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9 March 2020

Senator Slade Brockman
Chair of the Senate Select Committee on the Multi-Jurisdictional Management and
Execution of the Murray-Darling Basin Plan
PO Box 6100
Parliament House, Canberra ACT 2600

By email: murraydarlingplan.sen@aph.gov.au

Dear Senator

ACCC submission to the inquiry into the multi-jurisdictional management and execution of the Basin Plan and Constitution Alteration (Water Resources) 2019 bill.

Thank you for your invitation to make a submission to the inquiry into the multi-jurisdictional management and execution of the Basin Plan.

As you are aware, the Australian Competition and Consumer Commission (ACCC) is currently conducting an inquiry into markets for tradeable water rights in the Murray-Darling Basin under Part VIIA of the *Competition and Consumer Act 2010* (Cth).

The Senate Committee's December issues paper highlights the potential for considerable overlap in the matters to be considered and the findings and recommendations of the Senate Select Committee and the ACCC inquiries.

For this reason, we provide the following submission in order to:

- provide information on the process and timelines for the ACCC inquiry
- highlight areas of overlap between the two inquiries
- note that, as the ACCC's inquiry is in progress, the views the ACCC can share with the Senate Select Committee at this time are limited ; and
- outline the roles and functions of the ACCC.

Thank you for providing this opportunity to comment.

Yours sincerely

Mick Keogh
Deputy Chair



ACCC submission to the Senate Select Committee on the Multi-Jurisdictional Management and Execution of the Murray-Darling Basin Plan

March 2020

Process and timelines for the ACCC inquiry into water markets in the Murray-Darling Basin

Matters to be considered under ACCC Inquiry direction

On 8 August 2019 the Treasurer directed the ACCC to hold an inquiry into markets for tradeable water rights¹ in the Murray-Darling Basin (the ACCC inquiry).

Matters to be taken into consideration by the ACCC inquiry include:

- market trends since 2012, including demand for water, changes in the location where water is used, the quantity of water traded, water availability, changes in water users and their communities, development of new trading products, and the number of participants and sectors participating in the water markets
- the role of carryover arrangements, and the trading of water allocations which have been carried over, on water markets
- the role and practices of market participants, including water brokers, water exchanges, investment funds and significant traders of water allocations and entitlements
- the availability to the public of information on water market activities and tradeable water right holdings
- the timeliness, accuracy, and completeness of public information released on water market activities and tradeable water right holdings, including true trade price reporting and the types of trade (for example, immediate purchases, forward contracts, leases)
- barriers to entry, expansion and exit, including transaction costs
- the management of constraints on the storage or delivery of water, including adjustments made to give effect to trades and inter-valley transfers.

The ACCC is directed to recommend options to enhance markets for tradeable water rights relating to water in the Murray-Darling Basin, including options to enhance the markets' operations, transparency, regulation, competitiveness and efficiency.

The full terms of reference for the ACCC inquiry are available on our website:

<https://www.accc.gov.au/focus-areas/inquiries-ongoing/murray-darling-basin-water-markets-inquiry>.

Areas of overlap between the Senate inquiry and the ACCC inquiry

The Senate Committee's issues paper highlights the potential for considerable overlap in the matters being considered by the Senate Select Committee and the ACCC Inquiry.

Chapter 4 of the Senate Committee's issues paper provides contextual information on water trade, including a number of questions for consideration by the Committee that relate to water trade:

- whether the water market functions efficiently and transparently

¹ For the purposes of s.95J(1), the goods or services in relation to which the inquiry is being held are:

- (a) Tradeable water rights
- (b) Services facilitating the trade of tradeable water rights, including those offered by water market intermediaries; and
- (c) Infrastructure services in relation to tradeable water rights.

- whether there are any unintended consequences of water trade and how these are being managed by governments
- whether there is scope for improvements in existing water trade arrangements generally.

Further, in the Executive Summary, the Senate Committee's issues paper sets out a series of questions for consideration by the Committee across five general themes. Many of these questions are relevant for the ACCC inquiry to the extent that they address the operation and administration of water markets and trade. Examples include:

Adequacy of information

- What challenges exist in tracking and accounting for water volumes and use across the Basin?
- What improvements could be made to improve the scope, accuracy and accessibility of data?
- Is it feasible to introduce a central public source of information for the Murray-Darling Basin?
- What additional information or data would assist stakeholders in better understanding and meeting their obligations under the Basin Plan?
- How can accuracy, efficiency and transparency of water trading be improved?
- What are the potential merits and drawbacks of introducing a single Basin-wide water trading platform and Water Register?

Complexity of current Basin Plan governance arrangements

- Do jurisdictional differences create unnecessary complexity and inconsistency, or increase potential for compliance breaches?
- To the extent that such complexity is unavoidable, how can this complexity best be managed?
- Should the Commonwealth have greater powers to manage the Murray-Darling Basin?
- What are the benefits and drawbacks of a large number of entitlement types?

Compliance arrangements

- Do the Commonwealth and the states have adequate powers, resources, and information to monitor and enforce compliance?
- Is it feasible to develop uniform sanctions and penalties across the Basin?
- Do the existing licencing and regulation frameworks for water brokers provide sufficient protection for traders?

Public consultation

On 17 October 2019, we released an issues paper, which set out five key areas of focus:

- market trends and drivers: the factors driving changes in water markets and water prices
- market transparency and information: how market participants engage with market information, and whether water markets are sufficiently transparent

- regulation and institutional settings: how market regulation, regulatory agencies and policy differences between states and trading zones have affected water markets
- market participant practices and behaviours: how the practices and behaviours of different market participants and interested parties impact water markets
- competition and market outcomes: the extent to which the objectives of water markets have been achieved, and how overall market competition and efficiency have changed over time.

In November 2019 we held public forums across the Murray-Darling Basin. Approximately 800 people attended across the 10 locations.

We also invited submission from the public in response to the issues paper. Over 130 people and organisations made submissions, including irrigators, industry representative groups, infrastructure operators, environmental groups, indigenous representative groups, government bodies and members of the public. The submissions have been published on the ACCC website in accordance with the *Competition and Consumer Act 2010 (Cth)*, (CCA).²

Reporting timeframes

We are required to submit an interim report to the Treasurer by 31 May 2020 and a final report to the Treasurer by 30 November 2020.

The ACCC will publicly release the interim and final reports as soon as practicable after the expiry of 28 days from when the report was provided to the Treasurer, unless directed otherwise by the Treasurer. The final report will contain recommendations on measures that can be taken to improve the operation of markets for tradeable water rights in the Murray-Darling Basin.

ACCC inquiry process and timeframes preclude sharing views at this time

While the potential for some overlap suggests that there would be benefit from co-ordinating with the Senate Select Committee, the ACCC can share limited views on these matters until its inquiry runs its course. Collecting, processing, analysing and interpreting information, including detailed trade data, is an involved and time-consuming process. The ACCC is unlikely to reach settled views on key issues and recommendations until it finalises its reports.

In light of these constraints and the timeline of our inquiry, we are not in a position to further address the substantive matters raised in the Senate Select Committee's issues paper at this time.

We encourage the Committee to look to our interim report, due to the Treasurer by 31 May 2020, for our early analysis and discussion of matters common to the two inquiries. Similarly, we will be interested to read the findings and recommendations of the Senate Select Committee ahead of providing our final report to the Treasurer on 30 November 2020.

² The ACCC has published submissions received in accordance with s.95R(6) subject to any confidentiality claims established under s.95ZN of the CCA: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/murray-darling-basin-water-markets-inquiry/submissions>

Ongoing roles and functions of the ACCC in relation to water and the Murray-Darling Basin

The ACCC is an independent Commonwealth statutory authority promoting competition and fair trade in markets for the benefit of all Australians.

Under the CCA the ACCC administers competition and consumer laws applicable to all businesses, including the water industry. These laws include provisions prohibiting false and misleading representations and conduct, unfair contract terms, misuse of market power, price fixing and cartel behaviour.

Under the *Water Act 2007* (Cth), the ACCC has a number of roles in the Murray–Darling Basin. The ACCC monitors and enforces compliance with the water charge and market rules, assesses regulated water charges, transformations and terminations, and prepares an annual water monitoring report for the Minister. These functions are described further below.

Where regulation is effective and trade is well-developed, water markets are an efficient means of allocating scarce water resources between competing uses.

The performance of the ACCC's Water Act functions, along with concurrent water reforms implemented by other Commonwealth and Basin State agencies, has facilitated the development of more efficient water markets within the Murray-Darling Basin by reducing and removing barriers to trade and improving information available to water users on the charges they pay.

Monitoring and reporting Monitoring and reporting on regulated charges and compliance with water market and water charge rules

The water charge and market rules largely apply to infrastructure operators (IOs). Due to their monopoly position, IOs can, and have incentive to, prevent or unreasonably delay trade or transformation requests and increase the cost of termination.

Our monitoring is an important source of information on how an IO's charges compare to similar operators. It can highlight if IOs exercise their market power over irrigators and other customers and help policy makers determine whether there is a need to regulate.

The ACCC's water monitoring report uses a range of information sources to assess the state of the water market and regulated water charges, including data collected from IOs and Basin states, and information published by government agencies, academia and industry consultants. The latest report is available on the ACCC website.

Enforcing the water market rules and water charge rules

The ACCC is responsible for enforcing compliance with the water market rules and water charge rules. The Water Act provides a number of enforcement options to address non-compliance, including infringement notices, court enforceable undertakings.³ Any infringement notices imposed or undertakings received are held on a public register on the ACCC's website⁴. The Water Act empowers the Federal Court to make a range of orders in relation to a contravention. This includes imposing penalties for certain contraventions and make findings of fact enabling irrigators to seek damages.

³ *Water Act 2007*, section 100A. The ACCC's approach to enforcing compliance with the water market rules and water charge rules is set out in the ACCC Enforcement Guide to the Water Rules

⁴ <https://www.accc.gov.au/public-registers/undertakings-registers/s163-undertakings-register>

Following amendments in 2019 to the water charge rules, ACCC is implementing new Schedule of Charge requirements for operators. Customers, including irrigators, will benefit from increased protections and transparency regarding what charges they are required to pay and why.

Preparing policy advice for the Minister on the water market and charge rules

Under the Water Act, the Minister may make water market rules and water charge rules. Before making or amending these rules, the Minister must ask the ACCC for advice.

Since 2007, the ACCC has provided advice to the Minister on the making of water market rules and three sets of water charge rules.

In 2016, the ACCC provided advice to the Minister on a review of the Water Charge Rules. Based on this advice, the Minister amended the water charge rules and combined the three sets of rules into the Water Charge Rules 2010. The amending rules are available on the Federal Register of Legislation and take effect on 1 July 2020.

In the time since the rules were made, the ACCC has worked closely with Basin States and the irrigation sector to ensure successful implementation and compliance.

Providing advice to the Murray-Darling Basin Authority

Water market trade in the Murray-Darling Basin is regulated under the Basin Plan water trading rules, which came into effect on 1 July 2014. These water trading rules are enforced by the Murray-Darling Basin Authority.

The rules provide clarity and consistency across jurisdictions for the operations of the water market in the Murray–Darling Basin and aim to ensure free trade in surface water, except where there are defined allowable restrictions. The rules also require information to be made available about the characteristics of different allocations and entitlements, trading prices and the trading rules used by the states and irrigation infrastructure operators, among other requirements.

Under the Water Act, the Murray-Darling Basin Authority must obtain and have regard to the advice of the ACCC when preparing or amending the Basin Plan trading rules.