

ACCC INQUIRY INTO MURRAY-DARLING BASIN WATER MARKETS

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Legal Briefings - By **Sarah Benbow**

The Australian Competition and Consumer Commission (**ACCC**) has recently commenced an inquiry into the water trading market in the Murray-Darling Basin.

IN BRIEF

- The ACCC has commenced an inquiry into the tradeable water rights market in the Murray-Darling Basin at the direction of the Federal Government.
- As part of the Inquiry, the ACCC will specifically consider the practices and roles of investment funds in the water rights market.
- Institutional investor invested in the Murray-Darling Basin:
 1. may be subject to information and document requests from the ACCC; and
 2. should consider whether to proactively make submissions to the Inquiry, including in response to the ACCC's initial Issues Paper which has not yet been released.

BACKGROUND

On 7 August 2019, the Federal Government directed the ACCC to conduct an inquiry into the tradeable water rights market in the Murray-Darling Basin (**Water Inquiry**). The Water Inquiry was an election promise of the Coalition government in response to community concerns about changes in the use and trading of water from the Murray-Darling Basin, including by non-farming investors such as funds.

The ACCC must provide an interim report to the Government by 31 May 2020 and a final report by 30 November 2020. As part of its reporting, the Government has directed the ACCC to recommend options to enhance markets for tradeable water rights in the Murray-Darling Basin, including options to enhance operations, transparency, regulation, competitiveness and efficiency.

The ACCC's inquiry role in the Water Inquiry is in addition to its existing roles in price setting, monitoring, reporting and enforcement of water trading.

SCOPE OF THE INQUIRY

TERMS OF REFERENCE

The Government's Terms of Reference (**TOR**) for the Water Inquiry require the ACCC to specifically consider the following matters:

- market trends since 2012 including demand, location of water use, quantity of water traded, new trading products, water availability and the number of sectors and participants in water markets;
- the role and trading of carryover allocations in water markets
- the role of market participants including water brokers, exchanges, investment funds and significant traders.
- the public availability, timeliness, accuracy and completeness of information on water market activities and tradeable water right holdings;
- barriers to entry, expansion and exit; and
- the management of constraints on the storage or delivery of water, including in the context of trading and transfers.

ACCC POWERS AND APPROACH TO THE INQUIRY

The ACCC has a broad range of information gathering powers it can use to carry out the Water Inquiry. These includes powers to compel parties to hand over documents and information, and to provide oral evidence at a private or public hearing.

The ACCC can choose to publish information it obtains through the exercise of these powers, including information that is confidential to a party so long as the ACCC considers it to be in the public interest to publish that information.

The ACCC's role in the Inquiry is to make recommendations to the Government. It does not itself have the power to implement reforms to deal with issues that it identifies through the Inquiry. However, in previous market inquiries, including the recently completed Digital Platforms Inquiry, the ACCC has demonstrated its willingness to make broad reaching recommendations for substantial legal and policy reform and increased regulation of markets. These recommendations have generally been well received by the Federal Government.

Previous market investigations have also resulted in the ACCC uncovering and taking public enforcement action against contraventions of the Competition and Consumer Act.

PREPARING FOR THE INQUIRY

Institutional investor that invest or trade in the Murray-Darling Basin water market should consider their potential role in the Inquiry.

In particular, are there are issues that it is important for the ACCC to understand or take into account when it examines the operation of the market and the role of market participants or when it considers recommendations for policy or regulatory reform of the market?

There will be several stages of the Inquiry in which market participants could make proactive submissions on these types of matters:

- in response to the ACCC's Issues Paper that will be released at the outset of the Inquiry and identify the specific issues the ACCC intends to consider (in more detail than the Terms of Reference); and
- at private or public hearings held by the ACCC; and
- in response to the ACCC's draft report due to be released by 31 May 2020.

Institutional investor involved in the market should also be prepared for the possibility of receiving statutory notices requiring them to provide information or documents to the ACCC. The ACCC has been directed to investigate the functioning of the market dating back to 2012, which will require it to gather 7 years' worth of historical market information.

Responding to ACCC notices can be time consuming, especially where the information or documents requested relates to a number of years.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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