



Australian
Competition &
Consumer
Commission

Water trading rules—advice on amendments

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Australian Competition and Consumer Commission
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Abbreviations

ACCC	Australian Competition and Consumer Commission
BPWTR	Basin Plan water trading rules
CEWH	Commonwealth Environmental Water Holder
GL	gigalitre
IIO	irrigation infrastructure operator
MDB	Murray–Darling Basin
MDBA	Murray–Darling Basin Authority
ML	megalitre
NSW	New South Wales
NWI	National Water Initiative
SDL	sustainable diversion limit
WAE	water access entitlement
WAR	water access right
WCIR	Water Charge (Infrastructure) Rules 2010

Glossary

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

Basin State	New South Wales, Victoria, Queensland, South Australia or the Australian Capital Territory.
Basin water resources	all water resources within, or beneath, the Murray–Darling Basin, but not including: <ul style="list-style-type: none"> (a) water resources within, or beneath, the Murray–Darling Basin that are prescribed by the regulations. (b) groundwater that forms part of the Great Artesian Basin.
groundwater	<ul style="list-style-type: none"> (a) water occurring naturally below ground level (whether in an aquifer or otherwise), or (b) water occurring at a place below ground that has been pumped, diverted or released to that place for the purpose of being stored there, <p>but does not include water held in underground tanks, pipes or other works.</p>
irrigation right	a right that a person has against an irrigation infrastructure operator to receive water that is not a water access right or a water delivery right.
irrigation infrastructure operator	an infrastructure operator that operates water service infrastructure for the purposes of delivering water for the primary purpose of being used for irrigation.
infrastructure operator	a person who owns or operates infrastructure for the storage; delivery; or drainage of water (water service infrastructure) for the purpose of providing a service to someone who does not own or operate the infrastructure.
National Water Initiative	the inter-governmental agreement on a national water initiative between the Australian Government and the governments of New South Wales, Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory.
regulated system	means a surface water system in which water in a watercourse can be stored or flow levels can be controlled, through the use of structures such as large dams or large weirs.
surface water	includes water in a watercourse, lake or wetland, and any water flowing over or lying on land after having precipitated naturally or having risen to the surface naturally from underground.
the Act	<i>Water Act 2007</i>
tradeable water rights	water access rights, water delivery rights or irrigation rights.
transmission loss	water lost to evaporation, seepage, over bank flow etc. along the length of natural water courses. Losses vary with in-stream flow volumes and individual water course characteristics.

unregulated system	means a surface water system that is not a regulated system.
water access entitlement	a perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area.
water access right	any right conferred by or under the law of a state or territory to hold water from a water resource and/or take water from a water resource.
water allocation	the specific volume of water allocated to water access entitlements in a given water accounting period.
water delivery right	a right to have water delivered by an infrastructure operator.

Summary

This document sets out the ACCC's advice on a range of technical amendments to the Basin Plan water trading rules (BPWTR). These amendments relate to four specific areas of the rules. The ACCC's advice in each of these areas is summarised below.

Rule 12.18 – 'hydrologic connections and water supply considerations' and 'hydraulic connectivity'

BPWTR 12.18 provides that, despite BPWTR 12.16 and 12.17 (which prohibit certain kinds of restrictions on trade of water access rights), a restriction may be allowable if it is for one of the reasons listed in 12.18.

The ACCC's advice was requested on whether the list of reasons in BPWTR 12.18 would encompass a restriction deemed necessary for reasons of low or intermittent hydrologic connectivity between river reaches (e.g. within an unregulated system). Advice was also requested on the merits of the list of reasons set out in BPWTR 12.18 continuing to include a reference to 'hydraulic connectivity' (as currently defined), given that BPWTR 12.18 relates to trade in surface water systems only, but the term 'hydraulic connectivity' is defined in section 1.07 in a "groundwater only context".

The ACCC's advice on these issues is:

- (a) a restriction deemed necessary for reasons of low or intermittent hydrologic connectivity between river reaches falls within the notion of 'transmission loss', which in turn forms part of 'hydrologic connections and water supply considerations' (an allowable reason for a restriction under BPWTR 12.18). However, an amendment would put this beyond doubt.
- (b) the reference to 'hydraulic connectivity' should be retained in BPWTR 12.18, although the definition of the term should be reviewed.

Interaction between rules 12.16 and 12.17

BPWTRs 12.16 and 12.17 prohibit certain kinds of restrictions on trade of water access rights in surface water systems.

The ACCC considers that BPWTR 12.17 was intended to be, and should be viewed as, a specific subset of the matters covered by 12.16, which was included as a stand-alone rule in order to unequivocally address the matter of the "4 per cent limit"¹ on permanent trade, which

¹ At the time when the BPWTR were being formed, Victoria had in place a "4 per cent limit" which had the effect of capping the total volume of water access entitlement that could be permanently traded for use outside of a particular area, to 4 per cent of the volume of water access entitlements associated with the relevant area. These, and other similar limits in the MDB, were originally introduced to address concerns about stranded assets and the overall viability of specific irrigation areas or districts.

In its Final Advice on the development of the BPWTR, the ACCC considered that the 4 per cent limit has "a number of negative effects, including:

- preventing water moving to its highest value use
- artificially segmenting the water market

Footnote continues on next page.

was a controversial issue at the time the BPWTR were made. However, given that other interpretations are possible, to put this relationship beyond doubt the ACCCs advice is that amendments be made to amalgamate BPWTRs 12.16 and 12.17, and amend the definition of “restrict” (in section 1.07 of the Basin Plan) to make clear that “restrict” includes “impose a volumetric limit”.

This approach will ensure that the original intent of these rules—that the circumstances currently covered by BPWTR 12.17 should be viewed as a ‘specific case’ of the kinds of restrictions dealt with in 12.16—is upheld.

The MDBA also requested advice in relation whether these rules apply to volumetric limits in unregulated systems. The ACCC considers that the amendments outlined above will make clear that the application of a volumetric limit on trade within an unregulated system is a restriction of a kind covered by BPWTR 12.16. As such, this kind of restriction would only be allowable if it was deemed ‘necessary’ for a reason listed in BPWTR 12.18, and if it was deemed consistent with subdivision A of the rules.

Consequential amendments to Rule 12.47(5) required due to review of water charge rules

BPWTR 12.47(5) references Rule 15 of the Water Charge (Infrastructure) Rules 2010 (Cth) (WCIR). Given proposed amendments contained in the ACCC’s recent review of the WCIR and other Commonwealth water charge rules, the ACCC’s advice is that BPWTR 12.47 should be amended to remove references to rule 15 of the WCIR, and instead insert the relevant criteria directly (taken from WCIR 15).

This approach will ensure that the current operation of BPWTR 12.47 is not altered by any amendments to the WCIR. This is consistent with the original intent and the ACCC’s original rule advice for this rule.

Application of rule 12.09—take and use of water after a trade

BPWTR 12.09 provides that ‘a person may take and use water under a water access right free of any restriction arising from the fact that the person acquired the water access right by way of trade’. The ACCC’s advice was requested on the scope and application of BPWTR 12.09, and whether BPWTR 12.09 has a wider application than anticipated, which could lead to unintended water management outcomes.

The ACCC has identified that BPWTR 12.09 is considerably different from the original ACCC advice from which this rule was formed, in particular due to the use of the phrase “arising from the fact that the person acquired the water access right by way of trade” (which differs considerably from the language used in the original rule advice).

The ACCC considers that amendment of BPWTR 12.09 may ultimately be warranted, but that amendments are likely to be substantive in nature. Also, the ACCC considers that a reassessment of the policy intent of this rule would be prudent. Further, any amendments to

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

See ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, pp.89-96.

12.09 are likely to impact on other similar rules. Based on these considerations, the ACCC's view is that it is not appropriate to make rule advice in relation to BPWTR 12.09, but instead has recommended that the MDBA defer consideration of these matters until substantive amendments are open for consideration. The ACCC has further recommended matters MDBA should take into account when considering substantive amendments to this rule.

About this Advice

Under the *Water Act 2007*² (the Act) the Australian Competition and Consumer Commission (ACCC) has a role advising the Murray–Darling Basin Authority (MDBA) about the development of the water trading rules component of the Basin Plan.

The ACCC has made 'rule advice' where it considers that a minor and technical amendment can and should be made to a Basin Plan water trading rule, which would facilitate the development of an efficient water trading regime across the MDB.

The ACCC has made 'recommendations' where it considers that there may be merit in making amendments, but where amendments are not 'minor and technical' in nature, and so would require further analysis and consultation.

The ACCC has not comprehensively considered future possible amendments—rather, the ACCC's rule advice and recommendations relate to areas where advice was specifically requested by the MDBA.

The ACCC's rule advices are **not** draft rule amendments. Rather, they are the ACCC's view of what an amendment to the Basin Plan water trading rules should seek to achieve. The ACCC notes the MDBA will draft amendments to the Basin Plan water trading rules having regard to the ACCC's advice.

This advice has been developed within the legislative framework set out in the Act. In particular, the ACCC has considered the way in which the existing water trading rules, and possible amendments, can contribute to the achievement of the Basin water market and trading objectives and principles contained in Schedule 3 of the Act. The objectives and principles have informed the ACCC's analysis in this advice.

² Unless otherwise described, all legislation referred to in this document is Commonwealth legislation.

Rule advice and recommendations

Rule 12.18(d) – ‘hydrologic connections and water supply considerations’ and ‘hydraulic connectivity’

Rule advice A (*see section 2*)

To avoid potential uncertainty, the Basin Plan water trading rules should be amended to clarify that the defined term ***hydrologic connections and water supply considerations***, as set out in BPWTR 12.18(2), *would* extend to a situation where there is no hydrologic connectivity between two locations for a period of time.

In particular, the amendment should make clear that the concept of ‘transmission loss’ includes where actual or expected transmission losses between two locations are 100 per cent (i.e. no flow from location A would reach location B) at a particular point in time, or during a particular time period.

Rule advice B (*see section 2*)

The term ‘hydraulic connectivity’ should be retained on the list of reasons set out in BPWTR 12.18.

Recommendation A (*see section 2*)

The MDBA should consider amending the definition of the term ‘hydraulic connectivity’ to clarify that this term would encompass the ease with which, or the rate at which, water moves from adjacent or overlying surface water system(s) into aquifers.

Interaction between rules 12.16 and 12.17

Rule advice C (*see section 3*)

The Basin Plan water trading rules should be amended:

- to provide that the term ***restrict*** (as defined in section 1.07 of the Basin Plan) includes ‘impose a ***volumetric limit***’;
- to add a subrule to 12.16 expressly clarifying that a restriction in 12.16(1) includes a restriction in the form of a volumetric limit;
- to move the definition of ‘volumetric limit’ from 12.17(2) to 12.16; and
- to repeal 12.17.

Consequential amendments to Rule 12.47(5) required due to review of water charge rules

Rule advice D (see section 4)

Basin Plan water trading rule 12.47 should be amended to remove references to rule 15 of the Water Charge (Infrastructure) Rules 2010. This rule should instead directly specify that the existing rule requirements in 12.47(5) apply to an *irrigation infrastructure operator, if the sum of the maximum volume of water from Basin water resources in respect of which the operator provides infrastructure services in relation to:*

- (a) *water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water); and*
- (b) *water access entitlements held by its customers; and*
- (c) *water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator:*

is at least 10 GL.

Note: In this section the maximum volume of water refers to that held under water access entitlements.

Application of rule 12.09—take and use of water after a trade

Recommendation B (see section 5)

- The MDBA should consider further the merits of making substantive amendments to BPWTR 12.09 to more clearly give effect to the policy intent that the take and use of water to which a water access right relates should not be restricted *solely because* the water access right is, or has been, traded.
- In considering possible amendments to BPWTR 12.09, further analysis of the specific ways in which Basin States currently specify extraction conditions, and the roles these conditions have in Basin States' overall water management frameworks, should be undertaken.
- The MDBA should also consider whether its guidance material on BPWTR 12.09 can be clarified. Clarification may be warranted even in the event that no amendments are made to this rule.

Recommendation C (see section 5)

- In considering possible amendments to BPWTR 12.09, the relationship between BPWTR 12.09 and 12.12 should be carefully considered.
- If BPWTR 12.09 is amended, consideration should be given to the merits of making similar amendments to BPWTR 12.12(1).

1. Introduction

The *Water Act 2007* (the Act) provides for the development of a Basin Plan—a strategic plan for water resources in the Murray–Darling Basin (MDB).

The Act requires the Murray–Darling Basin Authority (MDBA) to obtain ACCC advice on the water trading rules component of the Basin Plan.³ The ACCC provided its final advice for the development of the water trading rules to the MDBA in March 2010. The MDBA then formed the Basin Plan water trading rules (BPWTR), having regard to this advice. The BPWTR commenced on 1 July 2014.

The Act provides that the Basin Plan (including the BPWTR) may be amended, and sets out the process by which amendments may be made.⁴ In preparing any amendments to the BPWTR, the MDBA must obtain, and have regard to, the advice of the ACCC.⁵

1.1. MDBA request for ACCC advice

On 18 August 2016 the Chief Executive of the MDBA requested the ACCC’s advice on possible “technical and minor amendments” to the Basin Plan water trading rules.

Details of specific areas of proposed amendment and the matters on which the ACCC’s advice was requested are provided in Table 1.

³ The framework for the water trading rules and the role of the ACCC is set out in more detail in chapter 2 of the ACCC’s *Water trading rules—Issues paper*, available on the ACCC website, www.accc.gov.au.

⁴ See Part 2, Division 1, Subdivision F of the Act.

⁵ See subsection 46(2) of the Act.

Table 1: areas of proposed amendment

Minor and technical amendments	
12.18 (d) and 1.07 definition	The MDBA requested the ACCC's advice on whether the definition of the term 'hydraulic connectivity' meant that some necessary restrictions on trade may not be allowable. Further, the MDBA requested advice on whether a variable flow regime could form the basis of an allowable restriction under 12.18.
12.16 and 12.17	The MDBA requested the ACCC's advice on whether the drafting of these rules satisfactorily achieved the policy intent.
12.47(5)	This subrule contains a cross-reference to Rule 15 of the Water Charge (Infrastructure) Rules (WCIR), which were recently reviewed by the ACCC. The MDBA requested the ACCC's advice on consequential amendments which could be necessary if WCIR 15 is to be amended.
Other amendments	
12.09	The MDBA requested the ACCC's advice on whether this rule may have a wider application than anticipated, which could lead to unintended water management outcomes.

1.2. Context of this advice

The MDBA has indicated that it intends to amend the Basin Plan in response to recently completed reviews. Consistent with section 46(2) of the *Water Act 2007* (Cth), the MDBA has requested the ACCC's advice in relation to a number of proposed minor and technical amendments. The MDBA's request for advice stated:

These proposed amendments are aimed at clarifying drafting ambiguities and ensuring the rules can function as originally intended. These changes include amending the definition of certain words for greater clarity and ensuring the scope of some rules appropriately cover all intended matters.

The ACCC's advice will inform the MDBA's development of amendments to the water trading rules.

The MDBA will publicly consult on the proposed amendments to the Basin Plan, including proposed amendments to the water trading rules.

The MDBA has indicated that it is aware of the possibility of other more substantive amendments that could be made to the water trading rules. However, the current proposed amendments are to be confined to those which are 'minor and technical' in nature. The MDBA may consider further amendments to the water trading rules at a future date.

1.2.1. The Basin Plan water trading rules

The Basin Plan water trading rules (BPWTR) form Chapter 12 of the Basin Plan 2012 (Cth). The purpose of the Basin Plan is to provide for the integrated management of Basin water resources, including providing for “water to reach its most productive use through the development of an efficient water trading regime across the Murray–Darling Basin”.⁶

The Basin Plan water trading rules must contribute to the achievement of the Basin water market and trading objectives and principles contained in Schedule 3 of the Act. The objectives are:

- (a) to facilitate the operation of efficient water markets and the opportunities for trading, within and between Basin States, where water resources are physically shared or hydrologic connections and water supply considerations will permit water trading; and
- (b) to minimise transaction cost on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions; and
- (c) to enable the appropriate mix of water products to develop based on water access entitlements which can be traded either in whole or in part, and either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time; and
- (d) to recognise and protect the needs of the environment; and
- (e) to provide appropriate protection of third-party interests.⁷

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

1.2.2. MDBA consideration of the ACCC’s advice

The adoption or otherwise of this advice is, in the first instance, a matter for the MDBA.

After the ACCC has provided its advice, the MDBA will undertake a formal consultation process on proposed amendments to the Basin Plan as a whole, including the BPWTR component, as is required under the Act. Any amendments proposed by the MDBA will then be presented to the Minister for consideration.

In its request for advice, the MDBA advised that this consultation is to commence in November 2016. This advice will be made public as part of the MDBA’s process for amending the Basin Plan.

⁶ Subsection 20(e) of the Act.

⁷ These are set out in clause 3 of schedule 3 of the Act.

1.3. Structure of this paper

Sections 2 to 5 consider each area of proposed amendments on which the ACCC's advice was requested, as set out in table 1.

The discussion of each matter is structured with a **background** (largely drawn from relevant sections of the ACCC's original advice on the water trading rules), a **discussion** of the issues relevant to each proposed area of amendments, and the **ACCC advice** on amendments to the water trading rules.

Where the ACCC considers that an amendment to one or more Basin Plan water trading rule(s) would facilitate the development of an efficient water trading regime across the MDB, the ACCC has made '**rule advice**'.

Where the ACCC considers that there *may* be benefit in making an amendment to the water trading rules which is more substantial than a "minor and technical amendment", the ACCC has made a '**recommendation**'. In these cases, the ACCC considers that further analysis and stakeholder consultation would be required before the ACCC could provide specific rule advice on amendments.

This paper does **not** contain drafted Basin Plan water trading rules. The MDBA will draft any amendments to the Basin Plan water trading rules having regard to the ACCC advice.⁸

1.4. Terminology used in this advice

For the purposes of this advice, the terminology and associated definitions contained in the Act will be used wherever possible. These terms are broadly similar—although not identical—to the terms used in the NWI.⁹ However, the terminology used to describe **tradeable water rights** (and water management and trading activities more generally) varies considerably between jurisdictions. Where other terminology is used in this advice (e.g. on the specific rights or dealings within a particular jurisdiction), this will be noted.

The term **tradeable water rights** includes **water access rights**, **irrigation rights** and **water delivery rights**. In turn, the term **water access right** can include a range of rights to take and/or use water. The advice refers to specific types of water access right—in particular to **water access entitlements** and **water allocation**—wherever necessary.

The terms **trade** and **transfer** are not defined in the Act. However, section 1.07(2) of the Basin Plan provides that "[i]n the Basin Plan, a reference to trade includes a reference to transfer."

Section 1.07(3) further provides that "[t]o avoid doubt, trade includes:

⁸ Under ss. 46(1) of the Act, the MDBA must also consult with Basin States, the Basin Officials Committee and the Basin Community Committee in preparing amendments to the Basin Plan (including the water trading rules). Under ss. 46(3), in preparing amendments to the Basin Plan, the MDBA may also undertake such other consultation, and publish such information to facilitate consultation, as it considers appropriate.

⁹ For example, the NWI and Water Act definitions of 'water access entitlement' differ. The NWI defines it as 'a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool as defined in a water plan'. See the *Intergovernmental agreement on a national water initiative*, Schedule B(i), available from <http://www.agriculture.gov.au/water/policy/nwi>; viewed September 2016. Under the Act, 'water access entitlement' is defined as 'a perpetual or ongoing entitlement, by or under a law of a State, to exclusive access to a share of the water resources of a water resource plan area'.

- (a) a trade that does not involve the payment of consideration; and
- (b) a trade between places under which ownership of the right being traded does not change; and
- (c) the establishment of a leasing arrangement; and
- (d) the establishment of a tagged water access entitlement.”

In this Advice, references to a ‘trade’ should be read as being defined consistently with these Basin Plan definitions.

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

2. Rule 12.18(d)—‘hydrologic connections and water supply considerations’ and ‘hydraulic connectivity’

The ACCC’s advice was requested on:

- whether BPWTR 12.18 could apply to a restriction which is deemed necessary for reasons of variable flow regimes, in particular where flow regimes are characterised by periods of low or intermittent hydrologic connectivity between river reaches (e.g. within an unregulated system)
- the merits of the list of reasons set out in BPWTR 12.18 continuing to include a reference to **hydraulic connectivity** (as currently defined), given that BPWTR 12.18 relates to trade in surface water systems only, but the term ‘hydraulic connectivity’ is defined in section 1.07 in a “groundwater only context”.

2.1. Background

When water access rights (WAR) are traded, often the trade results in a change in the location at which water to which the right relates may be taken. This could occur regardless of whether the trade also involves a change of ownership of the traded WAR. For example, a trade could result in a change in the location at which water available under the WAR:

- from one property to another, within the same trading zone / water resource
- from one trading zone to another, within the same water resource
- from a location within one water resource to a location in a different water resource.

In its advice for the development of the water trading rules, the ACCC acknowledged that there can be legitimate physical and environmental reasons for placing some restrictions on changing the location at which water may be taken (the ‘take’ location) when WARs are traded. However, other restrictions on changing the take location when WARs are traded should not be permitted.

The ACCC made several related rule advices and recommendations about how the water trading rules should govern restrictions on changing the ‘take’ location:

- water resource plans should define ‘trading zones’ and adopt the principle that trades within trading zones should generally not be restricted (recommendations 6-J(ii) and 6-C¹⁰)
- the BPWTR should provide that trade of tradeable water access rights between regulated system trading zones should only be restricted based on physical constraints, environmental constraints, or hydrologic connections and water supply considerations (rule advice 6-A¹¹)
- while the existence of a Basin State border may necessitate different trading zones, it should not (in isolation) limit trade between these two zones (rule advice 6-A¹²)
- the MDBA should consider requiring water resource plans to provide for the assessment of individual trades between zones on a case-by-case basis in unregulated systems where trading zones (and related trading rules) have not been established (recommendation 6-K¹³)
- the MDBA and Basin States should investigate the potential for trade of water access rights along rivers that are intermittently connected (recommendation 6-M¹⁴)

These advices together form the basis for BPWTR 12.16 and 12.18. However, these trading rules are phrased more broadly in terms of regulated and unregulated systems, rather than using the concept of ‘trading zones’ set out in water resource plans.

BPWTR 12.16 provides that a person may trade a water access right within or between regulated systems, or within an unregulated system, free of any restriction on changing the location at which the water to which the right relates may be taken, other than a restriction that is necessary because of a reason listed in subsection 12.18(1) (subsection 12.16(1)(a)). The restriction must also be consistent with all other rules in Subdivision A of the BPWTR (subrule 12.16(1)(b)).

BPWTR 12.18 provides a list of reasons why a restriction of a type referred to in BPWTR 12.16 (or 12.17 – see section 3 of this paper) may be necessary. These reasons are:

- the existence of a physical constraint
- the need to address hydrologic connections and water supply considerations

¹⁰ In considering how to assess whether a restriction on changing the take location is legitimate, the ACCC recommended that the Basin Plan, through its requirements for water resource plans, employ the concept of water ‘trading zones’ to distinguish between cases where (generally speaking) there is no need to impose such restrictions versus cases where these kinds of restrictions may be necessary. Recommendation 6-J(ii) provided advice on criteria for creating trading zones, while recommendation 6-C provided principles for trade in regulated systems, among which was the principle that trades within a trading zone should not generally be restricted.

ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, pp.171, 187.

¹¹ Ibid, p. 171.

¹² Ibid.

¹³ Ibid, p. 187.

¹⁴ Ibid.

- the need to protect the needs of the environment
- the level of hydraulic connectivity
- a combination of the above.

Further definitions are provided for several of these terms:

Physical constraint is defined in section 1.07 of the Basin Plan to mean “natural formation or a physical structure (for example, a pipe or channel) that limits the volume of water that can pass a given location.”

Hydraulic connectivity is defined in section 1.07 of the Basin Plan to mean “the ease with which, or the rate at which, groundwater moves:

- (a) within an aquifer; or
- (b) between aquifers; or
- (c) between aquifers and the adjacent or overlying surface water system.”

Hydrologic connections and water supply considerations is defined (for the purposes of BPWTR 12.18) in BPWTR 12.18(2):

“*hydrologic connections and water supply considerations*, in relation to a water access right, means any of the following:

- (a) the amount of transmission loss that may be incurred through evaporation, seepage, or other means;
- (b) the potential impact, as a result of the trade of a water access right, on water availability in relation to a water access right held by a third party (other than an impact arising solely because of an increase in use of the traded water access right);
- (c) the ability to:
 - (i) deliver water from the same storage from which it is currently delivered; or
 - (ii) adjust valley and state transfer accounts to facilitate trade, for example by way of a back trade.”

2.2. Discussion

The request for advice concerns whether certain restrictions can be deemed ‘allowable restrictions’ under BPWTR 12.18. The kinds of restrictions under consideration are those made in response to physical conditions such that the hydrologic connectivity between different river reaches varies considerably over time. These conditions are most likely to occur within unregulated systems. Some examples are:

- An unregulated system (e.g. an ephemeral stream) experiences severely variable flows between two locations, such that the locations are only intermittently hydrologically connected. A Basin State seeks to impose a restriction on trade between these two locations such that trade is permitted only during times where the two locations are sufficiently hydrologically connected.

- A Basin State sub-divides a regulated system into different ‘trading zones’ based on the degree of hydrologic connectivity between different locations or ‘zones’ within the system, and makes trading rules which relate to specific zones. For example, zones A, B and C may be defined, with trade permitted within each individual zone, and between zone A and Zone B, but not between zone C and other zones.
- A Basin State altogether restricts trade between two locations for the reason that the historical flow regime between these locations is such that the locations are rarely hydrologically connected (even though during the period when they are connected, the level of connectivity may be high e.g. due to floodwater flows).

The key concept in all of these examples is that trade between two locations has been restricted due to insufficient hydrologic connectivity between the locations at particular points in time.

Insufficient hydrologic connectivity and ‘allowable reasons’ in BPWTR 12.18

The ACCC considers that it is possible to characterise a restriction on trade which is necessary for reasons of insufficient hydrologic connectivity as being necessary due to ‘the need to address hydrologic connections and water supply considerations’, which is listed in 12.18(1)(b). In particular, the ACCC considers that the following two elements of ‘hydrologic connectivity and water supply considerations’ are relevant:

- transmission loss (BPWTR 12.18(2)(a))
- third party impacts (BPWTR 12.18(2)(b))

Additionally, the concept of ‘the level of hydraulic connectivity’ (BPWTR 12.18(1)(d)) is also of some relevance.

These are discussed in turn below.

In line with the request for advice, the ACCC’s consideration of these issues is primarily in the context where hydrologic connectivity is insufficient (or where there is no connectivity at all for a period of time, as in the case of intermittent / ephemeral streams). However, the ACCC considers that the considerations set out below would also be applicable to cases where hydrologic connectivity is always insufficient/not present between two locations.

Hydrologic connectivity and transmission losses

In its original advice for the development of the water trading rules, the ACCC proposed that ‘hydrologic connectivity’ can be interpreted to mean “that two water sources are connected in some way for a given period of time, such that water can be diverted from the new diversion location without unacceptable incremental losses or adverse third party impacts.”¹⁵ The Final Advice further cited a technical report prepared by SKM Consultants, which noted that:

The concept of hydrologic connectivity is linked to the concept of flow loss. Losses have previously been defined as ‘volumes of water that having entered the river system at one point do not reach a point downstream’. This definition was intended for use in a project

¹⁵ Ibid, p.150.

*on the operation of the River Murray main stem and only contemplated downstream movement of water, but nevertheless provides a good working definition of losses.*¹⁶

The SKM report cited in the ACCC's advice further identified that there are several different types of losses which can affect the level of hydrologic connectivity between two connected systems, and which are also applicable to connectivity between any two locations:

Losses between two connected surface water systems can occur for a number of reasons...and can include:

- *Evaporative loss from the water body surface*
- *Evapotranspiration loss from riverine flora adjacent to or within a water body*
- *Loss to groundwater*
- *Loss to channel wetting*
- *Bank storage*
- *Floodplain storage*
- *Unaccounted for water*
- *Measurement error.*¹⁷

These extracts suggest that the concept of 'hydrologic connectivity' can to a large extent be characterised with reference to the degree of 'transmission loss' occurring between two locations. Under this characterisation, where there is *no* hydrologic connectivity between location A and location B, this is equivalent to showing that any water flowing from location A towards the location B would be entirely lost, such that no transmission occurs—i.e. transmission losses are 100 per cent of flows at location A. Where transmission losses are high (but not 100 per cent), the locations have a low degree of hydrologic connectivity, and where losses are low (or zero), the locations have a high degree of connectivity.

The ACCC considers that the above characterisation applies reasonable and comprehensive interpretations of the terms 'transmission loss' and 'hydrologic connectivity'. However, 'transmission loss' is not a defined term in the BPWTR, and other interpretations are possible. For example, an alternative characterisation of 'transmission loss' is that transmission loss represents the proportion of a flow transmitted between location A and location B which is lost in transit, *where some level of flow is successfully transmitted between these locations*. Under this interpretation, where there is no flow at all between two locations (even if only for a discrete period of time, such as occurs in ephemeral streams), the concept of transmission loss is not applicable, because there was no 'transmission' to be 'lost'.

Moreover, the term 'hydrologic connectivity' is not used in the BPWTR—rather, as explained above, one allowable reason listed in BPWTR 12.18(1) is 'hydrologic connections and water supply considerations', which is then defined in 12.18(2) to mean, among other things, 'the amount of transmission loss that may be incurred through evaporation, seepage, or other means'.

The meaning of the term 'transmission loss' is therefore central to the question of whether restrictions of a kind described above are permissible under BPWTR 12.18. The ACCC considers that, if the broader conception of transmission loss used in its original advice was applied, restrictions imposed for reasons of insufficient or no hydrologic connectivity *would* be

¹⁶ Ibid, p.151.

¹⁷ Ibid, pp.155-156.

able to be characterised as being necessary because of hydrologic connections and water supply considerations, via BPWTR 12.18(2)(a).

The ACCC considers that it would be reasonable to adopt the comprehensive definition of ‘transmission loss’ (i.e. a definition that encompasses hypothetical or actual transmission losses of 100 per cent) without any amendment to the water trading rules. The MDBA’s guidance on this rule could make clear the MDBA’s interpretation of this term, and clarify for stakeholders how the MDBA interprets these rules in a situation where two locations are only intermittently connected or not connected at all.

However, to avoid uncertainty an amendment could be made to include a sub-paragraph or note at BPWTR 12.18(2)(a) which makes clear that the concept of ‘transmission loss’ includes a situation where transmission losses are, or hypothetically would be, 100 per cent in a given period of time, or for a proportion of time (e.g. transmission losses are on average estimated to be 100 per cent in 2 years out of 3).

Hydrologic connectivity and third party impacts

BPWTR 12.18(2)(b) provides that ‘hydrologic connections and water supply considerations’ includes “the potential impact, as a result of the trade of a water access right, on water availability in relation to a water access right held by a third party (other than an impact arising solely because of an increase in use of the traded water access right).”

Where two locations have low (or no) hydrological connectivity at particular times, allowing trade between these locations could have the result that the trade does not necessarily result in an increase in water availability at the destination location (because water does not always flow from location A to location B). Therefore, if the trade between location A and location B is permitted, it could result in increased extractions at the destination location without a corresponding increase in water availability. This creates the potential for adverse third party impacts to occur, in that other right holders in location B could face lower water availability due to extractions made by the holder of the traded water access right.

As such, the ACCC considers that this type of third party impact (as set out in BPWTR 12.18(2)(b)) could be a legitimate reason to restrict trade between two locations which have intermittent connectivity.

Hydraulic connectivity (12.18(1)(e))

As discussed above, the term ‘hydraulic connectivity’ concerns the rate at which groundwater moves, either within or between aquifers, or between aquifers and surface water systems.

Where surface water is ‘lost’ to groundwater via seepage, it is possible that this water may then *re-enter* the surface water system at another downstream location. This could occur, for example, in an intermittent stream where the hydrology is such that the stream is a ‘losing stream’ at one point and a ‘gaining stream’ at another (downstream) point.¹⁸ Given that ‘hydraulic connectivity’ has been defined to mean the movement of groundwater to surface

¹⁸ A ‘losing stream’ is a stream that loses water to groundwater, because the water table is below the lowest point of the streambed. In contrast, a ‘gaining stream’ is a stream that gains water from groundwater, because the water table is above the channel bed. See McDonough, Hosen and Palmer, ‘Temporary Streams: the hydrology, geography and ecology of non-perennially flowing streams’, in Elliott and Martin (eds.), *River ecosystems: dynamics, management and conservation*, 2011, New York, p.261.

water systems (among other things), hydraulic connectivity could be a causal factor in the level of connectivity *between* two surface water locations.

Given these possibilities, the ACCC considers that ‘hydraulic connectivity’ should be retained on the list of ‘allowable reasons’ in BPWTR 12.18, as it could be a relevant consideration for restriction on surface water trades in some circumstances.

However, the ACCC notes that the term ‘hydraulic connectivity’ has been defined with reference to the movement of **groundwater**¹⁹ (rather than ‘water’ more generally) within and between aquifers, and between aquifers and adjacent or overlying surface water system. This reference to groundwater gives rise to ambiguity as to whether ‘hydraulic connectivity’ encompasses movement of (surface) water from a surface water system into an aquifer. The use of this term in subdivision C of the BPWTR (rules relating to groundwater), particularly BPWTR 12.26²⁰, suggests that this term is intended to apply generally to connectivity between surface water and groundwater SDL resource units, which would seem to encompass both the movement of water *from* the surface water unit resource unit *to* the groundwater resource as well as vice versa. The ACCC recommends that the MDBA should consider whether the definition of ‘hydraulic connectivity’ can be clarified in this respect.

Relevance of other reasons listed in BPWTR 12.18(1) and other elements of ‘hydrologic connections and water supply considerations’

The ACCC has also considered whether any of the remaining reasons listed in BPWTR 12.18(1) or any of the other elements of ‘hydrologic connections and water supply considerations’ listed in 12.18(2) could be applicable to a situation where there is insufficient, or no, hydrologic connectivity between two locations. The ACCC’s view is that these remaining reasons are of limited or no relevance to such scenarios. The ACCC’s reasoning is briefly set out below:

- *physical constraints (12.18(1)(a))*: given the definition²¹ of this term, the ACCC considers that the notion of a restriction based on a physical constraint is not readily applicable to a situation characterised by intermittent flows. In such a situation, flows present at location A do not reach location B because they are entirely ‘lost’ (via one or more of the loss types identified above) before transit is completed, rather than because the carrying capacity of the stream, river, channel etc. constrains the flow rate of the water.
- *the need to protect the needs of the environment (12.18(1)(c))*: The ACCC is not aware of any cases (either existing or hypothetical) where a restriction on trade between two

¹⁹ Section 4 of the Act defines **groundwater** to mean:

(a) water occurring naturally below ground level (whether in an aquifer or otherwise); or
(b) water occurring at a place below ground that has been pumped, diverted or released to that place for the purpose of being stored there;
but does not include water held in underground tanks, pipes or other works.

²⁰ BPWTR 12.26 provides that:

The trade of a water access right between a groundwater SDL resource unit and a surface water SDL resource unit is prohibited, unless all of the following conditions are met:

(a) there is sufficient hydraulic connectivity between the 2 units;
(b) ...

²¹ In BPWTR 12.18, the term physical constraint means a “natural formation or a physical structure (for example, a pipe or channel) that limits the volume of water that can pass a given location” (section 1.07 of the Basin Plan). This definition refers to physical features which impede or constrain the flow of water, with the implication that, due to the constraint, there is a maximum flow rate at a particular location which cannot (or should not) be exceeded.

locations which is made for reasons of low or intermittent connectivity is based on an underlying need to protect the needs of the environment. However, such a situation could be possible, in which case 12.18(1)(c) would be relevant.

- *ability to deliver water from the same storage from which it is currently delivered; or adjust valley and state transfer accounts to facilitate back trade (12.18(2)(c))*: the ACCC considers that this provision generally relates to trade within or between regulated systems and therefore would not usually be relevant to the scenario of intermittent connection between two locations. However, to the extent that there was intermittent connectivity *between* two regulated systems, which could affect the ability to deliver water from the origin system to the destination system, this factor could be relevant.

2.3. ACCC advice

Rule advice A

To avoid potential uncertainty, the Basin Plan water trading rules should be amended to clarify that the defined term ***hydrologic connections and water supply considerations***, as set out in BPWTR 12.18(2), *would* extend to a situation where there is no hydrologic connectivity between two locations for a period of time.

In particular, the amendment should make clear that the concept of ‘transmission loss’ includes where actual or expected transmission losses between two locations are 100 per cent (i.e. no flow from location A would reach location B) at a particular point in time, or during a particular time period.

Rule advice B

The term ‘hydraulic connectivity’ should be retained on the list of reasons set out in BPWTR 12.18.

Recommendation A

The MDBA should consider amending the definition of the term ‘hydraulic connectivity’ to clarify that this term would encompass the ease with which, or the rate at which, water moves from adjacent or overlying surface water system(s) into aquifers.

3. Interaction between rules 12.16 and 12.17

Noting that BPWTR 12.17 does not reference trade within *unregulated* systems, the ACCC’s advice was requested on:

- the interaction between BPWTR 12.16 and 12.17; and
- whether the BPWTR as a whole would address volumetric limits in relation to trade of water access rights within unregulated systems.

3.1. Background

BPWTR 12.16 provides that a person may trade a water access right within or between regulated systems, or within an unregulated system, free of any restriction on changing the location at which the water to which the right relates may be taken, other than a restriction which is necessary because of a reason (or reasons) listed in 12.18(1), and which is consistent with subdivision A of the rules.

BPWTR 12.17 is specified in a similar manner to BPWTR 12.16, but relates specifically to the imposition of **volumetric limits**. This rule provides that, without limiting BPWTR 12.16, a person may trade a water access right within or between regulated systems free of any volumetric limit, unless the volumetric limit is necessary because of a reason (or reasons) listed in 12.18(1), and is consistent with subdivision A of the rules.

Volumetric limit is defined in BPWTR 12.17(2) as “a limit whose purpose or effect is to cap the total volume of water that may be traded out of an area”.

A number of ACCC water trading rule advices are relevant to the formation of these rules. Section 2.1 set out the general rationale for BPWTR 12.16 (and 12.18). The rationale for BPWTR 12.17 is set out below.

At the time when the BPWTR were being formed, Victoria had in place a “4 per cent limit” which had the effect of capping the total volume of water access entitlement that could be permanently traded for use outside of a particular area, to 4 per cent of the volume of water access entitlements associated with the relevant area. These, and other similar limits in the MDB, were originally introduced to address concerns about stranded assets and the overall viability of specific irrigation areas or districts.²²

The ACCC formed the view that the 4 per cent limit had “a number of negative effects, including:

- preventing water moving to its highest value use
- artificially segmenting the water market
- leading to efficiency losses, especially long-term dynamic efficiency losses, and preventing the efficient operation of water markets
- preventing irrigators experiencing financial distress from realising the value of their water access rights and restricting purchases of water for the environment.”²³

The ACCC also considered that the 4 per cent limit was a “poorly targeted mechanism for managing the two main justifications for the limit—namely, stranded asset risks and managing community structural adjustment.”²⁴

Given these considerations, the ACCC made rule advice that:

²² For a detailed discussion of the rationale for, and the effects of, the 4 per cent limits, see section 4.1 of ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, pp.89-96.

²³ Ibid, p.xii.

²⁴ Ibid.

As the rationales for the 4 per cent limit are better addressed through other mechanisms, the Basin Plan water trading rules should provide that the 4 per cent limit (and other, similar limits) should be immediately and completely removed by Basin States throughout the MDB.

As such, the Basin Plan water trading rules should provide that limits on the volume of trade out of an area (other than limits that reflects physical constraints, environmental constraints or hydrologic connection and water supply considerations) are prohibited upon the commencement of the Basin Plan.²⁵

BPWTR 12.17 (and 12.18) expressly gives effect to this rule advice.

3.2. Discussion

Relationship between BPWTR 12.16 and 12.17

In the ACCC's view, the key consideration for understanding the relationship between BPWTRs 12.16 and 12.17 is whether a **volumetric limit** is a type of 'restriction on changing the location at which the water to which the [water access] right relates may be taken' (and therefore covered by BPWTR 12.16).

As detailed previously, a volumetric limit is defined to be "a limit whose purpose or effect is to cap the total volume of water that may be traded out of an area". Although the phrase "traded out of an area" is not defined, in the ACCC's view it is clear from this phrase that, for the purposes of BPWTR 12.17, a volumetric limit necessarily has a locational aspect. In particular, the ACCC's view is that in practice the phrase "traded out of an area" would encompass any trade which has the effect that water which could previously be taken at a given location or locations within an area may no longer be extracted, taken or used within that area after the trade. This would include:

- where the trade involves changing the location of "take" from a specified location (or locations) within an area to another location that is outside that area
- where the trade results in there being no specific location at which water available under the traded water access right may be taken

In relation to the latter case—this could occur, for example, in a situation where, prior to the trade, the WAR was linked or 'associated' with a specific works approval or water use approval, which enables the right holder to extract and use water at the location(s) listed in the approval. Then, when trade occurs, the WAE is unlinked or 'disassociated' from all approvals. The result is that the right holder (after the trade) would need to complete a separate process to link or re-associate the WAR with a different works approval or water use approval in order to be able to take and use water. Some water users may choose to hold WARs which have no 'take' location specified, for example because:

- they simply wish to trade water available under that right (e.g. a water allocation).
- the water access right is intended to be 'used' for a non-consumptive purpose, such as to provide in-stream flows, and as such does not require a specific 'take' location to be specified—this is particularly relevant to 'held environmental water'.

²⁵ Rule advice 4-A, *ibid*, p.109.

As such, in the ACCC's view, a volumetric limit necessarily relates to trades where a locational aspect of the water access right is changed during or as a result of a trade.

Beyond this, it is also necessary to consider whether a 'volumetric limit' amounts to a 'restriction' on trade. The term **restrict** is defined in section 1.07 of the Basin Plan as follows:

***restrict**, in relation to trade, includes refuse, prevent, deter, delay or impose a condition or a barrier on, and **restriction** has a corresponding meaning.*

The ACCC notes that this definition is applicable both to a specific (actual or proposed) trade, but also more broadly to trade in general. Given that a 'volumetric limit' is a limit which "cap[s] the total volume of water that may be traded...", the ACCC considers that it is reasonable to characterise a volumetric limit as a restriction which imposes a barrier on the (total) trade of water out of an area.

Putting these elements together, the ACCC's view is that a volumetric limit is *necessarily*:

- a restriction on trade (within the meaning of 'restriction' as defined in section 1.07 of the Basin Plan); and
- a restriction on changing the location at which water to which a traded water access right relates may be taken.

Thus, the ACCC views BPWTR 12.17 conceptually as a subset of BPWTR 12.16. The ACCC considers that this characterisation is consistent with its original advice, and also with the wording of BPWTR 12.17, which begins: "[w]ithout limiting section 12.16..." Indeed, the ACCC considers that, unless BPWTR 12.17 is viewed as a subset of BPWTR 12.16, the phrasing "without limiting..." is superfluous and potentially misleading.

However, the ACCC is aware that several other views are possible:

- that a volumetric limit *is not* a restriction at all (within the meaning of 'restriction' given by section 1.07 of the Basin Plan); or
- that a volumetric limit *is* a restriction, but *is not* a restriction on changing the location at which water to which a right relates may be taken.

The ACCC views the alternative characterisations as problematic for several reasons.

First, if a volumetric limit is *not* a restriction (within the meaning of 'restriction' in section 1.07), this gives rise to the possibility that a limit or barrier which ordinarily would be considered a restriction could be re-characterised as a volumetric limit such that other rules which should apply do not.

Consider, for example, a situation where a Basin State wishes to curtail the trading activity of a particular class of persons. Assume that the state enacts a provision which imposes a limit on the total amount of water access entitlements which may be sold from "water users" to "non-water users". Assuming that this limit *is* a restriction, it would appear to contravene BPWTR 12.07, which provides that 'a person may trade a water access right free of any restriction on trade that relates to the person being, or not being, a member of a particular class of persons'.

However, using similar language to that used in BPWTR 12.17(2), such a limit could be characterised as "a limit whose purpose or effect is to cap the total volume of water that may be traded to non-water users". An argument could then be made that this limit should similarly not be considered a 'restriction' because:

- the limit is simply another kind of volumetric limit (i.e. akin to a ‘volumetric limit’ as specified in BPWTR 12.17, but based on the class of persons rather than the locational aspect of the WAR being traded), and
- a ‘volumetric limit’ as specified in BPWTR is not considered to be a ‘restriction’.

Under this argument, BPWTR 12.07 would not apply to such a limit.

The ACCC considers that such an outcome would be directly inconsistent with the intent of BPWTR 12.07. Given that similar characterisations could be used in relation to other rules in subdivision A of the BPWTR, the ACCC considers that characterising a volumetric limit as *not* being a restriction on trade risks undermining the effectiveness of the subdivision A rules as a whole.

Second, if a volumetric limit *is* considered to be a restriction, but *not* a restriction of the kind contemplated by BPWTR 12.16, then the implication (given the current drafting) is that a volumetric limit does not restrict “the location at which the water to which [a water access] right relates.” However, this appears to be unworkable, as it is not clear how a water access right could be “traded out of an area” *without* changing the location at which water may be taken (as discussed above).

Accordingly, the ACCC advises that the rules should be amended to make clear beyond all doubt that a ‘volumetric limit’ is taken to be a restriction for the purposes of BPWTR 12.16. The ACCC considers that this can be achieved by:

- amending the definition of ‘restrict’ to include imposing a volumetric limit; and
- amalgamating BPWTR 12.16 and 12.17 (see below).

Rationale for specifying BPWTR 12.17 separately from BPWTR 12.16

Given the ACCC’s view that BPWTR 12.17 should be regarded simply as a specific subset of BPWTR 12.16, it is worth considering why 12.17 should be specified separately from 12.16.

As noted above, at the time the water trading rules were being developed, the “4 per cent limit” was still in effect in some parts of the MDB (in particular, the 4 per cent limit was then in effect in Victoria, with NSW considering re-implementing the limit). This limit was highly contentious at that time. Also, given that historically NSW gave effect to such a limit by allowing irrigation infrastructure operators to prevent their customers from transforming their irrigation rights in order to externally trade, the 4 per cent limit was also directly relevant to the then-newly-commenced Water Market Rules 2009.²⁶ The ACCC considered that the 4 per cent limit warranted specific consideration separately to its consideration of general rules governing location aspects of water trading. However, this does not imply that volumetric limits should be

²⁶ The ACCC noted in its water trading rules final advice that “[u]ntil recently New South Wales did not directly impose a 4 per cent limit in its legislation but instead provided an exemption from a civil penalty that would ordinarily apply under the New South Wales legislation to irrigation corporations—a particular form of IIO—that take action to prevent transformation. However, on 12 November 2009 the New South Wales Government introduced a bill to repeal this exemption and stated that:

For now, the intention is to maintain the current cap through a trade order to ensure that regional economies continue to be protected.

The New South Wales Office of Water has commenced consultation on the terms of a trade order under section 71 Z of the Water Management Act to maintain the 4 per cent cap.”

Ibid, p.90.

viewed as conceptually distinct from other restrictions, but rather that the ACCC had identified the 4 per cent limit as a priority issue at that time.

Moreover, as discussed in section 2 of this paper, the ACCC's rule advice on location-related matters was generally phrased in terms of rules relating to trade *between* trading zones. As shown by the ACCC's recommendations relating to the specification of trading zones in water resource plans, the ACCC intended that, as a general principle, there should be *no* restrictions on trade between locations *within* regulated system trading zones²⁷ (while trading zones should be defined for unregulated systems as being areas "within which trade can occur without detailed assessment"²⁸). These elements of the ACCC's original rule advice do not have exact counterparts in BPWTRs 12.16 and 12.17.

The ACCC's recommendations for water resource plan requirements regarding trading zones were not adopted by the MDBA. Instead, BPWTR 12.16, which was formed out of ACCC rule advice 6-A, refers to trade within or between regulated *systems*, or within unregulated *systems*. BPWTR 12.17, which was formed from ACCC rule advice 4-A refers to trade "out of an area", which may be smaller than the "trading zone" contemplated in the ACCC's advice.

The ACCC's view is that there is a degree of overlap between these rules. Given this history and the specific drafting of these rules, the ACCC's view is that BPWTR 12.17 should be viewed as providing a higher degree of clarity in relation to a particular kind of restriction covered by 12.16. This clarity was particularly valuable given the situation at the time the rules were formed. However, the ACCC considers that there is merit in re-considering whether the rationale for having 12.17 as a separate rule still applies. The separate specification of this rule, together with the absence of any clear indication in the rules as to the relationship between defined terms "volumetric limit" and "restrict", gives rise to the possible view that BPWTR 12.17 is wholly separate from BPWTR 12.16 (although, as argued above, the ACCC considers this to be problematic).

Given the contentious history of the use of volumetric limits in the MDB, the ACCC considers that retaining a clear prohibition on the use of volumetric limits in the rules is desirable. However, the ACCC's view is that these provisions can be amalgamated without losing the benefits of addressing volumetric limits specifically.

Application of BPWTR 12.16 to volumetric limits in unregulated systems

As outlined above, the MDBA sought the ACCC's advice on whether a volumetric limit on trade in an unregulated system is a restriction on trade of a kind that is covered by the water trading rules. The ACCC's understanding is that the intent the MDBA wishes to achieve is that volumetric limits on trades *within* unregulated systems should be covered by BPWTR 12.16 and / or 12.17, with the result that such restrictions, even if allowable for a reason listed under BPWTR 12.18, need to be reported to the MDBA under BPWTR 12.19.²⁹

BPWTR 12.17 does not currently apply to trade within or between unregulated systems. Considered in isolation, an option for achieving the desired intent (as stated above) would be to

²⁷ Recommendation 6—C, *ibid.*, p.172.

²⁸ Recommendation 6—J, *ibid.*, p.187.

²⁹ BPWTR 12.19(1) provides that:

12.19 Basin States to notify the Authority of restrictions

- (1) If a Basin State decides to impose a restriction of a kind referred to in section 12.16 or section 12.17, it must notify the Authority of the decision and the reasons for the decision.

expressly broaden the scope of 12.17 to include trade of a water access right within an unregulated system.

However, if (as is the ACCC's view) a 'volumetric limit' *is* a kind of restriction on changing the location of take of a water access right, it appears to be quite clear that volumetric limits *within* regulated systems are able to be dealt with under BPWTR 12.16. Therefore, if the ACCC's rule advice C is accepted, the ACCC does not consider that further amendment is necessary to achieve the desired policy intent in this matter.

3.3. ACCC advice

Rule advice C

The Basin Plan water trading rules should be amended:

- to provide that the term ***restrict*** (as defined in section 1.07 of the Basin Plan) includes 'impose a ***volumetric limit***';
- to add a subrule to 12.16 expressly clarifying that a restriction in 12.16(1) includes a restriction in the form of a volumetric limit;
- to move the definition of 'volumetric limit' from 12.17(2) to 12.16; and
- to repeal 12.17.

4. Consequential amendments to Rule 12.47(5) required due to review of water charge rules

Noting that BPWTR 12.47(5) refers to Rule 15 of the Water Charge (Infrastructure) Rules 2010 (Cth) (WCIR), the MDBA requested the ACCC's advice on whether consequential amendments to BPWTR 12.47 would be likely to be required given the ACCC's recent review of the WCIR and other Commonwealth water charge rules.

4.1. Background

Trading rules and procedural requirements are located in a variety of instruments and are administered by a range of approval authorities and other entities. These rules relate to where trades can be made from and to, as well as the administrative steps required for a trade to be carried through. Having ready access to information about these rules and processes is clearly critical to a well-functioning water market.³⁰

The ACCC identified in its original advice on the development of the water trading rules that a large number of trading rules are currently in operation throughout the MDB, which creates the potential for significant uncertainty about the possibility of, and procedures for, trade. The

³⁰ ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, p.254.

ACCC considered that such rules are not necessarily accessible and may be in a variety of different documents, including in large and complex documents. This complexity leads to increased costs for water market participants.

The ACCC considered that a more centralised source of information about trading rules and processes would tend to facilitate trade, particularly trade in water access entitlements. Therefore, the ACCC advised that such rules should be provided in a compiled form to a central location, termed the ‘central information point’ in the BPWTR.³¹ In making this advice, the ACCC considered that IIO trading rules were similarly significant and should be made publicly available.

However, the ACCC considered that it would be appropriate that there be a differential reporting for IIOs depending on size of the IIO. For smaller IIOs, where there may be only a small number of parties interested in the rules, the ACCC considered that it would only be necessary that such parties provide the rules on their website and / or upon request. For larger IIOs, where more external parties could be expected to benefit from access to trading rules, the ACCC considered that the information should be provided to the same information point as for Basin States’ trading rules.

The ACCC advised that an appropriate delineation could be made to impose different reporting requirements based on whether the IIO and its customers have 10 GL or more of water access entitlements. In making this advice, the ACCC noted that this is the same volume used in thresholds for the provision of information in the water market rules and the (at the time) proposed water charge (infrastructure) rules.³²

With these considerations in mind, the ACCC made rule advice 9-C as follows:

Rule advice (9–C)

The Basin Plan water trading rules should provide that IIOs must provide their rules (as changed from time to time) regulating the trade of tradeable water rights for:

- *trade internal to the IIO’s irrigation network*
- *trade to and from water market participants external to the IIO’s irrigation network*

to:

- *for IIOs where the sum of the volume of water*
 - *to which the IIO is entitled under water access entitlements held by the IIO; and*
 - *to which its customers are entitled under water access entitlements*

is at least 10 GL, the same central information point as for government water trading rules (which could be provided by the MDBA or the National Water Market System’s National Portal)

³¹ BPWTR 12.45 provides that ‘central information point’ means “a point determined by the Authority to receive copies of trading rules”.

³² Water market rules 2009 (Cth), r. 6(3), available at <https://www.legislation.gov.au/Details/F2013C00159>, viewed September 2016; *Draft water charge (infrastructure) rules 2009*, r.15, available at <https://www.environment.gov.au/system/files/pages/04efd847-4de5-4e03-ac89-fadcf50e4c8a/files/draft-water-charge-infrastructure-rules.pdf>, viewed September 2016.

- for all IIOs, on their website and/or upon request.

*The rules should be provided in a compiled form but may use cross-references to other documents. Where cross-references are used, the document must explain the context in which the linked document relates to rules contained in the compilation.*³³

In line with this advice, BPWTR 12.47 provides that:

12.47 Irrigation infrastructure operator must make trading rules available

...

- (5) *If the irrigation infrastructure operator is one to whom rule 15 of the Water Charge (Infrastructure) Rules 2010 applies, it must also give a copy of the rules to the central information point:*
- (a) *within 7 days after the later of:*
 - (i) *the commencement of this Chapter; and*
 - (ii) *the day rule 15 of the Water Charge (Infrastructure) Rules 2010 applies to the irrigation infrastructure operator; and*
 - (b) *if the rules change—as soon as practicable, but in any case within 30 days after the change.*

Note: Rule 15(1) of the Water Charge (Infrastructure) Rules 2010 requires an infrastructure operator that meets the criteria in rule 15(2) to publish its schedule of fees in a prescribed manner.

...

WCIR Rule 15, to which BPTWR 12.47(5) refers, provides that:

15 Publication of schedule of charges

- (1) ...
- (2) *This rule applies to an infrastructure operator if the sum of the maximum volume of water from managed water resources in respect of which the operator provides infrastructure services in relation to:*
- (a) *water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water); and*
 - (b) *water access entitlements held by its customers; and*
 - (c) *water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator:*
- is at least 10 GL.*

Note: In subrule 15(2) the maximum volume of water refers to that held under water access entitlements.

³³ ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, p.258.

4.2. Discussion

As described above, the ACCC understands that the original intent in drafting BPWTR 12.47 was that the requirement for IIOs to provide their trading rules to the central information point [the MDBA] should only apply to IIOs over a particular size threshold. This recognised that there were limited benefits in requiring smaller operators to provide their trading rules to the ‘central information point’. This is consistent with the ACCC’s rule advice 9-C.

BPWTR 12.47 achieves this intent via section (5), which cross-references the specific size requirement of WCIR 15(2). The ACCC considers that the primary reason for specifying BPWTR 12.47(5) as a cross-reference, rather than replicating the relevant definition from WCIR 15(2), was to emphasise the similarity in approach between these two sets of rules for stakeholders.

The ACCC supports the intent of having Commonwealth water rules that stakeholders can clearly understand, and which are harmonised to the extent possible given the individual policy intent of each set of rules.

However, in its Draft Advice for the review of the water charge rules³⁴, the ACCC proposed streamlining the application of the WCIR by removing references to an operator’s size or ownership structure from rule application provisions.³⁵ Relevantly for BPWTR 12.47, implementation of this advice would result in the size criteria being removed from WCIR 15.

The ACCC notes that the MDBA may wish to consider at a future date whether the limited application of BPWTR 12.47(5) remains appropriate. However, the ACCC considers that any such change would be beyond the scope of a ‘minor and technical’ amendment, and therefore does not propose that such an amendment be considered at the current time. Rather, the ACCC has considered options to ensure that the current effect of BPWTR 12.47(5) is maintained in the event that the WCIR are amended such that current WCIR 15(2) is removed or amended in a way that would alter the application of BPWTR 12.47(5).

Option 1—amend BPWTR 12.47(5)

A straightforward method for ensuring that the operation of BPWTR 12.47 is unaffected by any potential amendments to the WCIR is to amend 12.47(5) to directly include the size criteria specified in WCIR 15(2).

In making such an amendment, it is important to recognise that, since BPWTR 12.47 applies only to irrigation infrastructure operators (IIOs), whereas WCIR 15(2) applies to infrastructure operators generally, BPWTR 12.47(5) applies to a *subset* of possible entities to which WCIR 15(2) applies. In order to maintain the current scope of BPWTR 12.47(5), this rule should continue to apply only to IIOs who meet the relevant size criteria.

The ACCC considers the merits of this option are as follows:

³⁴ The ACCC was requested to provide advice on possible amendments to the water charge rules in December 2014. The ACCC provided this advice to the Minister in September 2016. For further detail, see: <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development>, viewed September 2016.

³⁵ ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.57-59.

- Including the size criteria into BPWTR 12.47 directly decreases the complexity of the rules in that stakeholders need not refer to another rule set in order to understand the requirements of this rule.
- Including the size criteria into BPWTR 12.47 directly is the most straightforward legislative approach for the MDBA to ensure that its policy intent in relation to BPWTR 12.47 continues to be achieved.
- Including the size criteria into the rule directly makes BPWTR 12.47 rule robust to any future amendments to the WCIR.

Reference to “managed water resources”

If the rules are amended to directly include the size criteria, the ACCC considers that the exact language from WCIR 15(2) should be used, with one exception. WCIR 15(2) refers to “the maximum volume of water from *managed water resources*” (emphasis added). The term ***managed water resources*** is defined in the WCIR to include Basin water resources but also extends to certain non-Basin water resources of a “referring state” (which could be a Basin State or the Northern Territory).³⁶ Use of this broader term was necessary in the WCIR as the Act provided the option for Basin States (and the Northern Territory) to extend the operation of the water charge rules to all or part of their jurisdiction that are not Basin water resources. To date, no Basin State (or the Northern Territory) has taken up this option, and therefore in practical terms the definition of ‘managed water resources’ is effectively the same as ‘Basin water resources’.

Further, the Act does not provide for the extended operation of BPWTR, as it does for the WCIR. Therefore, the ACCC advises that term “managed water resources” should be replaced by the term “Basin water resources”.

Option 2—insert a ‘savings provision’ into the proposed water charge rules

The ACCC notes that the Basin Plan is a legislative instrument which may be amended by regulations made under the *Legislation Act 2003* (Cth) (the Legislation Act). Section 621 of the Legislation Act provides that such amending regulations may include ‘savings provisions’.³⁷

³⁶ WCIR 3 defines ***managed water resources*** to mean “all water resources that are—
 (a) Basin water resources;
 (b) water resources (not being Basin water resources) in a referring State, or part of a referring State, if—
 (i) a law of the referring State provides that section 100B of the Act applies to the State, or that part of the State; and
 (ii) the regulations under the Act provide that section 100B of the Act applies to the State, or that part of the State;
 (c) water resources (not being Basin water resources) in the Northern Territory, or a part of the Northern Territory, if—
 (i) a law of the Northern Territory provides that section 100B of the Act applies to the Territory, or that part of the Territory; and
 (ii) the regulations provide that section 100B of the Act applies to the Northern Territory, or that part of the Northern Territory—

but does not include water resources that are prescribed for the purposes of paragraph 100B(3)(a) of the Act.”

³⁷ *Legislation Act 2003* (Cth),
 Section 61 *Legislative instrument and notifiable instrument amendments by regulations under this Act*
 (1) A regulation under this Act may amend a legislative instrument or notifiable instrument.
 (2) Regulations made for the purposes of subsection (1) may include amendments providing for any matters of a transitional nature (including saving or application provisions) that are necessary or convenient to be prescribed for amendments of the instrument concerned.

Footnote continues on next page.

A saving provision “allows some or all of a repealed law to remain in force under specific circumstances. When large-scale changes to the law are proposed, savings provisions are sometimes enacted into a separate law such as a Consequential and Transitional Provisions Act. If a law is affected by a saving provision this will usually be noted in the endnotes.”³⁸

The ACCC has considered the alternative solution of inserting a ‘savings provision’ into the proposed water charge rules.³⁹ This savings provision would provide that WCIR 15(2) applies as unamended for the purposes of BPWTR 12.47(5). Under this alternative, no amendment would be required to BPWTR 12.47(5).

On balance, the ACCC considers that this option is not preferred, for the following reasons:

- Given that the ACCC has proposed removing the tiered structure from the WCIR, this aspect of similarity between publication requirements applying to operators in the WCIR and those in the BPWTR would—if the ACCC’s advice is adopted—no longer apply. Therefore, the rationale of emphasising the similarity of these provisions no longer applies.
- Inserting an amendment into the rules replacing existing WCIR 15 to provide for current WCIR 15(2) to remain in effect only for the purposes of BPWTR 12.47(5) is likely to result in a lack of clarity and simplicity for stakeholders, as stakeholders potentially need to consult three rule sets (BPWTR, amended water charge rules, and the existing WCIR) in order to fully understand the implications of BPWTR 12.47(5). The ACCC considers that this outcome works against creating a well-functioning regulatory framework.
- In the event that future amendments are made to the water charge rules, there would still be a need to ensure that the ‘savings provision’ for BPWTR 12.47(5) was preserved. This give rise to the possibility of the need to reconsider the same matters at a future date and could possibly result in the wording of any ‘savings provision’ itself changing over time (for example, due to changes in surrounding provisions which would require consequential changes to the ‘savings provision’).

Accordingly, the ACCC advises that Option 1 above is preferable to Option 2.

4.3. ACCC advice

Rule advice D

Basin Plan water trading rule 12.47 should be amended to remove references to rule 15 of the Water Charge (Infrastructure) Rules 2010. This rule should instead directly specify that the existing rule requirements in 12.47(5) apply to an *irrigation infrastructure operator, if the sum of the maximum volume of water from Basin water resources in respect of which*

(3) Before the Governor-General makes a regulation for the purposes of subsection (1) amending an instrument, the Attorney-General must be satisfied that the rule-maker for the instrument has agreed to the amendment.

See: <https://www.legislation.gov.au/Details/C2016C00186>, viewed September 2016.

³⁸ Federal Register of Legislation, Glossary. See: <https://www.legislation.gov.au/content/whatisit>, viewed September 2016.

³⁹ Given the ACCC’s draft rule advice to combine the three sets of water charge rules into a single set of rules, the ACCC has proposed that the amended instrument replacing the current WCIR, WCPMIR and WCTFR be named the “Water Charge Rules”. See section 4.3 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp. 44-46.

the operator provides infrastructure services in relation to:

- (d) water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water); and*
- (e) water access entitlements held by its customers; and*
- (f) water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator:*

is at least 10 GL.

Note: In this section the maximum volume of water refers to that held under water access entitlements.

5. Application of rule 12.09—take and use of water after a trade

The MDBA requested the ACCC's advice on:

- the scope and application of BPWTR 12.09; and
- whether BPWTR 12.09 has a wider application than anticipated, which could lead to unintended water management outcomes.

5.1. Background

Some categories of water access rights in some Basin States are linked to a specific intended water use. For example, in Queensland, 'water allocations' (equivalent to a water access entitlement) have an associated purpose, such as 'urban', 'agriculture' or 'any'.⁴⁰ The ACCC's original advice on the water trading rules identified that:

*Some of these categories of water access rights are subject to particular trading restrictions. For example, in some Basin states water access rights intended for urban use cannot be traded and can only be used for urban purposes. In other instances, trades may only be permitted between two parties that will use the water for the same purpose.*⁴¹

Trading restrictions based on the intended or historical purpose for which water is used impede the efficient operation of water markets, which work to allocate water between competing uses based on the relative value or benefits of water being used in those competing uses. The ACCC further identified that purpose-based restrictions on trade of (tradeable) water access rights which relate to whether or not water is being used for an environmental purpose serve to

⁴⁰ ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, p.47.

⁴¹ Ibid.

undermine the policy objective that environmental water holders should be subject to the same water trading rules as all other holders of water access rights.⁴²

In view of these considerations, the ACCC considered that general restrictions on trade based on past, current or intended purpose of water use should be prohibited under the water trading rules. However, the ACCC recognised that a targeted exemption from this prohibition was warranted in relation to stock and / or domestic rights, as these rights “form a special case due to the importance of water for these purposes”.⁴³ The ACCC therefore made rule advice as follows:

Rule advice (3–E)

The Basin Plan water trading rules should provide that, in the case of tradeable water access rights (other than stock and domestic rights):

- *there should be no restrictions on trade due to the purpose for which the water has, is currently, or will be used*
- *the purpose for which water arising from a trade is used should not be restricted as part of the trade approval process (water use on land should be separately addressed through use approvals).*

BPWTR 12.08 and 12.09 together give effect to the ACCC’s rule advice 3-E:

- BPWTR 12.08(1) gives effect to the first part of rule advice 3-E, and provides that “a person may trade a water access right free of any restriction on the trade that relates to the purpose for which the water relating to that right has been, or will be, used”.⁴⁴
- BPWTR 12.09 forms a complement to BPWTR 12.08, and gives effect to the second part of rule advice 3-E. BPWTR 12.09 provides that “[a] person may take and use water under a water access right free of any restriction arising from the fact that the person acquired the water access right by way of trade.”

5.2. Discussion

Differences between rule advice 3-E and BPWTR 12.09

The second part of rule advice 3-E, from which BPWTR 12.09 was formed, refers to restrictions occurring “as part of the trade approval process”. In contrast, BPWTR 12.09 encompasses “any restriction arising from the fact that the person acquired the water access right by way of trade”. This characterisation is both broader and narrower than rule advice 3-E, in three different dimensions:

- first, BPWTR 12.09 is able to encompass restrictions arising before, during and after a trade takes place, whereas rule advice 3-E was concerned with only restrictions

⁴² ACCC, *Water Trading Rules Draft Advice*, Canberra, December 2009, p.54.

⁴³ ACCC, *Water Trading Rules Final Advice*, Canberra, March 2010, p.51. Note that the exemption of stock and/or domestic rights from BPWTR 12.09 is not relevant to the amendments being considered here and therefore is not discussed further in this Advice.

⁴⁴ Note: 12.08(2) provides that rule 12.08 does not apply to a water access right that is a stock right, a domestic right, or a stock and domestic right.

occurring as part of the trade approval process—in this aspect, 12.09 is broader than rule advice 3-E;

- second, BPWTR 12.09 relates to any restriction on the take and use of water under a water access right, which is arguably broader than rule advice 5-E which relates to restrictions on the purpose for which water is used;
- third, BPWTR 12.09 applies only to restrictions “arising from the fact that the person acquired the water access right by way of trade”, which could be viewed (see discussion below) as implying that only trades involving a change of ownership are relevant to this rule. In contrast, rule advice 3-E could apply to trade regardless of whether or not a change of ownership occurs—in this aspect, 12.09 could be narrower than rule advice 3-E.

These three points are discussed in turn below.

Restrictions applied as part of the trade approval process versus restrictions “arising from” trade

In relation to the first of these dimensions, the ACCC considers that specifying the scope of BPWTR as being able to apply to restrictions on taking and using water “arising” from the fact that trade has occurred is a sensible approach that is consistent with the general policy intent that water use (on land) should be separately addressed from trade approvals. If BPWTR were confined only to such restrictions that occurred “as part of the trade approval process” (which was the characterisation used in the ACCC’s rule advice), a Basin State could conceivably avoid the operation of the rule by deliberately restricting the purpose of water use of a traded water access right immediately *after* the trade had been approved. In this manner, a Basin State could implement a policy whereby take and use of water available under traded water access rights was automatically restricted after the trade has been approved, solely because the right was traded, despite the operation of BPWTR 12.09.

As such, the ACCC considers it desirable that BPWTR 12.09 is able to apply to restrictions on the take and use of water under a water access right that arise *because* the right was traded, regardless of whether these restrictions are applied during the trade approval process or at a different time (with the most likely alternative being a restriction applied directly after the trade has been approved).

Restrictions relating to the purpose for which water is used, versus restrictions on “take and use”

In relation to the second dimension identified above, the ACCC notes that rule advice 3-E specifically advises that “water use on land should be separately addressed through use approvals”. This wording makes clear that while the main focus of this rule advice is restrictions on the purpose for which water is used, the original intent can be taken to more broadly relate to restrictions on taking and using water after a trade has occurred. While water use approvals may relate to the volume of water able to be used and the timing or other conditions of extraction, Basin States have not necessarily taken this approach to date—particularly in unregulated systems, specific extraction conditions continue to be an inherent feature or ‘attribute’ of water access rights. This approach to managing extraction and use conditions gives rise to the potential need to alter these specific conditions when water access rights are traded. Rule advice 3-E was aimed at encouraging a clearer separation of the trade approval process and take (extraction) / use approval processes.

The ACCC re-affirms its support for this broader interpretation. The separation of trade approvals from approval processes for water use is central to the ‘unbundling’ reforms, to which Basin States committed under the National Water Initiative (NWI).⁴⁵ As such, the ACCC considers that no amendment to BPWTR 12.09 to narrow its scope to only restrictions relating to the purpose for which water is used is needed.

Meaning of “acquired...by way of trade”

In relation to the third of these dimensions, the ACCC considers that the meaning of the qualifier “acquired...by way of trade” is open to differing interpretations. One possible view is that the term “acquired” is intended to narrow the scope of relevant trades to only those which involve a change of ownership of the water access right (regardless of whether a change of location also occurs). That is, a person who already owns a right and then undertakes a location-only trade could arguably be said to not have “acquired” the right at the new location by virtue of trade. This interpretation could be supported with reference to the ordinary meaning of the word “acquire”, one definition of which is “to come into possession of; get as one’s own”.⁴⁶ As such, a restriction that arose because a water access right was traded could arguably be characterised as being consistent with BPWTR 12.09 if it is to be applied to *all* trades of water access rights (or a particular category of water access rights), rather than only those trades involving a change of ownership. The key to this argument is that, even if the restriction arises solely because trade has occurred, it does not arise because a person *acquired* a water access right by way of trade.

The ACCC considers that such an interpretation is not consistent with the intent of rule advice 3-E, and could allow potentially inappropriate restrictions to be implemented such as:

- a restriction which provided that water available under a traded water access right could only be used for a particular purpose or could *not* be used for a particular purpose, where prior to the trade there was no such condition, such that the restriction arises solely because of the trade.
- a restriction which provided that water available under a traded water access right could only be used in a particular area or location, where prior to the trade there was no such condition, such that the restriction arises solely because of the trade (see, however, discussion below on location-specific extraction conditions) .
- a restriction which limited or reduced the circumstances in which a right holder could take or use water after a water access right had been traded (see, however, discussion below on location-specific extraction conditions) .

Another possible view is to consider a person’s acquisition of a right in terms of the specific attributes of the water access right which the person holds after trade has occurred. A good example to illustrate this view is to consider an interstate trade of water allocation conducted by a single person (e.g. a person who trades water allocation originally allocated in Victoria for use in NSW). In this example, the right held by the person *after* the trade is a fundamentally different right than that held prior to the trade—the right previously held against the state of origin (Victoria) is essentially extinguished and replaced with a right held against the state of destination (NSW). It seems quite clear in this case that the new right (the NSW water

⁴⁵ For a discussion on the ‘unbundling’ reforms which have occurred, see ACCC, *Water Monitoring Report 2014-15*, May 2016, Canberra, p.17, available online: <https://www.accc.gov.au/publications/accc-water-monitoring-report>, accessed September 2016.

⁴⁶ Macquarie Dictionary Online, accessed September 2016.

allocation) has been “acquired” by way of trade, even though no change in ownership has occurred.

However, this line of reasoning becomes less clear in a case where a location-only trade occurs (i.e. location changes but ownership does not), but location is only one “attribute” of the right in question. An example could be a water allocation trade between two trading zones within a single water resource (e.g. a water allocation trade from NSW Murray—above Choke (interstate trading zone 10) to NSW Murray—below Choke (zone 11)). Here, an “attribute” (the extraction location) of the water access right has been changed but (arguably) a right has not been “acquired” in this case.

The ACCC considers that the examples given here demonstrate that interpreting “acquired” as necessarily implying a change in ownership is too narrow, but also that assessing whether a water access right has been “acquired by way of trade” is problematic in a context where a fundamental attribute (extraction location) of a water access right is altered during trade but no ownership changes (or other changes) occur.

The ACCC considers that the possibility of BPWTR 12.09 being validly viewed as only applying when trade involves a change of ownership is sufficient to warrant an amendment to this rule. However, as set out below, there are several complicating factors that need to be carefully considered.

Application of BPWTR 12.09 to location-specific extraction conditions

In some cases, water access rights are issued with conditions specifying the particular circumstances in which water available under the right may be taken. Examples include:

- conditions relating to the rate at which water may be taken (e.g. pumping rates)
- conditions relating to the time at which water may be taken (e.g. a restriction specifying that pumping may only occur once a particular flow rate or water level has been reached)
- conditions relating to the specific location, watercourse, river reach etc. at which water may be taken)

The ACCC notes that the specific manner in which such conditions are specified can vary considerably between water resources and across Basin States.

These conditions may be essential attributes of the water access right itself, and are generally used by Basin States (particularly in relation to water access rights in unregulated systems or “supplementary” rights within regulated systems) to ensure appropriate protection for third party interests. For example, a Basin State might specify a minimum flow condition for extraction of water available under a water access right in an unregulated system, in order to ensure that there is sufficient overall water availability in the system for all right holders (taking into account water for critical human water needs and planned environmental water, if applicable).

The ACCC acknowledges that these kinds of conditions may be required in situations where the water rights framework does not result in specific amounts of available water being assigned to particular right holders (as is generally the case in regulated systems). The ACCC also acknowledges that where a trade involves a change in location, these conditions may need to be varied. For example, a minimum flow condition specified with reference to location A may need to be varied so that it is still meaningful at location B.

When assessing these kinds of conditions under BPWTR 12.09, the appropriate test should in general be whether the condition that applies to the traded water access right would also be applied to a similar right which had not been traded (e.g. if a new right were to be issued at the new location, would it have the same conditions as are being specified for the traded right?).

The ACCC considers that the current drafting of BPWTR 12.09 does not make clear that this is the relevant test. Rather, the drafting arguably suggests a slightly different test could be applied—whether a condition that applied after a trade involving a change of ownership would also have been applied if the trade did not involve a change of ownership. The ACCC considers this an inappropriate test as it would not preclude the application of conditions / restrictions which discriminated against water access rights which had been traded per se (including trades involving a change of ownership and / or a change of location).

The ACCC's view is that further analysis of the specific ways in which Basin States currently specify extraction conditions, and the roles these conditions have in Basin States' overall water management frameworks, is required before specific advice can be given on how BPWTR 12.09 should be amended to address the shortcomings identified above. Due to the timeframes for the MDBA's request for advice, the ACCC has not had the opportunity to undertake this analysis or consult with Basin States.

Accordingly, while the ACCC considers an amendment may be warranted, it has not made specific rule advice on BPWTR 12.09. The ACCC instead recommends that any amendments to BPWTR 12.09 should be deferred until substantive amendments to the BPWTR are under consideration (as opposed to the minor and technical amendments currently being considered). The ACCC also considers that any such substantive review of the rationale for and drafting of BPWTR 12.09 should also include a review of the MDBA's guidance on this rule.

Implications of amending BPWTR 12.09 for BPWTR 12.12

BPWTR 12.12 is a rule which operates similarly to BPWTR 12.09, but relates to a person's ability to access carryover arrangements rather than a person's ability to take and use water.

BPWTR 12.09 and 12.12(1)⁴⁷ both employ the phrase "free of any restriction arising from the fact that the person acquired the water access right by way of trade". Therefore, given the concerns identified above in relation to the phrase "acquired...by way of trade", careful consideration should be given to whether any amendment is required in BPWTR 12.12(1). However, such consideration is beyond the scope of the MDBA's request for advice at this time.

It is worth noting that BPWTR 12.12(2) provides that, despite 12.12(1), where a trade involves a change in the water resource to which the right relates, the carryover arrangements for the destination water resource may be applied to the trade water access right. This is conceptually similar to the case discussed above where a Basin State varies extraction conditions pertaining to a water access right whose location has been changed in the course of a trade. In both cases, an attribute of the water access right may legitimately need to be varied when certain location changes occur.

⁴⁷ BPWTR 12.12(1) provides that "[a] person may participate in a carryover arrangement in relation to a water access right free of any restriction arising from the fact that the person acquired the water access right by way of trade."

5.3. ACCC advice

Recommendation B

- The MDBA should consider further the merits of making substantive amendments to BPWTR 12.09 to more clearly give effect to the policy intent that the take and use of water to which a water access right relates should not be restricted *solely because* the water access right is, or has been, traded.
- In considering possible amendments to BPWTR 12.09, further analysis of the specific ways in which Basin States currently specify extraction conditions, and the roles these conditions have in Basin States' overall water management frameworks, should be undertaken.
- The MDBA should also consider whether its guidance material on BPWTR 12.09 can be clarified. Clarification may be warranted even in the event that no amendments are made to this rule.

Recommendation C

- In considering possible amendments to BPWTR 12.09, the relationship between BPWTR 12.09 and 12.12 should be carefully considered.
- If BPWTR 12.09 is amended, consideration should be given to the merits of making similar amendments to BPWTR 12.12(1).