based form for applications (although approval authorities may wish to offer both facilities), nor would it apply to applications to register a trade where this is conducted as a separate process. Approval authorities may also continue to accept trade approval applications by post and in person.

**Rule advice (5–J)**

The Basin Plan water trading rules should provide that a trade approval authority must not approve a trade unless it has first informed all other parties to the trade of any direct interest that it has (and, if so, the nature of that interest) in the trade (other than in its approval role).

An interest would include where a trade approval authority owns or operates a water market intermediary involved in the proposed trade.

**Rule advice (5–K)**

The Basin Plan water trading rules should provide that trade approval authorities must inform the market of any trade of a water access right to which they have been a buyer, seller, lessee or lessor. This disclosure should be made as soon as possible after the trade has been completed and on the approval authority's website.

**Rule advice (6–A)**

The Basin Plan water trading rules should provide that trade between regulated system trading zones should only be restricted based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations. While the existence of a Basin state border may necessitate different trading zones, it should not (in isolation) limit trade between these two zones.

**Rule advice (6–F)**

The Basin Plan water trading rules should provide that exchange rates should not be used to manage the trade of water access entitlements between trading zones in regulated systems. The ACCC recommends a transitional exemption to this rule in cases where an exchange rate is being used to reverse the impact of past exchange rate trades (specifically, from the Murray to the Goulburn system up to the historical volume previously traded out using exchange rates).

**Rule advice (6–G)**

The Basin Plan water trading rules should provide that any current restrictions on the ability to trade water allocation between two zones apply equally to the delivery of water allocations pursuant to a tag between the same two zones, at the time when delivery is requested (i.e. when water is ordered against the tag).

**Rule advice (6–P)**

The Basin Plan water trading rules should provide that trade of water access rights should be permitted within appropriately set groundwater trading zones, and should not be permitted between groundwater zones that have low, or no, hydraulic connectivity.

**Rule advice (6–T)**

The Basin Plan water trading rules should provide that trade between surface water and groundwater systems with a low level of connectivity (or that are not connected) is prohibited.

**Rule advice (7–A)**

The Basin Plan water trading rules should provide that IIOs are required to specify in writing the following for each member or customer who holds a water delivery right against them:

- the volume or unit share of the member's/customer's access to the irrigation network under the water delivery right
- where they have been determined, other characteristics that could restrict trade of that water delivery right to another person (including whether the water delivery right can be transferred to all or only part of the IIO's network).

**Rule advice (7–B)**

The Basin Plan water trading rules should provide that IIOs are prevented from requiring a person to obtain, terminate or vary the volume of a water delivery right as a result of, or condition for approval of, a trade of a water access right or an irrigation right.

**Rule advice (7–C)**

The Basin Plan water trading rules should provide that an IIO cannot unreasonably prevent, deter or delay the trade of water delivery rights (in part or in full) between persons who own or occupy land that is serviced by the IIO's irrigation network. Factors that may inform whether a trade has been unreasonably prevented, deterred or delayed include, but are not limited to:

- overall capacity in the network
- capacity in the parts of the network where the water delivery rights would potentially be traded to
- reconfiguration or decommissioning work in the parts of the network where the water delivery rights would potentially be traded to
- connectivity of the network (i.e. whether there is one large network or several component networks that are not physically connected)
- payment of previous water access fees or security for future water access fees and other relevant charges
- the amount of water delivery rights reasonably required to irrigate a person's property for both current and expected future water use
- whether the necessary administrative arrangements are in place to assess and give effect to a trade in water delivery rights.

**Rule advice (8–A)**

The Basin Plan water trading rules should provide that, for each person who holds an irrigation right against an IIO, the IIO must make a determination of that person's entitlement to water under their irrigation right, expressed as either a volume of water (denominated in megalitres) or a unit share of the IIO's water access entitlement(s), and provide a written notice of this determination to that person.

**Rule advice (8–B)**

The Basin Plan water trading rules should provide that, to facilitate negotiations in the event of a dispute between the IIO and irrigation right holders, the IIO must provide each irrigation right holder with written details to support the determination of the volume of water or unit share of their entitlement to water under an irrigation right.

**Rule advice (8–C)**

The Basin Plan water trading rules should provide that both (8–A) and (8–B) should not apply to an IIO that has given a written notice to each person who holds an irrigation right against that IIO, specifying that person's entitlement to water under their irrigation, expressed as either a volume of water (denominated in megalitres) or a unit share of the IIO's water access entitlement(s).

**Rule advice (9–A)**

The Basin Plan water trading rules should provide that state government agencies must provide information about the different licensed water access rights (but not water allocations) available under the water management regime in their state.

The information should be provided according to a standard template and available at a central location (such as the NWMS National Portal).

The information to be provided should include (if applicable):

1. location (water source name)
2. water source type (regulated, unregulated, groundwater)
3. priority class
4. total entitlement on issue of that kind
5. reliability profile (both long-term and more recent)
6. fees and charges payable by the holder of the entitlement
7. applicable carryover policy, if any
8. dates of allocation announcements, method for announcing allocations and any other applicable regular policy announcements (e.g. link to appropriate allocation determination website)
9. information on how allocation levels are determined (for water access rights in regulated systems)
10. links to applicable trading rules, especially applicable trading zone rules
11. areas where the water access right, and where any water allocation made against that water access right if it is a water access entitlement, can be traded (tagged) to
12. areas from which water can be traded to the water source location.

For some of these categories of information, it may be sufficient for a link to be provided. The link should be to a readily accessible source of information and not simply to master documents such as water resource plans. The ACCC considers that links may be appropriate for item 6 and onwards.

**Rule advice (9–B)**

The Basin Plan water trading rules should provide that state governments must provide all applicable rules regulating the trade of water access rights to a central information point (which could be provided by the MDBA or the National Water Market System's National Portal).

The rules should be provided in a compiled form but may use cross-references to other documents. Where cross-references are used, the document must explain the context in which the linked document relates to rules contained in the compilation.

**Rule advice (9–C)**

The Basin Plan water trading rules should provide that IIOs must provide their trading rules for:

- trade internal to the IIO’s irrigation network
  - trade to and from water market participants external to the IIO’s irrigation network
- to:
- for IIOs with a total water access entitlement of 10 GL or more for irrigation purposes, the same central information point as for government water trading rules in rule advice (9–B)
  - for all IIOs, on their website and/or upon request.

The rules should be provided in a compiled form but may use cross-references to other documents. Where cross-references are used, the document must explain the context in which the linked document relates to rules contained in the compilation.

**Rule advice (9–D)**

The Basin Plan water trading rules should provide that:

- water access right holders participating in a trade must ensure that the agreed price, for all trades of water access entitlements and water allocations, is accurately reported to approval authorities or registers at the time of seeking trade approval or registration
- approval authorities and registers must require pricing information to be provided as a condition of seeking approval and registration.

**Rule advice (9–F)**

The Basin Plan water trading rules should provide that governments (or their delegates) making:

- allocation announcements
- announcements of market-sensitive policy changes or information, including but not limited to:
  - changes to carryover conditions
  - changes in the ability to trade between trading zones
  - amendments to previous announcements

should make those announcements to the entire market at the same time by methods such as, for example, email mailing lists, media releases and press advertisements.

**Rule advice (9–G)**

The Basin Plan water trading rules should provide that parties privy to allocation announcements and announcements of market-sensitive policy changes should be prohibited from trading relevant water access rights until the announcement is made to the entire market.

## **Recommendations**

### **Recommendation (3–B)**

The ACCC recommends that Basin state governments review the existing arrangements for trade or subdivision of co-held water access rights by members of a co-holding that are not related entities.

### **Recommendation (3–F)**

The ACCC recommends that:

- there should be no exemptions from water trading rules for, or additional restrictions placed on, environmental water holders.
- water access entitlements and water allocations held by environmental water holders should be treated no differently to water access entitlements and water allocations held by any other person.

### **Recommendation (3–G)**

The ACCC recommends that stock and domestic rights (including special purpose water access entitlements and unlicensed statutory stock and domestic rights) could be turned into volumetric water access entitlements that are tradeable where:

- no new stock and domestic rights (of any kind) will be issued, except where a water source is not fully allocated and it is considered appropriate to allocate additional stock and domestic rights as part of the water resource planning process
- adequate safeguards are in place to meet critical human water needs in the event of very low allocation levels.

### **Recommendation (3–H)**

The ACCC recommends that in fully or overallocated water sources, new stock and/or domestic rights (water access entitlements, riparian rights or otherwise) should not be issued. Where a water source is fully allocated, water for new stock and/or domestic needs should be sourced through the market.

### **Recommendation (3–J)**

The ACCC recommends that:

- water trading should only occur within the environmental bounds set through the water planning process
- where environmental impacts result from the use of water on land (e.g. salinity), these impacts should be managed through separate use approvals, not restrictions on trade

However the ACCC considers that it is unnecessary for the Basin Plan water trading rules to incorporate these positions explicitly.

**Recommendation (3–M)**

The ACCC recommends against allowing for conversion between priority classes of water access rights. The benefits of allowing conversion may be realised through more efficient water markets and the potential disadvantages may be severe in terms of third party impacts.

**Recommendation (3–O)**

The ACCC recommends the use of continuous accounting, capacity sharing and spillable water account with no limits on carryover volumes to increase water holder's access to water across seasons. Where these are not feasible, other methods to extend access to carryover water should be pursued.

**Recommendation (3–P)**

The ACCC recommends that relevant agencies should determine appropriate signals about the likelihood of carryover water being available (and the timing of that availability in the season) and how this should be communicated to water access right holders. This could possibly be linked to the tiered water sharing arrangements in the Basin Plan.

**Recommendation (3–Q)**

The ACCC recommends that all jurisdictions should take steps to improve the accuracy and extent of metering in the MDB. Jurisdictions should ensure that all water access right holders have an approved meter installed at all off-take points, except where metering is assessed as not being cost-effective (although such assessments should be regularly reviewed with reference to changes in metering costs and expected benefits).

The ACCC recommends that meters should comply with relevant national standards or frameworks, such as that being developed through the Water Metering Experts Group.

**Recommendation (4–B)**

The ACCC recommends that, as the rationales for the 4 per cent limit are better addressed through other mechanisms, the 4 per cent limit should be immediately removed by Basin states throughout the MDB.

**Recommendation (5–A)**

The ACCC recommends that Basin states provide to the MDBA the following information in relation to their approval authorities' performance against the COAG / NRMCC standards for each month and water year:

- the number of water allocation and water access entitlement trades processed (both approved and rejected)
- the percentage of water allocation and water access entitlement trades processed (both approved and rejected) within the applicable COAG / NRMCC service standards.

**Recommendation (5–B)**

The ACCC recommends that approval authorities' performance against the COAG / NRMMC service standards should be published by the MDBA (or another Australian Government agency nominated by the MDBA, such as the NWMS National Portal).

**Recommendation (5–C)**

The ACCC recommends that the MDBA should:

- continuously monitor approval authorities' performance against the COAG / NRMMC service standards
- review the appropriateness and effectiveness of the COAG / NRMMC service standards at least every two years to consider whether the service standards can be further tightened and by how much. This review process should include an opportunity for stakeholder comment on the appropriateness and effectiveness of the service standards.

**Recommendation (5–D)**

The ACCC recommends that if approval authorities are consistently not meeting the COAG / NRMMC service standards as they exist from time to time, or the service standards are not regularly reviewed, the MDBA should reconsider the need for a Basin Plan water trading rule mandating service standards for trade approval times.

**Recommendation (5–E)**

The ACCC recommends that a working group comprising representatives from the Australian Government, Basin states and approval authorities would be an appropriate forum to more formally consider the longer term potential for cross-delegating selected trade approval functions or consolidating particular trade approval functions relevant to the MDB into one entity. Relevant considerations—for both cross-delegating approval functions and consolidating approval functions into one entity—include:

- the types of trade approvals most amenable to such measures
- likely benefits to water market participants and approval authorities
- the initial and ongoing costs
- the extent of any legislative changes that would be required
- the future role and effect of the National Water Market System.

**Recommendation (5–F)**

The ACCC recommends that jurisdictions continue to prioritise work towards the National Water Market System and complementary interstate information-sharing arrangements.

**Recommendation (5–H)**

The ACCC recommends that approval authorities consider the development of web-based forms for applications to trade water access rights. Approval authorities may also continue to accept trade approval applications by post and in person.

**Recommendation (5–I)**

The Basin Plan water trading rules cannot directly regulate the conduct of water market intermediaries. The ACCC notes that industry-specific legislation is a matter for governments (federal and Basin state) to consider. The ACCC recommends that fair trading agencies also continue to monitor complaints against water market intermediaries.

**Recommendation (5–L)**

The ACCC recommends that approval authorities and Basin state governments develop policies and procedures to identify and appropriately manage potential or perceived conflicts of interest of trade approval authorities.

**Recommendation (6–B)**

The ACCC recommends that the MDBA considers requiring water resource plans to:

- Define trading zones for regulated systems, on which location-specific trading rules are referenced.
- Where trade is restricted between two zones, the rationale behind this restriction should be explicitly stated in the water resource plan and based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations.

Trading zones and water trading rules that refer directly to these zones, should be reassessed and if necessary amended in the event that physical or environmental constraints or water supply considerations change.

**Recommendation (6–C)**

The ACCC recommends that the MDBA considers requiring water resource plans to incorporate the following principles for trade in regulated systems:

- trades within a trading zone should generally not be restricted
- downstream trades between hydrologically connected systems should generally be possible
- where a downstream trade is impeded by a physical constraint to channel capacity (and delivery shares across that constraint have not been created), it should only be approved as back trade
- where an upstream trade is made into a separate hydrological system, it should only be approved as back trade
- trades should be possible between the upper reaches of regulated river systems that converge downstream, provided that any supply obligations of the original location's river below the point of confluence, which may be affected by the trade, are assumed by the destination location's river

upstream trades from a location supplied by more than one source to a location supplied by only one of those sources should be possible, but may be subject to special limits and conditions.

**Recommendation (6–D)**

The ACCC recommends that river operators and/or relevant infrastructure operators should regularly provide information to market participants about the likelihood of short-term changes to trading restrictions due to changes in hydrologic connectivity. This information should include relevant values (such as streamflow volumes, trading volumes or storage levels) relative to defined trigger values, estimates of transmission losses, the use of available delivery capacity and back trade opportunities. However, the ACCC is not recommending this be a requirement under the Basin Plan water trading rules.

**Recommendation (6–E)**

The ACCC recommends that the MDBA coordinates a study to investigate the current and likely future magnitude and variability of river transmission losses in the MDB and, if these losses are found to be significant, options to account for these losses should be explored.

**Recommendation (6–H)**

The ACCC recommends that the MDBA—in consultation with Basin states and other relevant stakeholders—revisits the advantages and disadvantages of various administrative options, such as automated allocation trade and improvements to tagging processes, and assess whether they should be reconsidered following the implementation of the National Water Market System.

**Recommendation (6–I)**

The ACCC recommends that Basin states should examine options for improving the clarity and excludability of water access rights in unregulated systems. This should include an investigation of a range of management strategies, including rostering, restrictions and options to ‘shepherd’ water through zones, while recognising that different management approaches may be better suited to different stream types.

**Recommendation (6–J)**

The ACCC recommends that where the likely benefits outweigh the likely administrative costs, trading zones should be established for unregulated rivers, defining areas within which trade can occur without detailed assessment. Trading rules should be expressed with reference to these trading zones. Trading zones should consider:

- that hydrology should be homogeneous within the zone
- the location of important environmental assets and major off-takes
- the existing volume of available water and likelihood of further development
- transmission losses and local catchment inflow.

**Recommendation (6–K)**

The ACCC recommends that the MDBA considers requiring water resource plans to provide for the assessment of individual trades between zones on a case-by-case basis in unregulated systems where trading zones (and related trading rules) have not been established.

**Recommendation (6–L)**

The ACCC recommends that the MDBA considers requiring water resource plans to explain the rationale behind transmission loss factors where these are applied to trades in unregulated systems.

**Recommendation (6–M)**

The MDBA and Basin states should investigate the potential for trade of water access rights along rivers that are intermittently connected. To inform this process:

- more detailed information should be established and publicly reported about delivery losses
- arrangements for better communication between water users about options to minimise delivery losses for such trades should be investigated

If triggers are used to define hydrologic connectivity, these should be clearly stated, reported against and communicated.

**Recommendation (6–N)**

The ACCC recommends that trade of water access rights from an unregulated to a regulated trading zone (or vice versa) should not be allowed until:

- property rights are clearly defined and unbundled from land within the unregulated catchment
- it has been demonstrated that third party interests will be appropriately protected
- a range of alternative approaches to managing such trade have been assessed (see recommendation 6–O below).

**Recommendation (6–O)**

The ACCC recommends that further options to manage trade between unregulated and regulated systems should be considered by the MDBA and Basin states. The conditions for such trade may vary between catchments. Options such as tagging extraction conditions from the unregulated system to the regulated system, or crediting inflows from the unregulated system to storage associated with a regulated water access right should be considered. Where the market is thin in the unregulated system, the ability to use exchange rates to manage trade should be investigated to assess what conditions are required to ensure third party impacts are appropriately protected. The appropriateness of different methods to manage trade between unregulated and regulated systems would need to be assessed for individual catchments.

**Recommendation (6–Q)**

The ACCC recommends that the MDBA considers requiring water resource plans to ensure that trade of water access rights is not permitted between highly or moderately connected groundwater trading zones unless the following can be demonstrated:

- lag times are clearly understood
- where the zones have separate SDLs, accounting for trades can occur between the SDLs of the two zones
- water access rights in the two zones have substantially similar extraction conditions, or a tagging approach is in place
- where unbundling has not occurred, local extraction issues have been considered and extraction capacity is available in the destination zone and third party interests are appropriately protected.

While the existence of a Basin state border may necessitate different trading zones, it should not (in isolation) limit trade between these two zones.

**Recommendation (6–R)**

The ACCC recommends that the MDBA considers requiring water resource plans to include definitions of groundwater trading zones and the levels of hydraulic connection within and between those zones.

**Recommendation (6–S)**

The ACCC recommends that Basin states consider unbundling water access rights from extraction rights (or ‘partial unbundling’) within a trading zone. Impacts on neighbouring bores and surface water users could be assessed as part of the extraction right assessment process, rather than as part of a water access right trade assessment.

**Recommendation (6–U)**

The ACCC recommends that the MDBA considers requiring water resource plans to only permit trade of water access rights between highly or moderately connected surface water and ground water systems when it can be demonstrated that:

- lag times are clearly understood
- WRPs are integrated and specifically consider the relationship between the two water systems
- there is a process to ensure no double accounting of surface and ground water
- accounting for trades can occur between the SDLs of the two systems
- water access rights in the two systems have substantially similar extraction conditions, or a tagging approach is in place
- third party interests are appropriately protected.

The ACCC notes that meeting the above criteria will be more difficult—and therefore trade less likely to be permitted—in relation to moderately connected surface water and ground water systems.

**Recommendation (6–V)**

The ACCC recommends that the MDBA considers requiring water resource plans to provide that—where a water resource plan permits trade of farm dam water access rights—applications must be assessed on an individual basis and the following conditions met before such a trade is approved:

- the farm dam water access right is licensed
- the new location is in the same catchment as the original farm dam (to ensure similar characteristics)
- the size of the (current or proposed) dams is comparable
- the catchment areas (or inflow volume) of the two dam locations are similar in size
- third party interests are appropriately protected at the new location, and potentially impacted parties are consulted.

**Recommendation (6–W)**

The ACCC recommends that the MDBA considers requiring water resource plans to only enable trade between farm dams and surface water systems if it can be demonstrated that:

- the hydrological connectivity between the two specific locations and water sources is well understood
- the nominal volume, timing and reliability of supply in the destination mimics that in the origin
- water access rights in the two systems have substantially similar extraction conditions, or a tagging approach is in place
- third party interests are appropriately protected at the new location, and potentially impacted parties are consulted
- an assessment has been made to determine the maximum volume that can move between farm dams and surface water systems while providing appropriate protection for third party interests
- such trade will not jeopardise the provision of planned (or ‘rules-based’) environmental water.

**Recommendation (8–D)**

IIOs have significant incentives not to restrict the trade of entitlements to water under irrigation rights that do not involve transformation. In addition, there is a strong countervailing threat of IIO customers/members seeking to transform their entitlement to water under an irrigation right and employing the protections offered to them under the water market rules.

In light of these considerations, the ACCC recommends against making Basin Plan water trading rules relating specifically to either the trade of water allocated under an irrigation right, or the trade of entitlements to water under irrigation rights.

**Recommendation (9–E)**

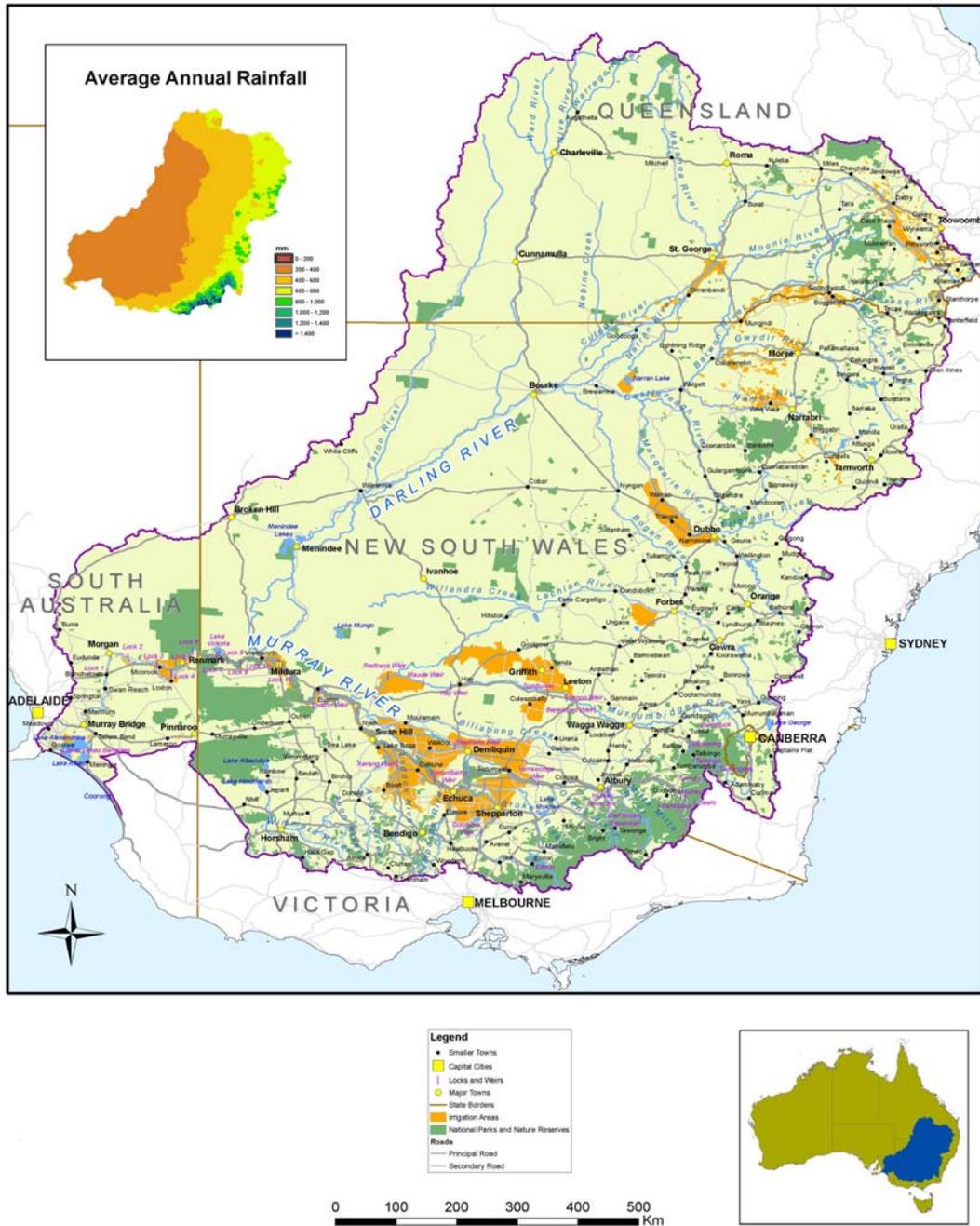
The ACCC recommends that the Bureau of Meteorology considers increasing the frequency with which it collects and reports water access entitlement price information.

**Recommendation (9–H)**

The ACCC recommends that water authorities should provide information on how allocation levels are calculated, including:

- disclosing the framework for making allocation announcements
- providing information on the major inputs (such as dam storage levels) for calculating allocation levels whenever an announcement is made.

## Appendix 2 The Murray–Darling Basin



Sources: Murray–Darling Basin Authority; Topographic data: Topo 250K © Geoscience Australia, 2006; Rainfall Data: Bureau of Meteorology, 2001; Irrigation Data: Various state agencies and irrigation companies © MDBA 2008; National Parks and Reserves Data: Department of Environment, Water, Heritage and the Arts, 2004 (CAPAD); Map produced February 2009.

## Appendix 3 Relevant purposes, matters, objectives and principles

### Purpose of the Basin Plan

Under s. 20 of the Act, the purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of the Act, in particular by providing for:

- (a) giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources); and
- (b) the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities); and
- (c) Basin wide environmental objectives for water dependent ecosystems of the Murray Darling Basin and water quality and salinity objectives; and
- (d) the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and
- (e) water to reach its most productive use through the development of an efficient water trading regime across the Murray Darling Basin; and
- (f) requirements that a water resource plan for a water resource plan area must meet if it is to be accredited or adopted under Division 2; and
- (h) improved water security for all uses of Basin water resources.

### Matters the Basin Plan water trading rules may deal with

The Act states that the trading rule may deal with a number of matters<sup>733</sup>:

- (a) the rules governing the trading or transfer of tradeable water rights;
- (b) the terms on which tradeable water rights are traded or transferred;
- (c) the processes by which tradeable water rights are traded or transferred;
- (d) the imposition or removal of restrictions on, and barriers to, the trading or transfer of tradeable water rights
- (e) 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;
- (f) the manner in which particular kinds of trading or transfer of tradeable water rights is conducted;

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<sup>733</sup> See s. 26 of the Act.

- (g) the specification of areas within which particular tradeable water rights may be traded or transferred;
- (h) the availability of information to enable the trading or transfer of tradeable water rights;
- (i) the reporting of the trading or transfer of tradeable water rights;
- (j) any matter that was dealt with in:
  - i. Schedule E to the former MDB Agreement (other than paragraph 15(3)(c) of that Schedule); or
  - ii. the Protocols to the former MDB Agreement made under Schedule E to the former MDB Agreement (other than the Protocol on Access and Exit Fees).

Schedule E of the former Murray–Darling Basin Agreement and its protocols set out:

- adjustments to valley accounts and state Basin cap amounts
- the processes for approving interstate permanent and temporary trades
- exchange rates to apply to trades within and between areas, or for the conversion of entitlements from one reliability to another
- processes for ‘tagging’ entitlements for extraction in another state
- trading zones between which water may be traded.
- The Act provides that particular trading rules may also be limited to:
- particular kinds of trading (e.g. tagging or exchange rate trade);
- particular kinds of tradeable water rights (e.g. irrigation or delivery rights); or
- particular water resources.<sup>734</sup>

Importantly, the trading rules:

may provide that a person who suffers loss or damage as a result of conduct of another person that contravenes the water trading rules may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.<sup>735</sup>

Without limiting the matters the rules may deal with, the trading rules must deal with trading and transfers between Basin states.<sup>736</sup>

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<sup>734</sup> Section 26(4) of the Act.

<sup>735</sup> Section 26(5) of the Act. See also section 2.1.1 of this paper.

<sup>736</sup> Section 22, item 12, of the Act.

The Basin Plan (including Basin Plan water trading rules) cannot **directly regulate**:

- land use or planning in relation to land use or
- the management of natural resources (other than water resources) or
- the control of pollution.<sup>737</sup>

### **Basin water market and trading objectives and principles**

The water trading rules must contribute to the Basin water market and trading objectives and principles contained in Schedule 3 of the Act. These objectives and principles are based on those set out in the National Water Initiative.<sup>738</sup>

Clause 3 of Schedule 3 of the Act states that the water market and trading objectives are:

- (a) to facilitate the operation of efficient water markets and the opportunities for trading, within and between Basin States, where water resources are physically shared or hydrologic connections and water supply considerations will permit water trading; and
- (b) to minimise transaction cost on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions; and
- (c) to enable the appropriate mix of water products to develop based on water access entitlements which can be traded either in whole or in part, and either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time; and
- (d) to recognise and protect the needs of the environment; and
- (e) to provide appropriate protection of third-party interests.

Clause 4 of Schedule 3 sets out the Basin water market and trading principles as follows:

- (1) This clause sets out the Basin water market and trading principles.
- (2) Water access entitlements may be traded either permanently, through lease arrangements or through other trading options that may evolve over time, if water resources are physically shared or hydrologic connections and water supply consideration would permit water trading.
- (3) All trades should be recorded on a water register. Registers will be compatible, publicly accessible and reliable, recording information on a whole of catchment basis consistent with the National Water Initiative.

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<sup>737</sup> Sections 22 (10) and (11) of the Act provide guidance on interpreting this requirement. Section 22(12) notes that ss. 22(10) and (11) do not prevent Basin Plan provision having effect to the extent to which they relate to interception activities (referred to in s. 22(7)), water quality and salinity management plan targets (s. 25), environmental water plan targets (s. 28) or requirements to report on steps taken by states to meet targets set in the Basin Plan.

<sup>738</sup> In particular, see clauses 58–63, and schedule G of the NWI.

- (4) Restrictions on extraction, diversion or use of water resulting from trade can only be used to manage:
  - (a) environmental impacts, including impacts on ecosystems that depend on underground water; or
  - (b) hydrological, water quality and hydro-geological impacts; or
  - (c) delivery constraints; or
  - (d) impacts on geographical features (such as river and aquifer integrity); or
  - (e) features of major indigenous, cultural heritage or spiritual significance.
- (5) A trade may be refused on the basis that it is inconsistent with the relevant water resource plan.
- (6) Trades must not result in the long term annual diversion limit being exceeded. That is, trades must not:
  - (a) cause an increase in commitments to take water from water resources or parts of water resources; or
  - (b) increase seasonal reversals in flow regimes;above sustainable levels identified in relevant water resource plans such that environmental water or water dependent ecosystems are adversely affected.
- (7) Trades within over allocated water resources (including ground water resources) may be permitted in some cases subject to conditions to manage long-term impacts on the environment and other users.
- (8) Where necessary, water authorities will facilitate trade by specifying trading zones and providing related information such as the exchange rates to be applied to trades in water allocations to:
  - (a) adjust for the effects of the transfer on hydrology or supply security (transmission losses) or reliability; and
  - (b) reflect transfers between different classes of water resources, unregulated streams, regulated streams, supplemented streams, ground water systems and licensed runoff harvesting dams.
- (9) Water trading zones, including ground water trading zones, should be defined in terms of:
  - (a) the ability to change the point of extraction of the water from one place to another; and
  - (b) the protection of the environment.The volume of delivery losses in supplemented systems that provide opportunistic environmental flows will be estimated and taken into account when determining the maximum volume of water that may be traded out of a trading zone.
- (10) Exchange rates must not be used to achieve other outcomes such as to alter the balance between economic use and environmental protection or to reduce overall water use.

- (11) Trade in water allocations may occur within common aquifers or surface water flow systems consistent with water resource plans.
- (12) Trade from a licensed runoff harvesting dam (that is, not a small farm dam) to a river may occur subject to:
  - (a) a reduction in dam capacity consistent with the transferred water access entitlement; or
  - (b) retention of sufficient capacity to accommodate evaporative and infiltration losses; or
  - (c) conditions specified in water resource plans to protect the environment.
- (13) Compatible institutional and regulatory arrangements will be pursued to improve intra and interstate trade, and to manage differences in entitlement reliability, supply losses, supply source constraints, trading between systems and cap requirements.
- (14) The transfer of water allocations and entitlements will be facilitated (where appropriate) by water access entitlement tagging, water access entitlement exchange rates or other trading mechanisms that may evolve over time.
- (15) Institutional, legislative and administrative arrangements will be introduced to improve the efficiency and scope of water trade and to remove barriers that may affect potential trade.
- (16) Barriers to permanent trade out of water irrigation areas are up to an annual threshold limit of four per cent of the total water entitlement of that areas will be immediately removed, subject to a review by 2009 by the National Water Commission under paragraph 7(2)(h) of the National Water Commission Act 2004, with a move to full and open trade by 2014 at the latest.
- (17) Subject to this clause, no new barriers to trade will be imposed, including in the form of arrangements for addressing stranded assets.

# Contacts

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