Regulating the Australian Water Market

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Abstract

This article examines Australia’s implementation of a national regulatory framework to support the development of robust and mature water markets. To date, competition in water markets and water trading have been inhibited by disparate State-based regulation as well as State-based limitations on trading outside of regions. State-based monopolsisation of water infrastructure has also been a significant impediment. The transfer of sovereignty over water to the central Commonwealth government has enhanced the capacity of the regulatory framework to better contribute to building efficient water markets.

Keywords: Water, markets, trading, regulation, Australia

1. Introduction

Water scarcity has been emblematic throughout Australian history.1 Australia is the driest inhabited continent but, nonetheless, has been highly dependent on agriculture for its economic prosperity and, therefore, vulnerable to climatic variation;2 over time, as a result of poor resource management, ageing water infrastructure, escalating demand for water3 as well as a long-term reduction

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in precipitation, Australia has become increasingly subject to a lack of water security.\(^4\)

Markets have emerged as a means of responding to increased water scarcity by facilitating improvements in the efficiency of water allocation and management. However, to attain efficiency, markets have to operate competitively. Competitive markets require: low barriers to entry; low transaction costs; perfect or near-perfect information; the absence of collusion among suppliers; clear rules of exchange; enforceable property rights; and effective governance structures.\(^5\) These pre-conditions do not arise automatically and, in the case of Australia—where the system of water supply has been historically dominated by government investment, subsidies and ‘command and control’

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**Table 1.** Relevant actors in the Australian Water Market

<table>
<thead>
<tr>
<th>Title</th>
<th>Composition</th>
<th>Function</th>
<th>Relevant agreements/policies/regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Water Commission</td>
<td>Independent statutory body governed by advisory commissioners appointed by the Commonwealth government</td>
<td>To assist implementation of the National Water Initiative. Also advises the Commonwealth government on matters of national significance related to water</td>
<td>National Water Commission Act 2004 (Cth)</td>
</tr>
<tr>
<td>Australian Competition and Consumer Commission (ACCC)</td>
<td>Independent statutory body with chair &amp; members appointed by the Commonwealth government</td>
<td>Promotes competition and fair trade in the market place. The ACCC is responsible for enforcing elements of the National Competition Policy set out in the Trade Practices Act; for ensuring fair trade between market participants; and for developing and enforcing water-trading rules.</td>
<td>Trade Practices Act 1974 (Cth) Water Act 2007 (Cth)</td>
</tr>
</tbody>
</table>

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mechanisms—a radical transformation of the regulatory framework has been required to achieve a competitive milieu (Table 1).

However, analogous to problems encountered in the USA and Europe, realisation of reform has been complicated by federalism. Under the Australian constitution, the power to regulate water use is largely devolved to Australia’s seven State governments. The exercise of national Commonwealth regulatory power is further constrained by §100 Constitution which provides that the Commonwealth’s power to regulate trade and commerce does not authorise the enactment of laws abridging the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. Moving on a uniform front and responding to international trends in favour of the sustainable development of water resources thus requires co-operation between Australia’s States and between the States and the Commonwealth government. Historically, however, there has been little incentive to address water resource management on a national basis. In the past, State water resource policies have focused upon supporting State economic and population growth, and State governments invested heavily in regionally based water capture and reticulation systems that characteristically treated water as an almost inexhaustible resource. Although all States are now committed to sustainable water management, despite the rhetoric of collaboration, the implementation of a national approach to water reform has been fraught with difficulty and historical over-allocation of water resources has proven difficult to reverse.

Established in 1992, the Council of Australian Governments (COAG) has become Australia’s primary forum for breaking down state provincialism and driving countrywide micro-economic reform. The COAG has moved on a number of fronts including: the development of uniform schemes of road vehicle and rail regulation; privatisation and restructuring of Australian energy industries; the mutual recognition of State licensing of trades and occupations; the general consensus is that water entitlements have historically been over allocated ie, the total volume of water able to be extracted by water users has at times exceeded the environmentally sustainable level of extraction: Australia Government Department of Environment, Water, Heritage and the Arts, ‘Restoring the Balance in the Murray-Darling Basin’ (May 2010) <http://www.environment.gov.au/water/publications/mdb/pubs/restoring-balance.pdf> accessed 24 September 2010.

9 L Crase, ‘Water Policy in Australia: The Impact of Change and Uncertainty’ in A Dinar and J Albiac (eds), Policy and Strategic Behaviour in Water Resource Management (EarthScan, London 2009). See also D Connell, Water Politics in the Murray-Darling Basin (The Federation Press, Leichhardt 2007) at ch 1, setting out the history and difficulties faced when shaping a national regime for the sustainable use of water.
10 The general consensus is that water entitlements have historically been over allocated ie, the total volume of water able to be extracted by water users has at times exceeded the environmentally sustainable level of extraction: Australia Government Department of Environment, Water, Heritage and the Arts, ‘Restoring the Balance in the Murray-Darling Basin’ (May 2010) <http://www.environment.gov.au/water/publications/mdb/pubs/restoring-balance.pdf> accessed 24 September 2010.
the introduction of competition and partial privatisation of the telecommunications industry; and privatisation of inter-modal facilities such as ports and airports.\textsuperscript{12} Increasing productivity and lowering barriers for investment by introducing competition into infrastructure service markets and service markets more generally were the chief drivers of these reforms.

The COAG’s 1994 \textit{Strategic Framework on Water Reform} laid the foundation for Australia’s water market-based transformation, committing the States and the Commonwealth to efficiency-based water reform and sustainable development in water management. Key elements of the framework included: (1) the development of catchment-based water resource allocation including allocation for environmental need; (2) the creation of a legal regime in each State for defining water access rights; (3) the disconnection of water access rights from land so that water can be traded; (4) the requirement that future investment in water infrastructure comply with economic and sustainability criteria; and (5) cost-reflective pricing for access to water and water infrastructure. While the \textit{Strategic Framework on Water Reform} incorporated similar objectives to those that had driven COAG’s micro-economic reform of Australian infrastructure in transportation systems and the energy industries, the incorporation of sustainability as a fundamental objective was an added factor exclusive to the water market. Water reform has, therefore, not just comprised the introduction of water trading and restructuring of the water supply industry, but has also strived to achieve more coherent and sustainable management of scarce water resources. Public health externalities associated with water consumption have also been a factor which has taken water reform well beyond the promotion of competition,\textsuperscript{13} and into the realm of ‘market environmentalism.’\textsuperscript{14}

Even though the 1994 \textit{Strategic Framework on Water Reform} was expected to be implemented as a matter of priority, progress to date has been less than satisfactory. In its most recent biennial review of water reform, the National Water Commission found (among other things) that the establishment of water trading has only been partially successful.\textsuperscript{15} According to the National Water Commission, although water trading has grown rapidly in the Murray–Darling Basin where over 70% of Australia’s irrigated agriculture occurs,\textsuperscript{16}

\begin{itemize}
  \item T Anderson and D Leal, \textit{Free Market Environmentalism} (Palgrave, New York 2001) 1–9. Market environmentalism refers to the use of market regulation that serves both economic efficiency and environmental aims.
\end{itemize}
artificial trade barriers and transaction processing delays still obstruct the efficiency of water trading in this region. The Commission is also of the view that beyond the Murray–Darling Basin much remains to be done towards the development of new and expanded water markets. Water trading between urban and rural regions remains virtually non-existent. In most cases, water pricing does not reflect the cost of supply or water scarcity. Furthermore, because water infrastructure has been a State responsibility, until recently, there has been no central government investment in national water infrastructure. Consequently, except for the Murray–Darling river system that traverses a number of States, the development of Australia’s water market has been impeded by limited avenues available for hydrological transfer across regional areas. In short, water markets have evolved on a patchy basis and the vision of an integrated national water market has yet to materialise.

This article examines the progress of the Australian States and the Commonwealth regarding the implementation of the legal measures required to achieve a mature, well-functioning water market. The particular focus of the article will be upon the development of the role of the Commonwealth regulator, the Australian Competition and Consumer Commission. As in any market, the role of regulator is crucial to market success.

The Australian Competition and Consumer Commission (ACCC)’s general mandate is to promote competition and fair trade in the Australian marketplace for the benefit of consumers, businesses and the community. As direct government management of water systems has gradually diminished pursuant to the process of micro-economic reform commenced by the 1994 COAG agreement, the ACCC’s role has concomitantly extended to the regulation of water markets. To further progress the Commonwealth government’s market


19 L Simpson and K Ringskog, *Water Markets in the Americas* (The World Bank, Washington DC 1997) 6 – opining that effective regulation is a necessary precursor for the effective operation of water markets. According to the authors, there must be a regulatory system of title and transfer and rules that police transfer. The authors also argue that a timely, fair and rational conflict dispute system is also a pre-requisite for a functioning water market.


21 Tisdell and others (n 2) 19. The authors report that the drivers of this micro-economic reform were: rising marginal supply costs, intensified competition between water users, increased water scarcity and increased interdependency between water users, growing awareness of environmental degradation and, at 3.1, broader micro-economic reform aimed at improving performance throughout the Australian economy. See further J McKay, ‘Water Institutional Reforms in Australia’ (2005) 7 Water Policy 35.
environmentalism agenda, the ACCC has been designated a major role in developing and enforcing new market rules designed to inhibit water infrastructure owners, irrigators and other water users from unreasonably interfering with water trade. This article critically evaluates these rules examining whether they effectively balance competing goals inherent in market environmentalism of efficiency of consumptive water use against environmental sustainability. The article contends that at this stage the legal infrastructure designed by the ACCC is more heavily focussed upon the former than the latter.

2. Water Trading

The philosophy underlying the promotion of water trading is to assure that water is allocated to its most efficient use. By imposing a market price and an opportunity cost upon water, users are encouraged to use what water they have more conservatively, or to transfer their water to others if the market price for water exceeds the cost of using it themselves. Water trading is also seen as an efficient vehicle for clawing back over-allocations of water so as to improve environmental flows.

The abolition of riparian rights and the creation of water entitlements independent of land are necessary precursors to water trading. While all Australian States abolished riparian rights and prohibited water diversion except by government authorisation in the 1880s and 1890s, it was not until the 1980s that entitlements associated with the right to store, access or use


24 Current legislative statements to this effect can be found in Water Management Act 2000 (NSW) s 393; Water Act 1989 (Vic) s 7; Water Act 2000 (Qld) s 19; Natural Resources Management Act 2004 (SA) s 124(8). However, basic landholder rights for domestic and stock needs have been retained: eg, Water Management Act 2000 (NSW) s 52; Water Act 1989 (Vic) s 8; Water Act 2000 (Qld) s 20; Natural Resources Management Act 2004 (SA) s 124 (4).

water could be held by or transferred between individual users. For the constitutional reasons outlined earlier, the creation and regulation of transferrable entitlements and the terms upon which they may be transferred are primarily determined by State legislation.\textsuperscript{26} Initially therefore, water trading evolved on a State-by-State basis, and until the development of recent changes to the balance of Commonwealth and State sovereignty over water, the ACCC’s role regarding the transfer of entitlements was consequently limited.

The first step towards establishing water markets, separating water entitlements from land, was implemented by three Murray–Darling States, South Australia, in 1983, and later by Victoria and New South Wales.\textsuperscript{27} It was also the scene for the second step necessary to facilitate water trading, the introduction of a cap upon further extraction of water. Once water users could no longer extract additional water from the Basin, they were required to purchase water from those with excess capacity to meet supply shortfalls. Subsequently, supported by market facilitators such as water brokers and water exchanges and market infrastructure, intrastate water trading in these States began to flourish.

With a view to augmenting water trading and improving efficiency in water markets, on 25 June 2004, the Commonwealth of Australia and the governments of New South Wales, Victoria, South Australia, Queensland, the Australian Capital Territory and the Northern Territory signed the National Water Initiative.\textsuperscript{28} Among other matters, the National Water Initiative provided that each government would:\textsuperscript{29}

- Facilitate water markets and water trading within and between States and Territories;
- Minimise transaction costs associated with water trading;
- Enable a mix of water products to develop;
- Protect environmental flows; and
- Avoid prejudice to third party rights.

However, despite the sentiment of the original 1994 COAG agreement and the subsequent National Water Initiative, water markets remain ‘thin’\textsuperscript{30} and, as a

\begin{itemize}
\item Eg, Part 3A, Div 5 Water Act 1989 (Vic); Div 4 Water Management Act 2000 (NSW); s 157 Natural Resources Management Act 2004 (SA); Div 6 Water Act 2000 Act (Qld).
\item Ibid CL 58.
\end{itemize}
result of prolonged drought, environmental benefit from water trading has not been significant.\textsuperscript{31} Today, the Murray–Darling Basin region continues to dominate water trading, accounting for 70–80\% by volume of all water traded in Australia.\textsuperscript{32} However, inter-State trading in the Murray–Darling Basin is still quite limited. In 2008–2009, there was no recorded interstate trading of permanent water entitlements, although as a result of drought, interstate trading accounted for 28\% of all seasonal water trading.\textsuperscript{33}

Growth in water markets and the attainment of allocative efficiency have been obstructed by the failure to unbundle water entitlements on a uniform basis throughout Australia, differences in entitlement specifications between jurisdictions, incompatibility between water registers maintained by different States, a lack of integration between the treatment of ground and surface water systems in resource management policies, a failure to account for return flows, lack of accurate market information, exclusion of certain parties (eg urban water users) from the market, varying closing dates for trade across jurisdictions, caps on trade volumes and high exit fees imposed by water supply entities, such as irrigation trusts.\textsuperscript{34} Furthermore, under the National Water Initiative all State jurisdictions agreed to an annual cap of 4\% on water trading outside of irrigation districts.\textsuperscript{35} The cap was reviewed in 2009 by the National Water Commission,\textsuperscript{36} which found that the limitation upon trading outside of irrigation districts impeded environmental buy-backs of over allocated water and distorted water markets. Despite this finding, the 4\% cap remains in the majority of Australian jurisdictions.\textsuperscript{37} Overall, progress in the transformation to a mature water market has been slow.

\textsuperscript{31} Although governments have been entering the market and purchasing seasonal water access entitlements to increase environmental flows, the total volume purchased remains insufficient (at 1800GL in 2008–9). National Water Commission, above n 30, 41 to prevent degradation of riverine environments in drought conditions: R Goddard, J Connor and R Ranjan, \textit{Environmental Triage Decisions During Drought} (AARES, Cairns 2009) noting that the Murray–Darling Basin’s environmental problems have become so acute that hard decisions have to be made regarding which assets to save and which to let go.

\textsuperscript{32} National Water Commission (n 30) 30–46.

\textsuperscript{33} Ibid 24–6.


\textsuperscript{35} The cap will gradually be phased out from 2011 to 2014.


In the meantime, pressure upon governments to secure the water supply, ensure scarce water is allocated equitably and to save the riverine environment from impending catastrophe intensified and, in 2007, resulted in the passage of the Water Act 2007 (Cth), followed by an intergovernmental agreement between the Commonwealth and the Murray–Darling Basin States, and then later the referral of State legislative power to the Commonwealth in relation to matters addressed by the Water Act 2007.

Among other things, the Water Act 2007 (Cth) creates the Murray–Darling Basin Authority (MDBA), an expert body with authority to address historical over-allocation of water resources to agriculture and industry and to increase environmental flows so that use of Basin water resources is sustainable. Functions of the MDBA include the preparation of a Basin Plan spanning all Basin States, advising the Commonwealth Minister on the accreditation of State water resource plans, enforcing the Basin Plan and monitoring the quality and quantity of Basin water resources and related ecosystems. The purpose of the Basin Plan prepared by the Authority after extensive consultation with the Basin States and their communities, is to provide for the integrated management of all water resources in the Murray–Darling Basin including the establishment and enforcement of environmentally sustainable limits of water that can be extracted by water users and the development of an efficient water-trading system across the Basin. The Draft Basin Plan will be released in late 2010 and finalised by mid-2011. It is generally anticipated that the Plan will set much lower limits for the diversion of water to irrigators and industry so that more water is allocated for environmental need.

All Commonwealth agencies and Basin State agencies, infrastructure operators and holders of water-access rights are required to comply with the Basin Plan and accredited State water-resource plans. The Water Act 2007 (Cth) thus places disparate State water-resource planning and water-trading mechanisms within a single overarching framework that requires Commonwealth approval. In addition, the Water Act 2007 (Cth) creates several new

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38 Agreement on Murray–Darling Basin Reform (3 July 2008).
40 Water Act 2007 (Cth) s 172.
42 Even then the Plan will not apply uniformly as the Water Act 2007 provides that interim and transitional State water resource plans may operate until their prescribed expiry date: Water Act 2007 (Cth) s 241.
roles for the ACCC including: (1) advising the Minister for Climate Change and Water (the Minister) on water market rules;\textsuperscript{46} (2) advising the Minister on water charge rules;\textsuperscript{47} (3) monitoring of compliance with water charge and water market rules;\textsuperscript{48} (4) enforcing water charge and water market rules;\textsuperscript{49} (5) advising MDBA on the reasonableness of fees;\textsuperscript{50} and (6) advising the MDBA on the water-trading rules as part of the development of the Basin Plan.\textsuperscript{51}

3. Water Market Rules

Water Market Rules\textsuperscript{52} contribute to water trading by mandating that irrigators be permitted to transform their irrigation rights into tradeable entitlements. The water market rules also prevent contractual arrangements between operators of irrigation infrastructure and irrigation right holders acting as barriers to trade.\textsuperscript{53} Pursuant to s 97 (2) Water Act 2007 (Cth), the water market rules are a legislative instrument and attract a range of civil penalties for non-compliance.\textsuperscript{54}

The rules only apply to organisations holding a statutory water access licence\textsuperscript{55} including irrigation corporations, private irrigation districts or schemes and irrigation trusts. Irrigation schemes or trusts have historically played an important role in Australian rural development. Originally, the schemes or trusts, comprised of a collection of pioneers, received government loans for the construction of irrigation canals and other storage and reticulation infrastructure for irrigated water in their districts. By this means, vast tracts of Australian dry-land farming were transformed into areas of intensive irrigation, providing the momentum for the expansion of settlement beyond Australia’s coastal fringes.\textsuperscript{56} In a number of Australian States (New South Wales, South Australia, Western Australia and Tasmania), irrigators continue

\begin{itemize}
\item \textsuperscript{46} Ibid s 98.
\item \textsuperscript{47} Ibid s 93.
\item \textsuperscript{48} Ibid ss 94 and 99.
\item \textsuperscript{49} Ibid ss 100A and 137 (b).
\item \textsuperscript{50} Ibid s 212.
\item \textsuperscript{51} Ibid s 42 (2).
\item \textsuperscript{52} The Minister for Climate Change and Water signed the Water Market Rules on 10 June 2009. The rules were registered on 22 June 2009 and have had legal effect from 23 June 2009. Operators are expected to comply with the rules by 1 January 2010.
\item \textsuperscript{53} Explanatory Memorandum to the Water Bill 2007 Cl 97 para 190.
\item \textsuperscript{54} Water Act 2007 (Cth) ss 97 (7) and 146 and various provisions of the Water Market Rules 2009.
\item \textsuperscript{55} In other words, the water market rules do not apply where individual irrigators own the relevant statutory water rights. Consequently, the Water Market Rules do not apply to the majority of irrigation organizations in Victoria because in a majority of cases irrigators directly own statutory water rights pursuant to a process of unbundling commenced in 2006: Water Act 1989 (Vic) Part 3A.
\item \textsuperscript{56} Davis (n 25) 647, 656.
\end{itemize}
to hold rights to participate in the water access of these bodies through means such as shares and supply contracts. The water market rules provide for the permanent transformation of the shares or supply contract rights into water-access entitlements that can be held or traded by the individual irrigators.

The ACCC is also of the view that the rules may extend to managed investment schemes (MIS) where the manager of the MIS is an operator holding a water-access entitlement on behalf of an irrigator or subject to an irrigation right. Managed investment schemes are collective investments whereby investors pool money in a common enterprise, e.g., a forestry plantation or a vineyard. Under the scheme, agricultural land and water rights are owned by the scheme’s operator, which charges fees to the investors for the establishment of crops and harvesting. Profits generated by the scheme are returned to scheme investors.

Driven by rules which make investment in the MIS tax deductible, in Australia the agribusiness investment industry is large and growing, and has often been the target of claims that it impacts negatively on the sustainability of Australian agriculture. Concern has also been expressed about the MIS schemes’ capacity to distort water prices and the water market. Any exemption from the Water Trading Rules on the basis of the legal structure of the MIS would therefore be perceived as a further unfair competitive advantage and given the broad definition of ‘infrastructure operator’ found in s 7 Water Act 2007 (Cth) would not appear to be justified.

Transformation of shares or contract supply rights into tradeable entitlements is not mandatory. It must be triggered by a request from an irrigator. However, once an irrigator makes such a request, generally the operator is required to set about fulfilling it. Under Rule 6 Water Market Rules, operators must establish clear procedures for the transformation of irrigation rights held against irrigation operators and ensure that details of such procedures are readily available. If requested by the holder of an irrigation right, the irrigation operator must provide details of the contractual or other arrangements related to the right for the purpose of transforming the right into a tradable entitlement.

Transformation only extinguishes the beneficial interest of the irrigator in the water entitlement. Accordingly, once the right is transformed, ongoing

59 Australia, Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Aspects of Agribusiness Managed Investment Schemes (Senate Printing Unit, Canberra 2009) 21–3.
60 Water Market Rules, Rule 7 (n 52).
delivery of water is still required of the operator on the same terms and conditions subject to any necessary variations that result from the transformation.61 Should an irrigator subsequently trade their entitlement, the right to access-delivery services can also be terminated.62 In such cases, a termination fee regulated by the Water Charge Rules may be applicable. Operators are permitted to recover unpaid access charges and reasonable administration fees, require security for the future payment of water delivery in limited circumstances and seek the approval of third parties who have a legal or equitable interest in the irrigation right subject to transformation,63 but otherwise must not do anything to prevent or delay transformation or trade in a transformed entitlement.64 Applications for transformation must be processed efficiently within set time periods.65

Several questions arise in relation to the operation of the rules. The first question concerns the relationship between the Water Market Rules and other State-based regulatory constraints on water trade such as the 4% cap imposed upon water trading outside of irrigation districts in the majority of Australian jurisdictions.66 State-based regulation may also require approvals to enable water use at a particular site or for a particular purpose. There may also be State restrictions on the sale of water to particular persons67 or restrictions on when trade may occur.68 Water Market Rule 20 (2) (a) therefore allows operators to apply restrictions on transformation and trade when this is mandated by State legislation. In turn, the Basin water market and trading objectives and principles, which bind the States,69 provide that water use resulting from trade can only be restricted for the purpose of managing: environmental impacts; hydrological, water-quality or geo-hydrological impacts; delivery constraints; impacts on geographical features; and features of major indigenous, cultural or spiritual significance. Clearly, some of the restrictions in current

61 Water Market Rules, Rule 8 and 9 (n 52).
62 The Water Market Rules recognise that under many irrigation-supply contracts the right to receive water is treated explicitly or implicitly as independent of the right to access delivery services. In this case, the delivery service includes connection to the irrigation operators’ infrastructure and the services provided by the operator in delivering the water, not the water per se.
63 Water Market Rules, Rules 10, 14 and 20 (n 52).
64 Water Market Rules, Rules 16 and 17 (n 52).
65 Water Market Rules, Rule 14 (n 52).
66 Refer to discussion below and see, eg, Water Management Act 2000 (NSW) s 71ZA, which provides that the Minister may impose civil penalties on specific operators if they prevent transfer of a member’s irrigation right up to an annual threshold of 4% of the operator’s annual water entitlement. See further Water Act 1989 (Vic), Trading Rules for Declared Water Systems, Part 5, ss 25(a) and (b).
67 Eg, Water Act 2000 (Qld) s 190 (d) restricts an interim water allocation to the holder of land.
69 Water Act 2007 (Cth) Schedule 3 Cl 4.4.
State legislation, such as restrictions on trading with non-land holders designed to inhibit speculation in water and the diversion of water away from productive use, do not fall into those categories. Consequently, the ACCC has not supported State requirements designed to confine water trading to irrigators and instead has suggested that it would be best if restrictions on water use were tied to land.\textsuperscript{70} Some States, such as South Australia, have responded by passing legislation consistent with the Water Market Rules providing a process for the transformation of individual irrigation rights and reducing impediments to trade.\textsuperscript{71} Other States, such as Victoria, have retained strict limitations upon trading of water outside of relatively small areas. New South Wales has also implemented a cap on the sale of water entitlements to the Commonwealth, acting as an environmental water holder.\textsuperscript{72} As a result, Commonwealth plans to purchase increasing amounts of water to increase environmental flows have been stymied.

The interaction between the Water Market Rules and the corporate governance framework adopted by irrigation operators under the Corporations Act 2001 (Cth) has also been raised as a potential area of concern.\textsuperscript{73} Corporate constitutions registered under the Corporations Act 2001 (Cth) may require revision to ensure that they are not inconsistent with the Water Trading Rules and directors’ duties to the collective interests of the irrigator operator as a whole will have to be revised in light of the requirement of unrestricted transformation.

When a transformation occurs, the operator’s water-access entitlement is correspondingly reduced. Accordingly, a third concern raised by the Water Market Rules relates to the extent to which operators may restrict transformation to ensure they can meet operational needs. There may be a critical mass of water required to assure an irrigation system’s hydrological integrity. Other commentators have raised the problem of ‘stranded assets’\textsuperscript{74} resulting from the sale of water entitlements outside of the irrigation network and the associated reduction in revenue available to maintain services to remaining users. As water entitlements are traded out of districts, it may no longer be economically feasible for irrigation infrastructure capital costs to be spread among fewer and more geographically dispersed farmers. These impacts may extend,
further undermining the social and economic fabric of regions and communities.\textsuperscript{75}

To some extent, the current 4% limit on permanent trade out of an irrigation district will insulate the remaining irrigators and communities from sudden structural adjustment allowing irrigators and operators to adapt to market conditions over time. The Productivity Commission is also of the view that any inefficiency due to atomistic water trading can be off-set by irrigation operators levying termination fees.\textsuperscript{76} But as the annual cap is gradually phased out and environmental purchase increased, structural adjustment will inevitably be deeper and more widespread. One public submission to the ACCC has estimated that a move to a 6% annual cap\textsuperscript{77} in out-trading could reduce demand in some districts by 50% over an 11-year period resulting in rapid downscaling, impacting significantly on the economic efficiency of the operator and remaining irrigators.\textsuperscript{78} Nonetheless, these structural adjustments appear to be regarded as a necessary corollary of transformation and water trading. From the ACCC's perspective, the potential problem of stranded assets arises primarily because investment in irrigation infrastructure was formerly contingent upon the bundling of rights to access and use water with the right to have it delivered by an irrigation operator, and then tying these bundled rights to land.\textsuperscript{79} However, the evidence that a robust market in delivery rights will assist irrigation operators adjust to potential rapid downscaling remains scant, and as a result of the implementation of the Water Charge (Termination) Rules discussed below, it is unlikely that irrigation operators will be able to recoup all of their sunk costs. Fears have been expressed that this will cause significant harm to regional economies and undermine regional environmental management initiatives by diffusing accountability for water use among a great number of water users rather than a single irrigation


\textsuperscript{76} Australia, Productivity Commission (n 44) xxxii. Note, however, that the ACCC's Water Market (Termination Fees) Rules, which came into effect on 23 June 2009, impose a maximum termination fee of no more than 10 times an irrigator's annual access fee. See further discussion below.

\textsuperscript{77} At its meeting of 3 July 2008 the Council of Australian Governments accepted that the current cap on water trading outside of irrigation districts would be lifted from 4 to 6% within 12–18 months.


\textsuperscript{79} ACCC, 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 (ACCC, Dickson 2006) vi.
On the other hand, transforming shares or contractual rights into statutory property rights will considerably improve the financial position of many irrigators. Transformation also provides individual irrigators with greater flexibility in their water use and agricultural production decision making. Moreover, a recent study conducted by the National Water Commission has confirmed that the benefits of water trading for individual irrigators are translated into benefits for local communities. The National Water Commission found no evidence that water trading led to changes in patterns of population, employment in agriculture or weekly household income. Accordingly, in its view, termination fees were an effective mechanism for dealing with the problem of structural adjustment.

4. Water Charge (Termination Fees) Rules

Termination fees are the fees payable when irrigators terminate their right to receive water delivery services rather than the transformation and trade of entitlements. Water trade and termination of delivery do not necessarily occur simultaneously. Individual irrigators may retain their delivery rights and purchase additional water from allocation markets (at one point in time) while also selling some of their own water entitlements (at other points in time, e.g., under forward contracts). Alternatively, irrigators may sell most of their water entitlements but retain their delivery rights to allow future opportunistic irrigation.

The Water Charge (Termination Fees) Rules were implemented together with the Water Market Rules. The rules are designed to ensure that termination fees do not constitute barriers to irrigators wishing to transform their collective rights into tradeable entitlements under the Water Market Rules discussed above, while still allowing irrigation operators to recover their committed fixed costs. A maximum of 10 times the value of the irrigator’s annual access fee may be imposed as a termination fee. Additional termination fees approved by the ACCC may be charged in respect of prior agreements to participate in the funding of capital works.

81 National Water Commission, The impacts of Water Trading in the Southern Murray-Darling Basin: an Economic, Social and Environmental Assessment (National Water Commission, Canberra 2010) vi–vii. However, it is important to note that these findings were based upon trading at less than 10% of water use.
82 The Water Charge (Termination Fees) Rules 2009, made pursuant to Water Act 2007 (Cth) s 92 (1) were signed by the Minister for Climate Change and Water on 22 June 2009 and came into effect on 23 June 2009.
84 Ibid, Rule 7.
85 Ibid, Rule 8.
Capping the maximum termination fee at 10 times the value of the irrigator’s annual access fee constitutes a compromise between efficiency and community sustainability. Although termination fees benefit irrigation operators and remaining irrigators by allowing the irrigation operator to set lower delivery fees, they also distort trade particularly from low- to high-termination fee areas, inhibit the transition from intensive irrigated land use to non-irrigated land use, and impede environmental and critical human need purchases by State and Federal governments. Prior to the implementation of the Water Charge (Termination Fees) Rules, the ACCC found that termination fees represented a very high proportion of water entitlement value, in some instances as high as 80% and in many other cases between 30 and 50% of the market value of water entitlement, thus acting as substantial impediments to water trading. However, recognising that investment in irrigation infrastructure exhibits natural monopolistic features, the ACCC determined that termination fees should be capped to promote investment in such infrastructure. Nevertheless, both the ACCC and the Productivity Commission rejected setting termination fees at levels that would allow recovery arising from sharing higher fixed costs among a smaller pool of irrigators. According to the Productivity Commission, the onus was upon irrigation operators to reduce their costs or to attract new irrigators to a region.

5. Water Charge Rules

Water Charge Rules are rules that must be applied when determining regulated water charges and as with Water Market Rules are legislative instruments under the Water Act 2007 (Cth). They consist of the following three key categories:

- Rules for charges payable to operators;
- Rules for bulk water charges;
- Rules for charges for the recovery of water planning and management costs.

Each of the above three categories of Water Charge Rules focusses on achieving cost recovery for services provided at a particular point in the water supply chain. There are further fees or charges as prescribed by regulation.

86 ACCC (n 83) 45.
87 ACCC (n 83) x.
88 Australia, Productivity Commission (n 44) 238.
89 Water Act 2007 (Cth) s 91(1)(a).
90 Ibid s 91(1)(b).
91 Ibid s 91(1)(c).
92 Ibid s 91(1)(d). There are, however, currently no fees prescribed under regulations.
However, Water Charge Rules do not apply in respect of urban water supply activities beyond the point at which the water has been removed from a Basin water resource.93

The Water Charge Rules must contribute to achieving the Basin water-charging objectives and principles as reflected in the National Water Initiative.94 Thus they must provide for a transparent process in the setting or determination of regulated water charges; ensure that water markets are able to operate freely across State boundaries; and avoid perverse outcomes from inconsistent water-charging arrangements. In addition, in providing advice to the Minister on Water Charge Rules, the ACCC must have regard to the governance arrangements of infrastructure operators, current charging arrangements and the history of charging arrangements of those operators.

This has created difficulties for the ACCC. It is clear that many of the current water charges are applied unevenly across the Murray–Darling jurisdictions because of historical arrangements and anomalies and, therefore, it has been suggested that any attempt by the ACCC to ‘impose economic theory on a sector that is clearly not a textbook good or service is designed to fail.’95 Part of the reason for this state of affairs is the considerable diversity in the number, size and ownership arrangements of water providers across the Basin. Furthermore, the resulting charges, both fixed and variable, do not reflect underlying costs and are viewed more as ‘negotiations’ between buyer and seller. Many feel that the ACCC should not regulate how parties enter freely into contractual dealings.96

In June 2009, and subsequently in February 2010, the ACCC provided the Minister for Climate Change, Energy Efficiency and Water with its draft advice on Water Charge Rules for charges payable to irrigation infrastructure operators and bulk-water service providers (ie, those involved in water harvesting, water storage and water transportation/delivery).97 Subsequently, the Minister has proposed Water Charge (Infrastructure) Rules that are not

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93 Ibid s 91(3). ’Urban water supply activities’ are not defined in the Act.
94 Australia, House of Representatives 2007, Debates Vol HRII, 7: ‘The rules will reflect the water charging and trading principles in the National Water Initiative, ensuring that the water market in the basin works effectively and that there are no inappropriate barriers to trade.’
96 This view was expressed in the NSW Irrigators’ Council Response to ACCC, ibid.
substantially the same as the draft rules provided by the ACCC. As a result of the changes, further public consultations are occurring. Analogous to the Water Market Rules, the proposed Water Charge (Infrastructure) Rules only apply to infrastructure operators, i.e., to persons or entities that operate water-service infrastructure for the storage, delivery or drainage of water intended for water supply. The key issues addressed in the proposed Water Charge (Infrastructure) Rules relate to the monopolistic characteristics of the current infrastructure arrangements that have led to inefficiencies because of a lack of competition. The risk of adverse competitive outcomes is greatest for non-member-owned operators, i.e., government-owned operators. Thus, the proposed Rules outline a three-tier approach to regulation for water-charge rules for infrastructure operators and bulk-water service providers.

The first tier is the least intrusive and imposes the lowest regulatory burden on all operators. It prohibits discriminatory pricing and requires operators to annually publish their fees and charges. The second tier is applicable to larger member-owned operators managing more than 125 GL of water resources, or a non-member-owned operator managing water-access entitlements of between 125 GL and 259 GL. For second-tier operators, there is a requirement to implement and document certain procedures when setting prices including the development of a network service-plan proposal. The third tier has the highest regulatory burden and is applicable to the larger operators, including State governments. Under the proposed Rules, either the ACCC or accredited State agencies will determine and approve charges for third-tier entities. In relation to non-member-owned third-tier operators, the ACCC/relevant State agency must be satisfied that each entity reflects the efficient and prudent costs of meeting the expected demand for the water supply and delivery services of the regulated water business and, with these, the costs of complying with all the associated regulatory obligations. Insofar as member-owned third-tier operators are concerned, the regulator must be satisfied that the operator’s charges will include a return on investment commensurate with commercial risk. The limits imposed on the charges are thus not concerned with the capacity of the irrigator to bear the charge. Rather, they are designed

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100 The third tier applies to Part 6 operators and Part 7 operators. Part 6 operators are non-member owned infrastructure operators managing water access entitlements of more than 250GL. Part 7 owned operators are member-owned operators managing more than 10GL of water-access entitlements.


102 Ibid Rule 49 (n 98).
Overall, the Rules address the pricing principles that the ACCC will consider in approving/determining charges, the process that the ACCC will follow in making approvals or determinations and the information the ACCC will require from operators as part of the application for approval/determination.

In addition, the ACCC also administers the Water Charge Rules for Water Planning and Management Charges.¹⁰³ Most water-pricing and management activities are carried out by, or on behalf of government. It would not be generally practical or possible for individual water users to undertake water-planning and -management activities due to a lack of incentives and/or resources. State government agencies including Catchment Management Authorities, Natural Resource Management regional boards and Environmental Protection Agencies, deliver water-planning and management activities to ensure the long-term sustainability of water resources, including management of salt-interception schemes and other negative external impacts of the use of water on the environment, development of entitlement frameworks, managing environmental flows and monitoring and evaluating water resources.

Again, there is considerable variation stemming from historical considerations that have resulted in a wide variation in the cost recovery for water-planning and management activities across the Basin States and inconsistency with the Basin water-charging objectives and principles. Accordingly, the rules focus on:

- Improving the transparency of water planning and management charges;
- Increasing information available regarding the associated activities and costs including the proportion of costs recovered from water users.

Under the enforceable rules, Basin jurisdiction entities are required to publish information about water-planning and management charges including the amount and processes used to determine the charge, the type of charge and activities and costs to which the charge relates and, where possible, the total revenue and proportion of net costs recovered from users. The information must be published no later than July 2011.¹⁰⁴ The ACCC will then use this information to produce a consolidated report which it will release during the first reporting period in 2010–2011. The rules provide a guide on how Basin States should report annually and highlight any key trends and, where possible, compare cost recovery arrangements across Basin States.

¹⁰³ The rules came into effect on 24 July 2010.
In this way, the ACCC aims to ensure that there is not only uniformity across States in terms of approaches and costs for water planning and management and to help facilitate comparison of costs and the drivers of those costs across Basin States but, perhaps, and more importantly, to educate and engage the players about the important role charges can play in water planning and management. In spite of this, the approach taken by the ACCC and the government is not without its critics who question why infrastructure operator charges should be regulated while management and planning charges set by State agencies should only be subject to a reporting requirement. The rules do not, eg, require that water and management-planning charges closely align with the actual cost of providing those activities. Nor are any cost-sharing criteria prescribed. Consequently, there are concerns that irrigators in some States where full-cost recovery is practised will be disadvantaged vis-à-vis irrigators in other States that are less committed to efficient water allocation. Arguably, however, given that the ACCC’s powers under the Water Act 2007 (Cth) only extend to the Murray–Darling Basin, regulating the charges imposed by State authorities for water management and planning within the Basin and permitting possibly divergent charging rules for the same State agency activity outside the Basin may result in perverse outcomes.

6. Water Trading Rules

At present, Water Trading Rules are determined on a State-by-State basis and State government approvals must be acquired in relation to each transaction. As noted previously, the Basin Plan must incorporate ‘[r]ules for the transfer or trading of tradeable water rights in relation to Basin water resources,’ addressing, among other matters, the terms on which water rights are traded, the processes by which they are traded, restrictions on transferring, restrictions on taking water as the subject of a transfer and the reporting of transfers.

In formulating the Water Trading Rules, the MDBA must ensure that the Water Trading Rules contribute to the overarching principles and objectives of Water Act 2007 (Cth) set out in Schedule 3. These objectives largely mirror

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106 The ACCC released its draft advice to the MDBA on the development of the Water Trading Rules on 17 December 2009. The advice will be made public when the proposed Basin Plan is released in late 2010.
108 Water Act 2007 (Cth) s 22 Item 12.
110 Ibid s 22 Item 12.
those of the National Water Initiative outlined previously and include: (1) facilitating the operation of efficient water markets; (2) minimising transaction costs (3) enabling a mix of water products to develop; (4) recognising and protecting the needs of the environment; and (5) providing appropriate protection of third parties. In addition, the MDBA is required to obtain and have regard to the advice of the ACCC.\footnote{Ibid s 42(2).}

When examining the objectives, it is evident that a key element of the Water Trading Rules is the removal of barriers to water trade to facilitate the operation of efficient water markets and provide opportunities for water trading. Ultimately allowing water to be traded to its ‘highest value use.’ The rules also aim for consistency across the Basin again to promote more efficient functioning of water markets by removing any distortions to trade and sending positive signals to investors. Similarly, a well-defined set of rules is necessary to permit market transactions to take place and be able to allocate scarce water among irrigators, industries and, ultimately, households under urban trading arrangements.

Historically, water entitlements were tied to the land on which the water could be used and could not be transferred separately from the land. This reflects the fact that water trading in Australia was initially restricted to trade between irrigators within the same irrigation district. Overtime, trading has expanded to include inter-State water trading. While the land–water link has been broken down allowing water rights to be ‘unbundled’ and transferred as a separate asset, thus enabling them to move to higher value users, there are still some ongoing restrictions imposed at the State level. Restrictions may be imposed to reduce adverse environmental impacts. For example, channel-capacity constraint at Barmah Choke on the River Murray requires flow capacity to be limited to 8500 megalitres per day to avoid flooding of the neighbouring red gum forests.\footnote{M Ejaz Qureshi and others, ‘Removing Barriers to Facilitate Efficient Water Markets in the Murray-Darling Basin of Australia’ (2009) 96 Agr Water Manage 1641, 1644.} Hence water trading must occur within these limits.\footnote{Murray–Darling Basin Authority, Media Release, ‘Water trading rules through Barmah Choke relaxed from July 1’ (30 June 2010).} In other cases, restrictions are imposed to reduce social and economic adjustment costs. For instance, there is a limit on the proportion of Victorian water shares that can be owned without being associated with a water-use licence or registration, commonly referred to as the 10% non water-use limit or the 10% rule.\footnote{See the Victorian Water register website: <www.waterregister.vic.gov.au/Public/Reports/NonWaterUseLimit.aspx> accessed 27 September 2010.} However, although such rules address concerns about potential water hoarding or speculation by non-landholders, they can prevent wider participation in the water market and impede the objectives of the Act.
in particular, the development by intermediaries of innovative water-related products. They also hinder the ability of environmental water-holders\footnote{An environmental water holder is a State or Commonwealth body that manages water entitlements that are acquired to assure sustainable water use. The Water Act 2007 (Cth) Part 6 establishes the Commonwealth Environmental Water Holder.} to purchase water rights. As a result the ACCC has advised that it does not consider that there is a compelling argument for ownership restrictions, including foreign ownership restrictions.\footnote{ACCC, ‘Water Trading Rules Draft Advice’ (ACCC, Canberra 2009) 36–39 <http://www.accc.gov.au/content/item.phtml?itemId=906693&nodeId=e3c76f8c04101cb37c82c1dbb36d93c&fn=Water%20trading%20rules%20draft%20advice.pdf> accessed 13 October 2010.} Therefore, although the gradual phase-out of restrictions unrelated to environmental impact or hydrological capacity under the Water Trading Rules will have the benefit of making more water available for environmental purchase, conversely, water rights will become more ‘opportunistic’\footnote{See, eg, ‘Water Investments Australia’ <http://www.waterinvestmentsaustralia.com.au/opportunity.html> accessed 8 August 2010. Water Investments Australia is an asset holding company designed to ‘create new investment opportunities in rural land and water.’} and water trading based primarily upon the consumptive efficiency of irrigators is unlikely to fully incorporate third party or environmental externalities, such as the ‘stranded assets’ problem referred to earlier.\footnote{E Hadjigeorgalis, ‘A Place for Water Markets: Performance and Challenges’ (2008) 31 Rev Agric Econ 50, 57.}

The Water Act 2007 (Cth) provides that the Commonwealth legislation is not intended to displace concurrent State law, but where there is direct inconsistency the Commonwealth law will prevail.\footnote{Water Act 2007 (Cth) s 250B.} As the ultimate object of the Water Act 2007 (Cth) is to enable the transfer of tradeable water rights between Basin States consistent with prescribed Basin water market and trading objectives and principles,\footnote{Ibid s 4; Sch 3.} there is likely to be some tension regarding the interpretation and application of rules designed to minimise transaction costs and prohibit technical barriers to trade, and restrictions imposed to minimise externalities. Although Basin Plan water-trading rules and State-based water-trading rules are intended to operate concurrently, that tension may be exacerbated by institutional arrangements that bifurcate responsibility for regulation between the Murray–Darling Basin Authority as advised by the ACCC, and State agencies responsible for developing water-resource plans to be accredited or adopted under the Act.\footnote{Ibid s 22, Item 11.} To illustrate, currently trade in seasonal allocations (as opposed to permanent trades) is relatively unrestricted. However, as a generalisation, trading water upstream can negatively impact upon the water quality of those downstream, especially in relation to salinity loads.\footnote{Ejaz Qureshi and others (n 112).} Water trading affects salinity levels by changing the volume of water at different reaches, by affecting the amount of saline drainage and by
impacting on groundwater accession. Consequently, it is predicted that increased levels of interstate water trading and moving water over longer distances is likely to intensify salinity problems. Water quality may also be affected for third-party users if water is traded to a use that applies greater quantities of agrochemicals. So far, however, the National Water Commission has found that water trading has generally moved water downstream, resulting in environmentally beneficial increases in flows at the ends of tributaries. Furthermore, apart from the impact of severe drought, the National Water Commission has found no discernible effect on key ecological assets due to water trading.

Transferring water-access entitlements from one location to another can affect security of water supply. When moving water upstream, for example, fewer storage options are available compared with moving water downstream. Moving water from location to location also results in substantial conveyance losses. In addition, the ACCC has recognised that changing the location of water extraction may cause existing water right holders to experience a reduction in the security of their water supply, because as outlined in the earlier discussion on the Water Market Rules, allowing large amounts of water to be traded out of districts affects the viability of irrigation infrastructure. However, because the ACCC’s chief mandate is the promotion of competition, it suggests that, rather than off-setting externalities through restrictions on trading, environmental concerns and third-party impacts should be addressed through water-use approvals and State water-planning processes, which will in turn be guided by and accredited against the Basin Plan.

The Basin is divided into trading zones determined according to the sourcing of water from a common supply system or reservoir. Trades and transfers of water-access rights that change the location of a water-access right are normally permitted within trading zones or across trading zones where hydrological connections and infrastructure allow for the transfer. Consistent with this principle, apart from back trade, delivering tradeable water rights to a different location is generally prohibited. This may also relate to demand and physical constraints as well as cases where there is insufficient water in a

124 Ibid 495.
127 Ibid.
130 Principle 2 of the Basin water market and Trading Objectives (Sch 3 of Act).
131 ACCC, ‘Water Trading Rules Draft Advice’ (n 116) 142. A backtrade is a trade where water allocation is redirected back to its place of origin.
watercourse to enable delivery without prohibitive transmission loss. Normally, however, delivery considerations are explicit in the form of the licence or entitlement and, thus, are ‘hard-wired’ into the water-trading rules. Consequently, the feasibility of delivery can be assumed if a trade/transfer is approved.

Trading zones not only reflect the water resource-management arrangements but also the physical realities of systems. This includes delivery noted above, and also regulated and unregulated surface water systems and groundwater systems. Water-access rights in regulated systems feature structures such as dams and weirs on major rivers and may take the form of water-access entitlements and water allocations. However, in unregulated systems, there are no or few structures in place to regulate the flow of water. Thus, the ability to access and trade water is less predictable and, therefore, less dependable in unregulated systems. On the other hand, while groundwater systems share some common characteristics with unregulated systems they can be more reliable if extraction is managed at sustainable levels.

To address some of the third-party impacts outlined above, the former Murray-Darling Basin Commission established an exchange rate among States. Trades from upstream diverters from New South Wales to Victoria and Victoria to South Australia were assigned a 1.0 exchange rate, which meant that 100% of entitlement could be transferred downstream. However, transfers from South Australia to upstream states of Victoria and New South Wales were assigned an exchange rate of 0.9 so that only 90% of the entitlement could be transferred. Nonetheless, in its draft advice on the Water Trading Rules, the ACCC has recommended that exchange rates should not be used to manage the trade of water-access entitlements of regulated river systems between trading zones, although it conceded that exchange rates may be appropriate in unregulated river systems where there is relatively low demand for trade. Instead, the ACCC has recommended a system of tagging according to the source of a water entitlement as the appropriate means to manage the trade of water allocations between trading zones. Tagging enables a water allocation to be automatically transferred to the account of a water user in a

132 Calculating conveyance losses for trade/transfer can be highly problematic: there is a need to consider climatic conditions, current level of the river and isolating the conveyance loss arising from trade/transfer as well as those that would occur without the trade/transfer.


135 ACCC, ‘Water Trading Rules Draft Advice’ (n 116) at 6.1.

136 Ibid at 6.3.3. The ACCC felt that because of the volatility of supply in unregulated water systems, risk to other users from trade could be better limited by capping the volume of what was traded by way of exchange rates.
designated area of destination. Hence tagging is designed to facilitate further trade rather than account for third-party impacts. However, as the ACCC concedes, interstate tagging has been inhibited by the failure to interlink Basin State water accounting systems.

The ACCC presented its advice on Water Trading Rules to the MDMA on 25 March 2010. The final advice will be released along with the much anticipated Basin Plan in late 2010.

7. Fair Dealing between Water Suppliers and Water Users

Once trading in water entitlements is established, the activity falls under the Australian Federal Parliament’s trade and commerce power and is, therefore, subject to the generalised rules of fair dealing contained in the Trade Practices Act 1974 (Cth). Most of the fair trading provisions in the Trade Practices Act 1974 (Cth) apply to corporations. Relevant examples for the purposes of this discussion include: (1) the prohibition upon misleading and deceptive conduct;

138 (2) the prohibition against false or misleading representations;

139 (3) the prohibition upon unconscionable conduct;

140 (4) the prohibition against accepting payment when unable to deliver;

141 and (5) the prohibition against coercion or harassment.

142 The provisions thus apply to incorporated water-infrastructure operators, such as irrigation corporations, incorporated operators of water exchanges and incorporated water brokers. Provided they are carrying on a business, the provisions also extend to Commonwealth authorities. Where the relevant entity is not a corporation, generally there will be a state Fair Trading Act equivalent.

143 In addition, if the recipient of the water entitlement or the recipient of water-trading services is classified as a ‘consumer’ certain conditions and warranties set out in Part V Division 2 of the Trade Practices Act 1974 (Cth) will be implied in the parties’ contract of trade.

Overall the provisions are designed to address flaws common to complex markets such as information asymmetry regarding the quality of goods and

137 Commonwealth of Australia Constitution Act (‘The Constitution’) s 51 (i).
139 Ibid s 53.
140 Ibid ss 51AA–AC.
141 Ibid s 58.
142 Ibid s 60.
143 Ibid s 2A. The fair dealing provisions of the Trade Practices Act 1974 do not bind State authorities: s 2B. State authorities are bound pursuant to Fair Trading Act equivalents. The state authority must also be engaged in trade or commerce.
144 The degree of equivalence will vary from State to State.
145 Trade Practices Act 1974 (Cth) s 4B classifies consumers as persons who acquire goods (the definition of goods includes water) where the price does not exceed $40,000 or where the goods were ordinarily acquired for personal, domestic or household use.
services between supplier and customer and the abuse of inequality of bargaining power. Markets cannot effectively function and allocate resources efficiently if individual dealings are tainted by misrepresentation, fraudulent practice or abuse of market power. Consequently, consumer dealings that are typically characterised by inequality of bargaining power and information asymmetry have minimum standards imposed as to quality of goods and services under Part V Division 2 of the Trade Practices Act 1974. Deceptive practice and unconscionable behaviour are prohibited between suppliers and customers regardless of status. There are a number of relationships in the water-trading market where the provisions or their Fair Trading Act equivalents will apply:

- Between water users, eg, irrigators and irrigation infrastructure operators;
- Between water users and water brokers or exchanges;
- Between water users;
- Between government authorities acting in trade and commerce,\(^\text{146}\) eg, environmental water managers or water authorities, and water users.

Provided a causal link can be established between a breach of one of the prohibitions outlined below and the harm suffered, the aggrieved party may initiate a claim for an injunction under s 80 of the Trade Practices Act 1974 (Cth) or damages under s 82 of the Trade Practices Act 1974 (Cth). Alternatively, the ACCC may initiate enforcement proceedings seeking fines\(^\text{147}\) or the payment of civil penalties.\(^\text{148}\)

A study conducted on behalf of the National Water Commission in 2007\(^\text{149}\) established that most water brokers and water exchanges in Australia were meeting the above standards and evidence of misconduct was not widespread. The study found that the majority of the reported cases of misconduct stemmed from a lack of standard industry documentation and fiduciary procedures. In terms of competency, the main complaints were that a number of brokers lacked familiarity with trading rules, failed to keep clients informed of key market events, failed to handle documentation appropriately and failed to ensure that sellers had sufficient water in their accounts to support trades. Problems were also observed in the manner brokers addressed State and rural water agencies. It appeared that there was a low level of awareness among traders and intermediaries about the rights and obligations of each party under

\(^\text{146}\) The exercise of a statutory power to consent to the transfer of a water entitlement is unlikely to be regarded as being in trade and commerce. However, if the government authority is itself engaged in the purchase or sale of a water entitlement then it would be engaged in trade and commerce: \emph{NT Power Generation Pty Ltd v Power and Water Authority} (2004) 219 CLR 90 [46]–[88] per McHugh ACJ, Gummow, Callinan and Haydon JJ interpreting Trade Practices Act 1974 (Cth) s 2B as to whether the PWA was engaged in carrying on a business.

\(^\text{147}\) Trade Practices Act 1974 (Cth) s 76.

\(^\text{148}\) Ibid s 77.

\(^\text{149}\) Ibid.
market regulations and approval processes. However, because these problems were largely associated with the embryonic nature of the water market, the National Water Commission concluded that a licensing regime for water intermediaries was not warranted and that the growth in water trading, increased competition among water traders, the formation of the Australian Water Agents Association, the development of derivative products in the water market and consequential application of financial services regulation under the Corporations Act 2001 (Cth), together with the fair trading provision of the Trade Practices Act 1974 (Cth) and Fair Trading Acts, were sufficient to minimise market failure.

8. Conclusion

The enactment of laws that enable the creation of tradable entitlements, prohibit barriers to trade such as exorbitant termination fees, minimise regulatory restrictions on transfer and impose fair dealing obligations on water-industry participants, have been identified as necessary pre-requisites for the development of a ‘mature’ water market. However, the fact that it has been almost 15 years since Australian governments committed to efficiency-based water reform and sustainable management of water resources demonstrates that political will, administrative innovation, the allocation of substantial funding to underwrite significant physical and managerial restructuring and cultural adaptability are also required to lay the foundation for legal reform and to assure the success of that legal reform.

Despite the 1994 Strategic Framework and the 2004 National Water Initiative, water markets have largely benefitted a small number of irrigation farmers although, acting as purchasers in the public interest to facilitate environmental flow, the Commonwealth and State governments have recently become significant market players. Past impediments to a broader and deeper national market outlined in this article include the constitutional devolution of regulatory power over water to State governments and the concomitant patchwork of differing rules governing the creation and trading of water entitlements, as well as the unwillingness of State governments to allow substantial volumes of water trading outside of irrigation districts. The co-operative federalism of the Water Act 2007 (Cth) is designed to deconstruct these barriers to trade and facilitate improvements in the specification, registration and trading of water entitlements, as well as address historical over-allocation of water resources at the expense of the environment. While

the new Act requires State water-management plans to conform to an overarching national water plan with significant reservation of water resources for the environment, it is important to remember that the Water Act 2007 (Cth) does not affect the power of the States to issue and define water entitlements. Rather, the major means by which the Act will unify water-trading regulation is by arming the regulator with various powers in relation to market impediments such as the power to make obstruction of the transformation of irrigation rights into tradable entitlements unlawful. Whether the demarcation between the regulatory role of the States as the providers of water entitlements and the regulatory role of the ACCC as the market police officer will work effectively has yet to be tested as a result of slow community-consultation processes that have underlain the drafting and implementation of the new market rules.

Current impediments to broadening the water market further include the high cost of the physical transfer of water, institutional segregation between regions, spatial and temporal variability in water supply and adverse third-party impacts where large amounts of water are transferred out of catchment areas. Beyond the Murray–Darling system, there has traditionally been little hydrological interrelationship between urban centres and between urban and rural regions. Because of the high cost of piping water relative to water value, regions have been principally supplied from localised supply sources such as dams. Apart from the substantial investment required to build the pipelines, there are considerable energy costs involved in pumping water across long distances. These costs have been exacerbated by Australia’s historically strict physical separation between potable supply systems and wastewater-treatment systems for reasons of public health.\(^\text{151}\)

However, as a result of government imprimatur imposed due to increased water scarcity, this is slowly changing. Water collection, wastewater and storm-water systems are becoming more complex, more diverse and more interconnected.\(^\text{152}\) Desalinated water, recycled water and independent household rainwater collection are increasing, and State and Commonwealth governments are beginning to invest in intra- and interstate water grids. South Eastern Queensland\(^\text{153}\) and Victoria\(^\text{154}\) have established water grids across

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152 Ibid.
regions to reduce critical water scarcity in parts of those States. These comple-
ment existing pipelines between Adelaide and the River Murray at Mannum,
and between Perth and Kalgoorlie. A number of urban water utilities are also
beginning to source water from irrigation infrastructure owners that hold
water entitlements. Along with substantial restructuring of water infra-
structure providers and water suppliers in some States, the creation of
intra-State and inter-State water grids makes it far more likely that robust mar-
kets in water trading will flourish once the regulatory framework for water
trading is fully implemented. The fact is that Australia needs these water mar-
kets to be successful and demonstrate unequivocally that water trading can
provide the significant economic, social and environmental benefits that it pro-
mised to deliver as well as securing critical human needs for the States.

155 Examples include the purchase by of water entitlements from Murray River irrigators by SA
Water and the purchase by the Western Australia Water Corporation of water from Harvey
Water, a private irrigators' co-operative. See further P Ker, 'SA Towns to Get the Water the
Murray Can't Buy' The Age, (17 September 2009); Allen Consulting Group, Saying Goodbye to
Permanent Water Restrictions in Australia's Cities (Infrastructure Partnerships Australia
2007) 15.