



Feedback to the
Australian Competition and Consumer Commission
Murray-Darling Basin water markets inquiry
Interim Report

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To the Director,

Thank you for the opportunity to provide feedback on the ACCC's Murray-Darling Basin water markets inquiry Interim Report, published on 30th July 2020.

The Murray Darling Association (MDA) commends the ACCC on a comprehensive and detailed report. The MDA supports the findings and recommendations contained in the report. The findings are salient, broad ranging and are consistent with those views and opinions expressed and resolved by our regions, our board and our member councils.

The options considered in your report are practical, achievable and if implemented will go a significant way to ensuring that the market operates more efficiently, sustainably, and fairly.

By extension, this will support a more efficient and sustainably implementation of the Basin Plan with particular benefit to its social and economic objectives.

The MDA notes the significant focus in the findings on the importance of Basin governments working together, and the need for adequate community consultation.

In this submission we have taken the liberty of highlighting the resolutions, position statements and advocacy work published over recent years by the MDA. We have done this to demonstrate the consistency of local government's attention and commitment to the matters and options considered by the ACCC in this investigation.

The Murray Darling Association would like to thank Commissioner Mick Keogh for his presentation to the membership of the MDA at our 76th national conference on September 15th, 2020.

About us

The Murray Darling Association is the peak body for local government in the Murray-Darling Basin, informing policy and contributing local knowledge and regional solutions since 1944. There are 167 councils that sit within the Basin and whose communities rely upon water from within the catchment.

The management of water is a matter that is of significant interest to local government. Local government has a direct and immediate relationship to the communities we serve; responsible for delivering core services, maintaining economic growth, resilience and community health and wellbeing.

The allocation, sustainability, availability, and affordability of water resources is recognised as a critical factor in the environmental, social, cultural, and economic health and stability of our nation as whole. This is never more applicable than across the rural and regional communities of the Murray Darling Basin.

Conduct of market participants

The ACCC considers there is insufficient regulatory oversight, and enforcement and compliance activity, in relation to some practices of some market participants

The ACCC's preliminary view is that market integrity regulation needs to be improved and that regulation should be introduced in the case of water brokers. Additional regulation could be introduced to cover other market participants such as investors and IIOs.

The ACCC has identified three options for improving market regulation:

- a) Introduce a government-initiated licensing scheme for intermediaries
- b) Apply the financial regulation framework to all water products, which would be relevant to the activities to a range of market participants
- c) Establish an independent market-focused government regulator, which would enable the regulation of market participants such as intermediaries, investors and IIOs.

Item 1: Feedback on options to improve market regulation

The MDA would support any combination of three of the options identified by the ACCC with specific focus on option c) ***Independent market-focused government regulator:***

Two key risk factors to market failure are of significant concern to the MDA:

- a) Asymmetric information, whereby an imbalance of information available to buyers v sellers cause economic inequity and potential disadvantage; and
- b) a lack of confidence in market systems or mechanisms that may have a chilling effect on full and equal participation.

These two risk factors are clear in the current arrangements of water trading in the Basin, constraining the water market from working to its greatest efficiency.

The MDA has been clear in our support for all water brokers to be licensed and regulated; and for investigation into the probity of brokers being able to hold and trade water on their own accounts; of representing both parties to a trade; for the creation of a single MDB water exchange; for mandatory price reporting, for justification of \$0 trades to be made mandatory on all trade registrations, and for increased transparency via live time trade reporting.”¹

The MDA supports the development of water market trading rules that limit or avoid adverse third-party impacts of investment in tradable water products by non-water using

¹ <https://www.mda.asn.au/source/ckfinder/files/Position%20Statement%20-%20MDA%20position%20on%20water%20market%20conduct%20and%20reform.pdf>

investors.²

We would like to see the Independent market-focused government regulator cover the conduct of market participants such as investors and IIOs as well as water brokers.

The conduct of market participants does not appear to be actively or consistently monitored. Any standards that market participants are currently being held to are opaque, and there is little if any accountability required of parties who operate in multiple markets to.

The MDA acknowledges that water investors can help irrigators free up capital by buying and leasing out water and can increase water market liquidity.

However, the MDA has consistently argued for the re-bundling of water to land and for strict control of any investment in the water market by non-water users.

In 2017, the MDA (a non-water-user) recognised the inconsistency of advocating for investigation into the methodologies that could inhibit the purchase and trade of water entitlements by market participants not involved in productive water and land uses; while actively holding and occasionally trading water. The MDA completed divestment of all water licences and entitlements held by the organisation in 2019 in order to ensure alignment between our position and our practice.

The MDA has called on the Federal Government to create a National Water Ombudsman with Federal jurisdiction to inquire, arbitrate, enforce, impose punitive measures and oversee amendments to state water legislation³, all sought with the objective of improving market regulation.

Improving trade processes and market transparency

The ACCC considers practical changes to trade processing are needed to improve the quality and timeliness of core market data

The ACCC has identified several practical improvements that, in its preliminary view, should be made as soon as practicable. These improvements relate to the validation and quality checking of trade data, including how zero dollar trades should be approved; capturing additional information in trade forms such as the reason for trade, struck date and intermediaries' details; and increasing harmonisation across Basin States' registers.

Item 2: Feedback on options to improve quality and timeliness of core market data

The MDA agrees that improvements must be made to tracking trade information to enhance access to and quality of core market data if confidence in the market is to be restored, or indeed established.

We agree that harmonisation of data capture, systems and reporting will be a key requirement to achieving greatest efficiency and transparency, with improvements to be made in a uniform manner across all basin states.

² Board Meeting 387 - Motion 5.1.2
[https://www.mda.asn.au/source/ckfinder/files/Minutes%20387%20\(combined\).pdf](https://www.mda.asn.au/source/ckfinder/files/Minutes%20387%20(combined).pdf)

³ 2018 AGM Motion 5.10 [https://www.mda.asn.au/source/ckfinder/files/2018%20AGM%20Minutes\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/2018%20AGM%20Minutes(1).pdf)

The MDA would be concerned that if such improvements were to be made at different stages and to different degrees across different Basin states then this would further contribute to the failure for market participants in “gaining a full, timely and accurate picture of water trade, including price, supply and demand”, serving in turn to further erode confidence in the water market.

The MDA has consistently called for the continual move toward transparency of all water trading and water trading mechanisms in the Murray-Darling Basin including the access to water trading information.⁴

The MDA has further called on Federal and State governments to

- i) Develop a transparent National Water Information Platform which will serve as a single source of information on water, from recovery targets to allocations, through to sales (whether permanent or temporary)
- ii) Require routine disclosure statements by larger water holders (such as any person or entity that owns upwards of 2% of available entitlements in an area or any water trading companies), and
- iii) Require routine disclosure by banks of any debts recovered through forced water sales in irrigation farming areas.⁵

The MDA has requested from the Minister for Agriculture and Water Resources and the MDBA a complete accounting of all water storages, including open channels, diversions and on-farm storages holding un-metered water in temporary storages, for public release.”⁶

And more recently the Murray Darling Association has called on the Basin Officials Committee and the Ministerial Council to establish and maintain consistent and equitable metering and measuring extraction across all states and regions, including flood plain harvesting, ground water extraction and river extraction.⁷

This indicates a strong and consistent level of unanimity across local government and communities to improve the quality and timeliness of core market data.

The ACCC considers practical changes need to be underpinned by clear and comprehensive mandates to provide efficient trade services and high quality information to market participants

The ACCC has also identified a suite of further changes required to achieve a consistent and comprehensive trade processing and market reporting framework:

⁴ 2019 MDA AGM Motion 5.15

[https://www.mda.asn.au/source/ckfinder/files/National%20Conference%20AGM%20Minutes%202019v2%20\(confirmed\).pdf](https://www.mda.asn.au/source/ckfinder/files/National%20Conference%20AGM%20Minutes%202019v2%20(confirmed).pdf)

⁵ 2019 MDA AGM Motion 5.16

[https://www.mda.asn.au/source/ckfinder/files/National%20Conference%20AGM%20Minutes%202019v2%20\(confirmed\).pdf](https://www.mda.asn.au/source/ckfinder/files/National%20Conference%20AGM%20Minutes%202019v2%20(confirmed).pdf)

⁶ 2019 AGM Motion 5.17 [https://www.mda.asn.au/source/ckfinder/files/2019%20AGM%20Motions%20on%20Notice\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/2019%20AGM%20Motions%20on%20Notice(1).pdf)

⁷ 2020 AGM Motion 5.7

[https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020(1).pdf)

- a) Legislative changes to require Basin States to keep registers of entitlement and allocation trades and for Basin State water registers to provide information services with clear publication requirements.
- b) IIOs should be required to establish and maintain registers for temporary and permanent trades, within, out and into their networks.
- c) Update Water Regulations 2008 (Cth) to more clearly specify data reporting requirements for trades of irrigation rights.
- d) Allow for contracts to be registered with or otherwise recorded in water registers such that all allocation trades arising under one contract can be identified together.
- e) Introduce standardised single party identifiers across the Basin, such as using ABNs.
- f) Standards and processes for processing trade applications and recording and disseminating trade data should be mandated and consistent across jurisdictions and apply to all IIOs and Basin State approval authorities. Standardised record-keeping and continuous disclosure rules should also be placed on intermediaries.
- g) Basin States should work towards harmonising allocation trade application fees in the Southern Connected Basin, while recognising the NWI principles for cost recovery.
- h) Basin Plan water trading rules should be revised to require prices to be reported for all tradeable water rights, including irrigation rights and water delivery rights.

Item 3: Feedback on options to provide efficient trade services and data collection

The MDA has consistently advocated for changes as identified in items a) to e) in the options above.

It is a common complaint of local government, irrigators and other stakeholders across the breadth of the water resource management sector that the number and diversity of agencies tasked with delivering upon the objectives of the Basin Plan has resulted in a sector that is overly complex and unwieldy.

This has contributed to an environment in which outcomes are uncertain, messaging from authorities is inconsistent if not outright contradictory, community engagement is repetitive and insular, and confidence in reporting and data presented is undermined.

Multiple agencies each report to different authorities, state, and federal governments, each having priorities, obligations and accountability requirements that are not always consistent and are often misaligned. This results in duplication and overlap, and lays open the risk of gaps in accountabilities and deliverables. Again, these issues emphasise the need for harmonisation of accounting and reporting systems and agencies across the jurisdictions.

The level of complexity in the sector has resulted in difficulty for both agencies and authorities to deliver effective marketing, messaging and communications leading to unnecessary cost and frustration across rural communities and other stakeholders.

Navigating the sector to engage with the right agency to access timely, relevant and accurate information to make effective decisions or to achieve a particular outcome can be a challenge, even for the most experienced.

In a 2014 submission to the Review of the Water Act 2007, the MDA recommended that a

body of work be undertaken to facilitate better alignment between the Commonwealth and the States, and state to state and to provide a level of uniformity or consistency across the water management sector. A key priority of the work should be to minimise.⁸

The MDA has previously made calls to “instigate a National Water Registry, to monitor and report on all rainfall, surface and groundwater storage, evaporation and capacity or movement, including flow rate and interstate or intervalley trade, extraction, unaccounted activity, licenses and allocation in real time, and inform the public in relation to foreign ownership of water assets and infrastructure.”⁹

This motion touches on how shortfalls in the provision of various types of information and inconsistency between information sharing of different states and departments contribute to inefficient trade services and market information.

The MDA acknowledges the experience reflected in the Interim reports which states “*Our efforts to gather and analyse trading data and other information to assess the impacts of market conduct make it clear that the current information and data collection arrangements across the Basin make analysis of market participants’ trading behaviour challenging. There is no institution responsible for, or capable of, gathering the necessary data to effectively monitor trading behaviour in the Basin. Better data collection and coordination across the Basin would be central to better market oversight.*”

The MDA would like to re-iterate what the interim report noted and add that if the Commission is finding such activities challenging then how are market participants supposed to trust water markets and therefore participate in the most efficient way possible.

In addition to this motion the MDA endorsed recommendation 8 from the *Submission to Assessment of Take and Protection during First Flush Flows in the Northern Basin*: “Improve flow forecasting modelling and real-time monitoring capability, including measurement of extractions and the hydrometric system for inflows and monitoring end of system flows.”¹⁰

Consistent hydrological monitoring and measuring, especially of overland flows and floodplain storages and diversions are foundational requirements to accurate reporting and the provision of high quality information to market participants, and for market regulators.

The ACCC considers digital technologies offer the opportunity to streamline trade services, at the same time as improving information quality and availability

The ACCC has identified options for using technological change to make more substantial improvements to improve the integrity of Basin water markets. The ACCC’s preliminary view is that while governance remains distributed between Basin States and other actors, options which deliver *harmonisation* and *co-ordination* are more suitable than options which deliver *centralisation*. This approach could be achieved by combining the following options:

⁸ MDA Submission to the Select Committee on the Murray-Darling Basin Plan to the Committee Secretariat - 29 September 2015

⁹ 2018 AGM Motion 5.9 [https://www.mda.asn.au/source/ckfinder/files/2018%20AGM%20Minutes\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/2018%20AGM%20Minutes(1).pdf)

¹⁰ Submission to Assessment of take and protection during first flush flows in the Northern Basin [https://www.mda.asn.au/source/ckfinder/files/MDA%20-%20Submission%20to%20Northern%20Basin%20First%20Flush%20Assessment%20\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/MDA%20-%20Submission%20to%20Northern%20Basin%20First%20Flush%20Assessment%20(1).pdf)

- a) a digital protocol that enhances interoperability between Basin State approval authorities and registers, IIOs and exchanges, and automates the collection, cleaning and publishing of water market information
- b) a water market information platform which brings together (but does not replace) diverse information sources.

Other options for using technological change include:

- a) a spot market and real-time automated matching of buyer and seller offers, similar to the National Electricity Market
- b) a single exchange platform for posting and matching trade offers by creating a single mandatory online platform for matching buyers and sellers
- c) an ASX-like approach of a single clearinghouse to administer trade but connecting via interoperability protocols to trading platforms and different Basin State registers
- d) Distributed Ledger Technology, such as Blockchain, which administers trade through smart contracts and also records all registry information
- e) a single common register in which all water accounting for both trade and delivery (use) would be accounted for in the same, single system.

Item 4: Feedback on digital technology options

The MDA has consistently argued for a comprehensive database of all water related information for the entire country that is easy to use and capable of compiling reports regarding water movement and use across the nation, including foreign ownership information tracking and reporting, in the interests of security of future water supply for communities and industry and being able to plan for future events such as extended dry periods.

We know that there are effective digital technology options available that can serve this need, as demonstrated by the reliable operation of stock markets, financial markets, weather tracking and forecasting etc.

The MDA is not appropriately qualified to comment on specific digital technology options, however our members have, as various times considered the merits of combinations of all the options noted above.

The ability to combine multiple state databases into a one stop shop, which is easy to use and can adhere to standards, privacy and ensure secure data will drive confidence in the market.

As well as a commercial function, foreign investors and the Australian public and regulators need to ensure that investment is in line with current legislation pertaining to percentage of foreign ownership.

By providing accurate, current information and transparency, there can be greater certainty in the international and domestic market and in the wider public arena, that investment is supportive of Australian industry as a priority.¹¹

¹¹ 2018 MDA Annual General Meeting Motion 5.9

Improving market architecture

The ACCC considers the design of the southern connected Basin market architecture has not kept pace with increasing trade activity, and the ACCC is seeking to identify options for reform

The ACCC considers that market architecture that better integrates trade, operational requirements and the physical characteristics of the system will improve the operation of water markets. This will help achieve a range of benefits, including properly pricing the costs of trade and protecting other water users and the environment.

The ACCC is identifying appropriate market architecture reform options, which might include:

- a) Improvements to policy transparency and consultation processes
- b) Alternative approaches for allocation and carryover policies
- c) Creating formal markets for storage and delivery capacity
- d) Applying transmission loss factors to water deliveries in the southern connected Basin
- e) Removing the exemption for grandfathered tags or removing entitlement tagging altogether
- f) Alternative and more dynamic mechanisms to manage inter-valley trades
- g) Changing all allocation trade to tagged allocation trade
- h) Improving consistency across Basin States' accounting and metering requirements.

Item 5: Feedback on options to improve market architecture

The MDA welcomes the reform options outlined above as an excellent reflection of the options considered across our members group over time, and captured in the various decisions, resolution and submission referenced in the sections above.

Demonstrating an approach to market architecture that is balanced and supports social, economic, and environmental sustainability, the MDA has called for the ACCC to establish a water trading system that responsibly optimises (not maximises) the economic performance of irrigated agricultural communities (not only farms).¹²

Changes to market governance

The ACCC considers there is a need to reconsider governance frameworks to enable independent and clear decisions on the development of market settings

The ACCC considers improved governance will help resolve many of the issues identified throughout the inquiry and strengthen the system so fewer problems emerge in the future.

The ACCC is considering options to improve market governance that may seek to:

- a) establish clear, independent decision making structures

¹² 2020 AGM Motion

5.17[https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020(1).pdf)

- b) separate market governance roles from broader water management governance
- c) consolidate or harmonise fragmented roles
- d) reduce regulatory gaps by creating and assigning new roles or functions
- e) address conflicting roles.

Item 6: Feedback on options to improve market governance

Much has been made of the importance of sound governance frameworks to achieve reliable outcomes in complex policy reform, all of which the MDA has contributed actively to:

- Keelty Report: Impact of lower inflows on state shares under the Murray–Darling Basin Agreement (Interim Inspector-General of Murray–Darling Basin Water Resources, 17 April 2020)
- Murray-Darling Basin Plan: Five-year assessment, Inquiry report (Productivity Commission, 19 December 2020)
- Sefton’s Report: Independent Assessment of Social and Economic Conditions in the Murray-Darling Basin Draft Report (Independent Panel Report, 16 March 2020)
- Murray-Darling Basin water markets inquiry Interim report (Australian Competition and Consumer Commission, 30 June 2020)
- Independent Review of Lower Lakes Science Informing Water Management (Independent Panel Report, 29 April 2020)
- Matthews Report: Independent investigation into NSW water management and compliance (NSW Department of Industry, 24 November 2017)¹³

The ACCC has clearly identified in items a) – e) above the ‘first principals’ required to establish functional and accountable governance arrangements.

We hold firmly that if you get the governance framework and the process right, the outcomes will follow!

Other comments

Please provide any other feedback you consider relevant to the ACCC’s inquiry.

Item 7: Other Comments Feedback

The MDA is of the view that one of the most significant and fundamental risks to the effective reform of Australia’s water resources sector is the combination of the omission of local government from any formal role in the institutional and governance arrangements of the Plan, and the absence of an agreed and meaningful framework and process for community consultation.

Local government has the skill and institutional capacity to inform policy development, including water market policy, and has rich and established regional networks that offer an invaluable interface and an effective resource for state and federal policy makers.

Having a 2/3 government approach to formulating and establishing the Basin Plan has cost all levels of government and our communities significant financial, social, and emotional

¹³ AGM 2020 Motion 5.12

[https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020(1).pdf)

cost. The MDA recommends that local government be afforded a formal role in the implementation of the Plan and long-term management of the shared water resources.¹⁴

Unbundling

No submission to the inquiry into water market trade and reform would be complete without reference to the impacts of unbundling, or the access to water independent of land, widely regarded as the pre-requisite condition for a water trading market.

With the agreement in 2004 to create *nationally compatible* and secure water access entitlements, separate to land under the National Water Initiative (NWI)¹⁵, and The Water Act 2007 providing the Minister with the power to make the Rules to ensure that water markets in the Basin operated efficiently without inappropriate barriers to trade,¹⁶ it is fair to say that Australia's journey into an efficiently functioning water market was perhaps ambitious and lacked the appropriate checks and balances to avoid unintended adverse impacts.

In 2015 the Murray Darling Association sought a formal investigation into the effects of speculation by non-productive holders of water licenses in the Murray Darling Basin; suggested methodologies that could inhibit the purchase of water licenses solely for speculative purposes as opposed to productive use; and a report on the costs and benefits of reappropriation of water licenses to land ownership.¹⁷

Members and stakeholders of the MDA have consistently heard feedback seeking the reappropriation of water to land, with the overwhelming feedback from our members indicates an appetite for water to be reappropriated as a means to address the inequities of our current water management and trading environment, and to provide greater security of water to productive use and environment.

While not specifically advocating for the absolute repeal of unbundling, the MDA recommends that greater controls should be established to reappropriation such water products to land as may be required to

- a) Provide water security for the sustainable farming futures and productive capacity to serve Australia's long term future.
- b) Avoid water use arrangements that replicate the effects, if not the system of 'prior appropriation' or 'first in time, first in use' as experienced in the Unites States with often devastating environmental, social, economic and health outcomes; and
- c) Minimise adverse impacts of water recovery required to restore the environmental flows, health and wellbeing of our river systems.

¹⁴ AGM 2020 Motion 5.8

[https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/MDA%20National%20Conference%20AGM%20Minutes%202020(1).pdf)

¹⁵ ACCC Article in the SA Law Society Journal on Water Market Rules and Water Charge Rules

https://www.accc.gov.au/system/files/ACCC%20Article%20in%20the%20SA%20Law%20Society%20Journal%20on%20the%20Water%20Market%20Rules%20and%20Water%20Charge%20Rules_0.doc

¹⁶ Water Bill 2007, Second Reading Speech, 27 August 2008. The Water Act also provides for the MDBA to make water trading rules as part of the Basin Plan: see item 12 in s. 22 and s. 26 of the Water Act.

¹⁷ AGM 2015 Motion 5.5 [https://www.mda.asn.au/source/ckfinder/files/AGM%20Minutes%2010th%20September%202015%20-%20DRAFT\(1\).pdf](https://www.mda.asn.au/source/ckfinder/files/AGM%20Minutes%2010th%20September%202015%20-%20DRAFT(1).pdf)

The MDA would further welcome the development of communications and educational content targeted to support the development of higher levels of water literacy and increase understanding and awareness of the role and operation of water market for interested stakeholders.

The MDA would again like to thank the Commission for the opportunity to provide feedback on what we hold to be a sound and detailed report that considers a broad range of options that align strongly with positions and priorities advocated by the members of this organisation. We are hopeful that the ACCC's findings will result in a swift and comprehensive overhaul of the rules, conditions and governance frameworks that regulate water trade, providing confidence and clarity to better support our broader water reforms.