

INQUIRY INTO STATUS OF WATER TRADING IN NEW SOUTH WALES

Organisation: Australian Competition & Consumer Commission

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Dear the Hon. Robert Borsak MLC,

ACCC submission to the Select Committee on the status of water trading in New South Wales

Thank you for the opportunity to provide a submission to the Select Committee on the status of water trading in New South Wales (NSW inquiry).

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010 (CCA)*, regulate national infrastructure and undertake market studies.

As directed by the Commonwealth Treasurer, between August 2019 and March 2021, the ACCC conducted an in-depth inquiry into markets for tradeable water rights in the Murray-Darling Basin (the Basin). The terms of reference, Guide to the Final Report and the [Final Report](#) (ACCC inquiry), published in March 2021, are available on the ACCC website.

There are a number of issues in common between the terms of reference of the NSW inquiry and the ACCC inquiry. This includes the focus on water market practices and effects, including potential misconduct and market manipulation. However, the ACCC inquiry focused on water markets in the Murray-Darling Basin, that includes but is not limited to New South Wales. The ACCC used its information gathering powers to gather and analyse a comprehensive data set for the period 2012-2019, as well as extensive information and confidential business records from a wide range of market participants to inform the inquiry. The ACCC's data set included trade data from all state registries and multiple exchange platforms.

This submission sets out:

- The ACCC's role in water markets
- The ACCC's inquiry process
- The key findings and recommendations from the ACCC inquiry
- The current roadmap for policy reform.

The ACCC role under the Water Act

Under the *Water Act 2007* (Cth), the ACCC has several ongoing functions that contribute to the functioning of water (and related) markets. These roles include:

- advising the Commonwealth Minister on water rules¹ and the Murray-Darling Basin Authority on the Basin Plan water trading rules:
 - the water market rules 2009 govern the conduct of infrastructure operators to ensure that the ‘transformation’ of irrigation rights is not prevented or delayed, and
 - the water charge rules 2010 set a cap on the maximum termination fee payable and impose obligations to publish information on regulated water charges.
- monitoring and reporting on regulated water charges, transformation arrangements and compliance with the water rules
- enforcing the water rules and the CCA, including the Australian Consumer Law.

The information gathering process for the ACCC water markets inquiry

Throughout the inquiry, the ACCC held public forums across the Basin and received over 200 submissions.² Submissions were received from stakeholders, including irrigators and their representatives, commonwealth, state and local government bodies, brokers and exchanges, investors, indigenous water user representative groups, environmental groups and members of regional communities.

The ACCC issued voluntary information requests to infrastructure operators and Australian and Basin State government agencies, as well as other market participants, to obtain information and data. The ACCC also used its compulsory information gathering powers to obtain information from investors, brokers and intermediaries and large water users. This enabled the ACCC to examine a wide range of information and documents that had not been available to past examinations of water markets.³

The ACCC also commissioned reports to assist with its analysis including a water market literature review and empirical analysis by the University of Adelaide, a report analysing participation in water trading by irrigators by the University of Canberra, and a report by Frontier Economics on water market architecture.⁴

The ACCC’s analysis also considered the data collected for its annual [Water Monitoring Report](#) which has been published every year since 2010.

¹ *Water Market Rules 2009* and the *Water Charge Rules 2010*.

² 130 submissions in response to the issues paper and over 91 submissions in response to the interim report.

³ This included reviewing internal strategy documents, communications, contracts and data. Notice recipients claimed confidentiality over the majority of material submitted. The ACCC conducted two private hearings of representatives of a large investor to examine its investment and trading strategy and trading activities.

⁴ See: <https://www.accc.gov.au/focus-areas/inquiries-finalised/murray-darling-basin-water-markets-inquiry/accc-commissioned-research>.

ACCC findings and recommendations

The ACCC's inquiry considered the history of tradable water rights, drivers in water markets as well as market trends since 2012. The ACCC found that water trading brings substantial benefits to many water users but also determined that Basin water markets need decisive and comprehensive reform. The ACCC made a number of recommendations to enhance markets for tradeable water rights, including their operation, transparency, regulation, competitiveness and efficiency. The recommendations can be found in the Final Report and are summarised in the [Guide to the Final Report](#).

Market integrity and conduct

The ACCC found no evidence that investors exercised market power or manipulated markets to increase water prices in the Southern Connected Basin. However, the ACCC found that these trading behaviours are not adequately regulated and that a lack of trust in the integrity and fairness of Basin water markets is inhibiting market confidence. The ACCC found that the complex nature of Basin water markets are best understood and leveraged by professional traders and large agribusinesses with the time and knowledge to analyse and navigate them. As such, the ACCC recommended that legislation should be introduced to protect the integrity of Basin water markets by regulating conduct of market participants, including a mandatory code for intermediaries, and price manipulation and enhanced insider trading protections.

Trade processing and water market information

The ACCC found that there is a lack of quality, timely and accessible information in water markets. This affects water market participants, as trading is complex and adequate information is needed to enable efficient trading decisions. The collection of trading data and the setting of data standards is essential to both the effective regulation of the conduct noted above and the improved oversight and governance noted below.

Market architecture

The ACCC found that the rules, policies and arrangements that enable and support trade in the Southern Basin do not always adequately reflect scarce storage and delivery capacity, and this has led to river channel congestion and negative third party and environmental impacts. The ACCC also found that changing conditions are challenging key assumptions that underpin trade arrangements and the design of tradeable water rights.

Governance of the Basin water markets

The aim of effective, markets-focused governance is central to the ACCC's recommendations. The ACCC recommended establishing a new independent Basin-wide Water Markets Agency to give market design, integrity and oversight the prominence and coordination necessary to make water markets work effectively.

The Expert Panel and role of the Advisor

The ACCC recommended that a reform roadmap be developed as a second 'stream of work' following the inquiry.

The former Minister for Resources and Water, the Hon Keith Pitt, appointed Daryl Quinlivan AO, as an independent Principal Adviser to work with the Australian Government, Basin states, industry, communities, and other stakeholders to develop a phased, practical, and cost-effective plan for water market reform having regard to the ACCC's findings and recommendations.

The Principal Adviser receives and considers advice from an advisory group comprised of technical experts and water market stakeholder representatives, and the Department of

Agriculture, Water and the Environment provides secretariat services to support [development of the roadmap](#).

The Principal Adviser will provide the Minister for Water and Environment with a phased implementation plan (the 'roadmap') for water market reform shortly.

The ACCC continues to support this process and will continue to advocate for water markets reform in the Basin.

Yours sincerely

Mick Keogh
Deputy Chair