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25 August 2017

Mr Josh Bull MP  
Chair  
Parliament of Victoria - Environment, Natural Resources and Regional Development  
Committee  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002

Dear Mr Bull

### **Inquiry into the Management, Governance and Use of Environmental Water**

Thank you for the invitation to make a submission to your committee's inquiry into the Management, Governance and Use of Environmental Water. I attach the submission from the Australian Competition and Consumer Commission (ACCC).

Under the Commonwealth *Water Act 2007*, the ACCC has a variety of water-related roles in the Murray-Darling Basin, including advising on regulatory and policy matters.

The ACCC considered a number of issues relevant to the management, governance and use of environmental water as part of its advice to the Commonwealth Minister for Agriculture and Water Resources on the Commonwealth water charge rules (published November 2016).

The ACCC has also commented on matters relevant to this inquiry in its recent submission to the Productivity Commission's Inquiry into National Water Reform.

Please do not hesitate to contact Leo Lovius on [REDACTED] with any questions regarding this submission.

Yours sincerely

[REDACTED]

Robert Wright  
General Manager  
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Australian  
Competition &  
Consumer  
Commission

# Victorian Inquiry into the Management, Governance and Use of Environmental Water

ACCC submission

Date 25 August 2017

## Summary

The Australian Competition and Consumer Commission (ACCC) considers that environmental water holders (EWHs) should be treated like any other water user. This includes:

- being subject to the same trading and carryover rules as other users
- paying appropriate and transparent charges for water infrastructure services provided for held environmental water
- being able to access the same infrastructure services as other users.

The ACCC considers that such treatment will remove market distortions and barriers to trade and help deliver the objectives of the National Water Initiative – most relevantly, facilitating the functioning of efficient water markets and promoting the economically efficient and sustainable use of water, infrastructure and government resources devoted to the management of water.

In undertaking its water-related roles, the ACCC has recently advised that a number of amendments to the Commonwealth water charge rules can be made to help ensure these outcomes are achieved in practice:

- pricing transparency for regulated water charges can be strengthened by amendments to make clear that all regulated water charges, including those paid by environmental water holders, must be listed on infrastructure operators' schedules of charges, and that specific information must be provided in relation to these charges
- a 'level playing field' can be facilitated by a 'non-discrimination rule' which requires infrastructure operators to levy the same infrastructure charge for an infrastructure service for all customers, unless a reasonable basis for a difference can be shown.

These proposed changes are still being considered by the Commonwealth Minister for Agriculture and Water Resources. Victoria can encourage infrastructure operators within its own jurisdiction to adopt approaches consistent with this advice. Victoria can also implement the principle of equal treatment for environmental water holders by ensuring that development of new trade mechanisms or infrastructure services, or reforms to carryover arrangements, take into both account environmental water holders' and consumptive water users' needs, and do not preference one over another.

The ACCC also considers that there is potential to improve stakeholder understanding of arrangements relating to the trade of water by environmental water holders and of administrative arrangements relating to the movement of environmental water that operate outside of the trading framework. The ACCC supports ongoing work to educate water users about these arrangements to improve confidence in, and understanding of, water markets.

Victoria could consider implementing a publicly-accessible registry of Victorian held environmental water (listing bulk environmental entitlements, water shares and any other entitlements held by environmental water holders). A register of environmental water would improve the ease of access to this information and may increase water users' understanding of the quantity of environmental water held in each catchment or trading zone.

The ACCC has previously recommended that 'the Australian Government work with Basin States to improve the accuracy and consistency of water trade reporting', particularly in relation to robust and separate reporting of market-based trades from other types of trade (e.g. non-commercial trade between environmental holders).<sup>1</sup> The ACCC continues to hold the view that increased transparency of this information will assist all market participants to

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<sup>1</sup> Recommendation 8-A, Australian Competition and Consumer Commission, *Review of the Water Charge Rules Final Advice*, September 2016, p. 308.

accurately understand trade volumes and prices, which will benefit decision-making and increase confidence in market mechanisms.

Finally, while supportive of efforts to overcome physical, administrative and co-ordination constraints to improve the efficiency of environmental watering, the ACCC cautions that such efforts should ensure that this does not come inappropriately at the expense of other water users or in breach of the Basin Plan Water Trading Rules, the Commonwealth Water Charge Rules and the *Competition and Consumer Act 2010* (Cth).

## 1. Introduction

### 1.1. ACCC roles

The Australian Competition and Consumer Commission welcomes the opportunity to respond to the Victorian Parliamentary Environment, Natural Resources and Regional Development Committee's Inquiry into the Management, Governance and Use of Environmental Water.

Under the Commonwealth *Water Act 2007*, the ACCC has a variety of water-related roles in the Murray-Darling Basin, including advising on regulatory and policy matters, monitoring regulated water charges and enforcing compliance with the water market and charge rules, as well as playing an active role in making markets work for consumers in the wider Australian economy.

In September 2016, the ACCC completed a review of the Commonwealth water charge rules<sup>2</sup> and provided advice to the Minister for Agriculture and Water Resources (Commonwealth Minister).<sup>3</sup> The water charge rules establish rules relating to the setting and publication of information about regulated water charges in the Murray-Darling Basin. In undertaking this review, the ACCC considered a number of issues relevant to environmental water.

The ACCC has also commented on matters relevant to this inquiry in its recent submission to the Productivity Commission's Inquiry into National Water Reform.<sup>4</sup>

### 1.2. About this submission

The matters on which this submission comments are generally relevant to the management of 'held environmental water'. Held environmental water refers to water available under a statutory right (such as a Victorian water share or water allocation) that is held for the purpose of achieving environmental outcomes. Both Commonwealth and Victorian legislation establish standalone statutory 'environmental water holders', giving them specific responsibility for managing held environmental water, but other government agencies and private bodies can also own and / or manage held environmental water.<sup>5</sup>

The ACCC considers that environmental water holders should, as a matter of principle, be treated like any other water user. This includes:

- being subject to the same trading and carryover rules as other users

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<sup>2</sup> These rules are the: Water Charge (Infrastructure) Rules 2010; Water Charge (Planning and Management Information) Rules 2010, and the Water Charge (Termination Fees) Rules 2009.

<sup>3</sup> The Commonwealth Minister adopted part of the ACCC's advice and is currently considering the remainder. See [Department of Agriculture and Water Resources website](#), accessed August 2017.

<sup>4</sup> Australian Competition and Consumer Commission, *Submission to Productivity Commission National Water Reform Inquiry*, April 2017, p.26. Accessible via the [ACCC's website](#).

<sup>5</sup> Water can also be provided for the environment through the operation of rules or requirements of water plans, licences and other legal instruments. This water is often referred to as 'planned environmental water' or 'rules-based water'. Because of the way this water is provided for, fees and charges, management tools and governance arrangements do not apply in the same way as for held environmental water.

- paying appropriate and transparent charges for water infrastructure services provided for held environmental water
- being able to access the same infrastructure services as other users.

The ACCC is of the view that equal treatment of environmental and other water users will remove market distortions and barriers to trade and help deliver the objectives of the National Water Initiative – most relevantly, facilitating the functioning of efficient water markets and promoting the economically efficient and sustainable use of water, infrastructure and government resources devoted to the management of water

## 2. Fees & Charges for Environmental Water

Environmental water holders pay a range of fees and charges in relation to the water access rights they hold and the water infrastructure services they receive, as do other users. However, currently there is some lack of clarity about what fees and charges are paid, and what infrastructure services are received, by environmental water holders. This leads to stakeholder concerns about inequitable treatment for environmental water holders compared to consumptive users.<sup>6</sup>

This lack of information about the fees paid by environmental water holders, together with some lack of clarity about the requirements on infrastructure operators<sup>7</sup> to publish information on these charges, has made it difficult for the ACCC to enforce the Commonwealth water rules in this area<sup>8</sup> and to improve the quality and comprehensiveness of information available on the fees and charges paid by environmental water holders.

The Victorian Environmental Water Holder (VEWH) publishes some information on the total amount of charges it pays for infrastructure services in its annual report but this information is not necessarily sufficient to assess whether it pays the same charges for water harvesting, storage, delivery, trade and other services as other water users or to assess the extent to which ‘users pays’ principles are being implemented.<sup>9</sup>

The Water Charge (Infrastructure) Rules 2010 (WCIR) require infrastructure operators in the Murray-Darling Basin (MDB) to publish details of all regulated water charges they impose. However in its recent review of the water charge rules, the ACCC identified that this has not always been the case in practice, particularly in relation to charges for services negotiated with environmental water holders.

The ACCC advised a number of amendments be made to the rules to:

- strengthen pricing transparency by making clear that all regulated water charges are required to be included on operators’ schedules of charges and that certain information must be provided about these charges<sup>10</sup>
- put in place a ‘non-discrimination rule’ requiring all operators:
  - to levy the same charge for an infrastructure service to all customers unless there is a reasonable basis for the difference.

<sup>6</sup> For further information on concerns raised by stakeholders, see: ACCC, Final Advice, pp. 52-56.

<sup>7</sup> Used here to refer to ‘a person or entity that owns or operates water service infrastructure to provide a water storage, delivery or drainage service (including the delivery of water for irrigation) to another person’: see section 7 of the *Water Act 2007* (Cth).

<sup>8</sup> The ACCC has taken administrative action to enforce the rule requirements to publish information on all of an operator’s ‘regulated charges’ - see ACCC, Media Release: ‘Murrumbidgee Irrigation in breach of the Water Charge Rules’, <https://www.accc.gov.au/media-release/murrumbidgee-irrigation-in-breach-of-the-water-charge-rules>, (Accessed: 21/8/2017).

<sup>9</sup> The ACCC understands that VEWH pays two types of fees and charges for holding and using environmental water. The first is water storage charges (which made up nearly half of all VEWH expenses in 2015-16) and the second is general delivery expenses (less than 1 per cent of all VEWH expenses in 2015-16). See: VEWH, *Annual Report 2015-16*, p.58.

<sup>10</sup> ACCC, Final Advice, chapter 5.4, p.95.

- o to offer the same infrastructure service to stakeholders unless it is reasonable not to do so.

The ACCC advised that reasonableness should be based on a non-exhaustive list of factors including: the amount of infrastructure required to provide the service, and whether any difference in costs related to the estimated costs of providing the service or the usage of the service.

A difference in charges could also be permitted if it resulted in lower charges for other customers of the infrastructure operator (a prudent discount).<sup>11</sup>

These proposed amendments could have a meaningful impact on charging practices in Victoria, particularly because of existing charging practices in Goulburn-Murray Water that result in environmental water holders, as 'non water users' or 'bulk entitlement holders', paying different storage charges to 'water users'.<sup>12</sup> The proposed amendments would also improve the information available because the pricing transparency requirements would require operators to publish on their schedule of charges information on charges for all infrastructure services provided to environmental water holders (as for other customers), including different rates or discounts, if applicable.

The ACCC considers that this advice, if implemented, will assist stakeholders to understand what charges environmental water holders pay and what infrastructure services they receive, including how these services might differ from other services provided to customers such as irrigators.

The ACCC recommends to this inquiry that Victoria could strengthen its framework by:

- requiring Victorian infrastructure operators to adopt greater transparency about any discounts or differences in charges paid by environmental water holders, and the nature of infrastructure services provided to them, including how these services might differ from those provided to other customers
- putting in place a non-discrimination rule to prohibit Victorian infrastructure operators from charging customers different prices for the same service or restricting the availability of a service between customers, unless there are reasonable grounds for the difference in price or lack of availability of the service or the difference in charges reflected a 'prudent discount'.

The ACCC considers that acting on these recommendations would increase the transparency of charges and of the terms and conditions on which services are provided for all Victorians, and together with the proposed non-discrimination rules, would reduce concerns about cross-subsidisation or discrimination against some customer groups.

### **Recommendation One**

The ACCC recommends that the Victorian Government improve the availability of information on, and the transparency of, charges paid by environmental water holders by requiring infrastructure operators in Victoria to:

<sup>11</sup> This builds on existing rule 10 of the WCIR, which allows member-owned operators to offer the same service at a different price to customers who hold irrigation right compared to customers who do not hold irrigation rights only where the difference in cost is referable to the actual difference in cost in providing the service to those two classes of customer. As Victorian infrastructure operators are not member-owned (and Victorian customers do not generally hold irrigation right), they are not currently bound by rule 10. For further information, see ACCC, Final Advice, chapter 5.3.

<sup>12</sup> In Victoria, a 'non water user' is a customer whose water share is not 'associated' with a water use licence or registration (i.e. someone without permission to use water on a particular area of land). The CEWH holds Victorian non-associated water shares, and so falls into the category of 'non-water user'. The VEWH holds Victorian bulk entitlements, and so pays 'bulk water' charges within GMW's area of operations. Bulk storage charges are the same as entitlement storage charges for non-water users, but they differ from charges for 'water users'. For the Goulburn and Murray basins, where the majority of environmental water is held, the bulk / non-water user storage charges are lower than those paid by water users. See ACCC, Final Advice, Box 5.2, pp.63-64, and GMW's 2016-17 Schedule of Charges, available at: [http://www.gmwater.com.au/downloads/gmw/Pricing\\_List/GMW\\_2016\\_17\\_Price\\_List.pdf](http://www.gmwater.com.au/downloads/gmw/Pricing_List/GMW_2016_17_Price_List.pdf), accessed August 2017.

- include environmental water charges on their schedule of charges and to provide details about each of these charges
- levy the same charge for an infrastructure service provided to environmental water holders and to other customers, unless there is a reasonable basis for the difference in charges.

### 3. Use of water management tools such as carryover and trade

Environmental water holders rely on water management tools such as trade and carryover in managing held environmental water. These tools allow them greater flexibility as to the timing and location of use of held environmental water. They can also use commercial trades (i.e. trading water access rights with non-related parties) to alter the volumes and types of water access rights held, and trade revenues can provide an income stream.

Stakeholder concerns with use of these management tools by environmental water holders stem from concerns that such actions can impact on the rights of consumptive water users<sup>13</sup> (such as the reliability of their water access right or access to water markets), or preferentially allow environmental water holders access to infrastructure services or trade mechanisms not available to others.<sup>14</sup> The following sub-sections consider the use of carryover and trade by environmental water holders; whether environmental water holder carryover or trade decisions can, or do, impact other water users; and how the use of these tools can be made more transparent to reduce stakeholders concerns.

#### 3.1. Carryover of environmental water

Carryover is a mechanism which allows water access entitlement holders to store unused water allocation from the current year for use or trade in the subsequent water year. Rules governing access to carryover generally vary according to the type of entitlement held and by water resource. Also, different states each take their own approach to carryover – thus carryover rules for water users in the Victorian Murray differ from those in the NSW Murray. However, for a given entitlement type and water resource, access to carryover for environmental water holders is the same as for other water users; that is, carryover rules are not predicated on the intended use of the water.

Data from the Victorian water accounts shows that as an individual user, VEWH's use of carryover under its bulk environmental entitlements is substantially smaller than aggregate carryover by water share holders.<sup>15</sup> Despite carryover being an important tool for VEWH, in 2013-14 and 2014-15 VEWH's share of carryover in the Goulburn and Vic Murray Basins has totalled at most 16 per cent of the total amount carried over by all water users. More broadly, of the 856 GL carried over by all water users in the Goulburn and Murray system, 247 GL (28 per cent) was carried over by environmental water holders (including CEWH and VEWH).<sup>16</sup>

<sup>13</sup> In relation to carryover, stakeholder concerns generally derive from the belief that the scale of use of carryover by environmental water holders affects consumptive users' access to carryover or the reliability of water allocations to consumptive water users' entitlements, via environmental water holders' carryover water displacing consumptive users' water or leading to a greater risk of spill.

<sup>14</sup> See, for example, stakeholder concerns raised in ACCC, Final Advice, p. xv.

<sup>15</sup> Source: Victorian Water Accounts, 2013-14 and 2014-15.

<sup>16</sup> Source: <http://nvrn.net.au/resources-and-data/current-water-ownership>, accessed August 2017.

### 3.1.1. Impact of carryover of environmental water

Carryover is a relatively recent water management mechanism, being first introduced in northern Victoria in 2007<sup>17</sup>. In Victoria, carryover rules have periodically been refined, as water resource managers ‘learn by doing’ about the ways in which carryover can impact on water availability and water trade and use decisions.

In theory, an individual’s use of carryover could impact other users in several ways, such as:

- water carried over from previous years could displace inflows by using storage airspace, leading to lower volumes of water available to be allocated
- water not carried over would be subject to forfeiture, and would be returned to the pool of water available to be allocated
- if water allocation is traded between accounts or locations in order to optimise access to carryover, this could affect market outcomes, such as whether, and when, relevant water allocation trading limits are reached.

The extent to which these potential impacts occur in practice depends on the design of carryover mechanisms, trade restrictions, and incentives for individual users to access carryover.

#### *Carryover and inflows*

To minimise the risk that carryover water could displace inflows, Victoria has introduced ‘spillable water accounts’ (SWA) for the Goulburn, Murray and Campaspe systems.<sup>18</sup> This mechanism provides a very high level of protection from possible third party impacts insofar as carryover water is stored in SWAs; because this water is the first to spill, it cannot displace inflows. However, if a storage spills *after* a ‘low risk of spill’ declaration is made, carryover water *could* displace inflows.

In smaller systems—Broken, Loddon, Bullarook and Werribee—carryover plus new allocations are limited to 100 per cent of the users’ entitlements.<sup>19</sup> This mechanism also protects water users from the risk that water carried over will displace inflows.

#### *Carryover and water forfeiture*

In practice, the introduction of carryover does tend to decrease the amount of water forfeited at the end of each year. However, given that individual users are entitled to use their allocation within the water year, there is no guarantee even without carryover that water will be forfeited. As such, carryover cannot be said to introduce *inappropriate* third party impacts via reducing average amounts of forfeited water.

#### *Carryover and trade*

Carryover provides an additional option to use of water in the current year, trade or forfeiture. Where the expected net<sup>20</sup> value from applying water in a future year exceeds the expected value of using or trading water in the current year, users will carry over water. Other things equal, carryover is likely to increase the average volume of water held in

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<sup>17</sup> See <http://waterregister.vic.gov.au/about/water-reform-history>, accessed August 2017.

<sup>18</sup> SWAs ‘quarantine’ any water allocation which is in excess of 100 per cent of a user’s water access entitlements linked with the account (regardless of whether that water was carried over, traded in, or allocated to the account). Water quarantined in SWAs is not available for use or trade unless and until the resource manager has declared a ‘low risk of spill’. If a storage spills, any water in SWAs is the first to spill. However, if a ‘low risk of spill’ declaration is made, water allocation in SWAs is transferred into the user’s regular allocation account, and from that point forward is treated the same as any other water allocation in that account. See <http://waterregister.vic.gov.au/water-entitlements/carryover/carryover-faqs>, accessed August 2017.

<sup>19</sup> See <http://waterregister.vic.gov.au/water-entitlements/carryover/carryover-rules>, accessed August 2017.

<sup>20</sup> I.e. net of any costs associated with carryover, such as carryover or storage fees and deductions for storage losses.

storages. On average, this reduces the available storage space that can be used to give effect to water allocation trade in.<sup>21</sup>

Victoria introduced and currently applies allocation trade limits designed to 'prevent situations where, when a trade occurs, the increased obligation to deliver water to users is not accompanied by storages receiving a matching secure volume of water'.<sup>22</sup> These limits were originally put in place due to a range of factors, including high levels of carryover into the 2010-11 water year and a 'decision early in the water year to guarantee access to these carryover volumes'.<sup>23</sup>

The circumstances of the imposition of such trade limits emphasise the strong link between carryover rule design and inter-valley trade rules. Given that both inter-valley trade and carryover are important management tools for environmental water holders, it is very important that environmental water holder trade and carryover patterns (in addition to those of consumptive users) are taken into account when reforming these rules.

However, trading and carryover rules should not be designed to give preference to environmental water holders' needs over consumptive users' (or vice versa); this is important both for maintaining the integrity of the inter-valley allocation trading system, and for maintaining a 'level playing field' between environmental water holders and consumptive users. Relevantly, Basin Plan Water Trading Rule (BPWTR) 12.08 prevents restrictions on trade of surface water access rights in the MDB that relates to the purpose for which the water has been, or will be, used. Also, BPWTR 12.07 prevents restrictions that relate to a person being (or not being) a member of a class of persons (such as an 'environmental water user').

### ***Carryover by environmental water holders and carryover rule design***

The ACCC is aware that some consumptive water users hold the view that the environment should not have access to carryover.<sup>24</sup> The ACCC's view is that access to carryover for environmental water holders should not be viewed any differently than access by consumptive users – both have access to carryover arrangements via the water access entitlements they hold. Maintaining the same rules for accessing carryover for environmental water holders and consumptive users is an integral part of ensuring that entitlements purchased for the environment maintain the same characteristics as before the purchase.

However, when designing carryover rules, it is important to recognise that environmental water holders may have a different demand for carryover than other users. For example, if scenario analysis is used to test the operation of proposed rules, the scenario analysis should include likely environmental water holder carryover demand profiles as well as consumptive user demand profiles. Carryover rules should be designed to allow for the range of behaviours all water users may wish to engage in, without leading to inappropriate third party impacts.

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<sup>21</sup> Note that in practice, water allocation trade does not necessarily result in the physical movement of water between storages, but rather in how storage space is accounted for – see, for example, an explanation of how NSW and Victorian shares of Hume Dam are adjusted to reflect trade between the NSW and Victorian Murray, available at: [https://waterregister.vic.gov.au/images/documents/Victoria%20refines%20controls%20on%20allocation%20trade%20between%20valleys\\_November2012.pdf](https://waterregister.vic.gov.au/images/documents/Victoria%20refines%20controls%20on%20allocation%20trade%20between%20valleys_November2012.pdf), accessed August 2017.

<sup>22</sup> These limits came into effect following a Victorian decision to suspend allocation trade from NSW into Victoria, and from the Goulburn, Campaspe and Loddon systems into Vic Murray or interstate on 11 April 2011. Ibid, p.3.

<sup>23</sup> National Water Commission (2011) *Understanding the Victorian decision to suspend inter-valley water allocation trading*, p. v.

<sup>24</sup> See, for example, comments on GMW's 'Water Resource Availability and Security Comments' board, available at: <http://www.g-mwater.com.au/ourfuture/what-we-ve-heard-so-far/water-resource-availability-security-comments>, accessed August 2017.

## Recommendation Two

That the Victorian Government ensure that carryover rules treat environmental water holders and non-environmental water holders equally. However, carryover rules should be designed to allow for the range of behaviours all water users may wish to engage in, without leading to inappropriate third party impacts.

## 3.2. Trade by environmental water holders

### 3.2.1. Use of trade by environmental water holders

Environmental water holders engage in several different types of trade:

- **Administrative trade between locations or between accounts** (without a change in ownership) – these trades facilitate a change of the extraction / use location of water access rights or move water allocation between accounts. Examples are the VEWH trading water allocation allocated to its entitlements in the Goulburn system for environmental watering in the Victorian Murray system, or trading water between allocation accounts in order to optimise carryover.
- **Administrative trade between owners** (with or without a change in location) – these are trades between environmental water holders to facilitate co-ordinated watering activities. Usually these trades have a ‘zero’ reported price, as the two parties are related and the trade does not involve monetary consideration. An example is the CEWH trading water allocation allocated to its water access entitlements to the VEWH for delivery in Victoria. These kinds of trades may be referred to as ‘transfers’.
- **Commercial trade** (with or without a change in location) – these trades alter the portfolio of held environmental water. Examples include purchase of water access rights from consumptive users (whether ‘permanent’ rights such as water access entitlements or ‘temporary’ rights such as water allocations) and the sale of water allocation to consumptive users.

VEWH undertook substantial non-commercial allocation trade between its own accounts and with other environmental water holders. These trades facilitate changes in location of environmental water use, and in some cases are undertaken to maximise carryover opportunities. In contrast, VEWH’s commercial trade activity is very small. In particular, over the period 2011-12 to 2015-16, apart from a purchase of 300 ML in the Loddon system in 2013-14, VEWH did not purchase water allocation in the Northern Region (and only made a small number of purchases in other regions).<sup>25</sup>

Beyond these uses of trade mechanisms, in some circumstances environmental water can also be allocated, moved, or have a change in ownership via administrative mechanisms in State water management law that operate outside the trading framework and are different from the arrangements available to consumptive entitlements. Some examples of these administrative mechanisms that operate in the MDB include:

- **Overdrawing:** In some cases VEWH is able to draw down more of its allocation than is held in storage. This ability is not available to other water users, who generally, must

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<sup>25</sup> Over the period 2011-12 to 2015-16, net transfers *from* the CEWH averaged 329 GL per year; net transfers *to* The Living Murray averaged 29 GL per year, and net transfers between VEWH allocation accounts averaged 365 GL per year. In contrast, net commercial trade by the VEWH averaged 7 GL per year. Source: VEWH Annual Reports, 2011-12 to 2015-16.

make up any water that they have overdrawn within a short period of time, or else face penalties.<sup>26</sup>

- Return Flows: In some cases, where environmental water is used by VEWH, VEWH can apply to the storage manager to have water re-credited to its account. This ability is not available to other water users, even where they return water to the system.<sup>27</sup>
- Shepherding: Water shepherding involves mechanisms or arrangements that allow for the protection of environmental water from downstream extraction and for re-use of entitlements between connected areas. These arrangements or protections are not available to other water users.<sup>28</sup>

These arrangements are not well-understood by most water users, and can be a source of perceptions that EWHs are afforded 'special treatment'.

The ACCC considers that actions could be taken to improve water users' awareness and understanding of these arrangements and reiterates the position taken in its recent submission to the Productivity Commission's National Water Reform Inquiry:

*'Further reform efforts which seek to improve the availability of services required by environmental water holders [...] should neither give preference to, nor disadvantage, environmental water users compared to consumptive users. [...]*

*Further development of such mechanisms should be required to explicitly assess and address likely impacts on water markets, and should if possible be undertaken via standard trading frameworks rather than via alternative processes. This will help ensure that water users fully understand how these mechanisms operate, so that they can make decisions based on full information.'*<sup>29</sup>

### **Recommendation Three**

That the Victorian Government undertake further ongoing education of stakeholders regarding arrangements used by environmental water holders for the trade of environmental water and other administrative arrangements relating to the movement of environmental water that exist outside the trading framework.

### **Recommendation Four**

That further reforms which seek to improve the availability of services to environmental water holders should neither give preference to, nor disadvantage, environmental water users compared to consumptive users.

## **3.2.2. Impact of trade of environmental water on other water users**

Held environmental water generally constitutes a small proportion of a water resource relative to entitlements for consumptive use. However, environmental water holders are

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<sup>26</sup> One example of this type of mechanism is the provisions in Victorian bulk environmental entitlements which allow for the water holder (VEWH) to 'overdraw' allocation in a given water year (subject to limits set by the relevant Minister): see Cl. 3, Schedule 6 in the Bulk Entitlement (River Murray - Flora & Fauna) Conversion Order 1999 - Consolidated Version as at 05 June 2014.

<sup>27</sup> An example of the "right to use return flows" can be found in Clause 7A of the Goulburn River Environmental Entitlement 2010 – Consolidated Version as at 05 June 2014.

<sup>28</sup> Basin Plan Water Trading Rule 12.02 currently provides a limited exemption from the operation of other specified trading rules for certain arrangements relating to the movement of environmental water (commonly known as 'shepherding'). The exemption permits the application of restrictions on a trade of a water access right if the trade is for an environmental purpose and if the restrictions are imposed in the furtherance of an intergovernmental agreement and that agreement relates to the trade of held environmental water and is for the purpose of achieving one or more environmental outcomes.

<sup>29</sup> ACCC (2017) *Submission to Productivity Commission National Water Reform Inquiry*, p.26.

often the largest individual user in a given catchment. In theory, this gives rise to the possibility that an environmental water holder's trading actions could materially impact prices in water markets; i.e., that environmental water holders could hold 'market power'. Further, there is a possibility that environmental water holders could seek to misuse this market power in a manner which causes adverse impacts for other market participants.

In practice, a range of mechanisms are in place to limit the potential for adverse market impacts of EWH trading, including:

- statutory limits on commercial trading activity by EWHs<sup>30</sup>
- 'good neighbour'<sup>31</sup> policies adopted by EWHs in which they self-commit not to undertake market actions which would be reasonably likely to materially impact market outcomes, and to report transparently about trading activity
- requirements in the Basin Plan Water Trading Rules relating to trade by persons (including environmental water holders) who are aware of certain market-sensitive information (relevant only for MDB trades)<sup>32</sup>
- general provisions against misuse of market power in the *Competition and Consumer Act 2010* (Cth).

The ACCC is not aware of any instances where specific trades undertaken by environmental water holders have materially impacted current prices, or where an environmental water holder has misused its market position as a dominant water user.

However, the creation of environmental water holders as a new category of water user, and the fact that water access rights previously held by consumptive users are now held for the environment, may affect market outcomes via shifts in market supply and demand. Because environmental water holders' demand profile and trading strategies can differ markedly from consumptive users', particularly across time, overall levels of supply and demand in water markets at a given point in time are likely to differ from the case where only consumptive users participate in water markets.

### 3.2.3. Transparency of environmental water holder trading activity

As noted above, one tool used by environmental water holders to mitigate the potential for their trading activities to cause adverse market impacts is reporting about intended, and actual, trading activity. Considerable aggregate information about participation in markets is already available from individual environmental water holders and the ACCC acknowledges that the quantity and breadth of this information has increased over time.<sup>33</sup>

However, less information is available about individual trades, and environmental trade between related parties is generally not separately identified in water registers. This can make it challenging for persons accessing the register to accurately separate out environmental trades and provide accurate statistics on commercial trade volumes and prices and non-commercial trade volumes (these trades usually occur as zero-value trades).

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<sup>30</sup> For example, s.106 of the *Water Act 2007* (Cth) limits the circumstances in which the CEWH may dispose of water or Commonwealth environmental water holdings.

<sup>31</sup> See CEWH's submission to the Productivity Commission's National Water Reform Inquiry, p. 4: available from <http://www.pc.gov.au/inquiries/current/water-reform/submissions>, accessed August 2017.

<sup>32</sup> See Division 5 of the Basin Plan Water Trading Rules. These rules require persons aware of certain information to refrain from trading water access rights until the information is made generally available, unless the trade is conducted pursuant to a 'trading strategy' that has been the subject of a water announcement that has become generally available. These rules also provide certain protections if 'Chinese wall' arrangements have been put in place in relevant agencies (the Commonwealth, a Basin State, or an agency of the Commonwealth or Basin State).

<sup>33</sup> For example, the VEWH produces annual 'trading strategies' (see <http://www.vewh.vic.gov.au/news-and-publications/news/trading-strategy-2017-18>, accessed August 2017) and the CEWH has published a 'trading framework' (see <http://www.environment.gov.au/water/cewo/trade/trading-framework>, accessed August 2017). Also, both entities report on past trading activity via their annual reports. The Victorian water accounts also provide an overview of annual environmental water allocation trade (see, for example, *Victorian Water Accounts, 2014-15*, Table 4-2, pp.31-32 and Table 5-1, p. 37).

Additionally, although it is possible to determine from the Victorian Water Register the environmental water entitlements held in a particular area, including the individual bulk environmental entitlements, we believe that it is currently only possible to identify which entity holds specific water shares by searching individual water share records.

The ACCC has previously recommended that 'the Australian Government work with Basin States to improve the accuracy and consistency of water trade reporting. This requires raising awareness of the importance of, and ensuring compliance with the requirements for, accurate trade price reporting. In particular, water trading price data should be collected (and reported) on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades.'<sup>34</sup> The ACCC supports trade data being made available in a form and manner that would allow stakeholders to easily analyse and interact with it.

The ACCC also supports the enhancement of the Victorian Water Register to enable stakeholders to identify the holders and holdings of environmental water entitlements in a given trading zone or water resource without the need to search individual water share records. The ACCC continues to be of the view that increased transparency of this information will assist all market participants to accurately understand trade volumes and prices, which will benefit decision-making and increase confidence in market mechanisms.

The ACCC acknowledges that efforts to improve the availability and accuracy of water market data are ongoing and being undertaken by a variety of public and private entities.

#### **Recommendation Five**

That the Victorian Government continue to improve the capacity to identify information relating to environmental water in the Victorian Water Register. In particular, the register should enable users to:

- identify the holders of environmental water entitlements in a trading zone / water resource
- understand the basis on which water trading price data is collected, with data collected and presented in a way that allows for the identification and separation of market-based trades from other types of trades
- easily analyse and interact with it.

## 4. Barriers to more efficient use of Environmental Water

Environmental water holders have already identified several barriers to, and potential solutions for, more efficient use of environmental water.<sup>35</sup> The ACCC supports efforts to overcome physical, administrative and co-ordination constraints to improve the efficiency of environmental watering. However, such efforts should not be undertaken at the expense of other water users. In particular, the following points need to be taken into account when seeking to address these constraints:

- innovative trade mechanisms or water infrastructure services should not be developed solely for use by environmental water holders.<sup>36</sup>

<sup>34</sup> Recommendation 8-A, ACCC, Final Advice, p. 308.

<sup>35</sup> See, for example, the CEWH's submission to the Productivity Commission's National Water Reform Inquiry, p. 3: available from <http://www.pc.gov.au/inquiries/current/water-reform/submissions>, accessed August 2017; MDBA (2013) *Constraints Management Strategy 2013 to 2024*, p. 69.

<sup>36</sup> While some mechanisms or services may in practice only be used by environmental water holders, in principle they should be open to any water user who seeks to access them (notwithstanding general conditions such as a requirement to hold an entitlement or to pay relevant fees and charges in order to access a mechanism / service).

- for trade of MDB water resources, all trading rules, and any regulated water charges for infrastructure services need to be consistent with Commonwealth water legislation, as well as any relevant Basin State legislation.
- when seeking to co-ordinate the activities of different environmental water holders, it should be noted that the *Competition and Consumer Act 2010* (Cth) requires entities not to co-ordinate their trading activities (e.g. not to agree on a particular shared trading strategy).

#### **Recommendation Six**

That the Victorian Government, in developing measures to improve the efficiency of environmental watering, has regard to the principles of open access, and equal treatment of, environmental and non-environmental water users and ensures that this does not come at the expense of other water users and is not in breach of the Basin Plan Water Trading Rules, the Commonwealth Water Charge Rules and the *Competition and Consumer Act 2010* (Cth).

## 5. Transparency of environmental water holdings

The ACCC notes that there is now a range of information available on environmental water holdings held in Victoria from different sources. For example, the Victorian Water Accounts present information on:

- environmental entitlement held and used by basin or system<sup>37</sup>
- the volume of surface environmental water flow leaving from Victorian basins or systems to South Australia<sup>38</sup>

Stakeholders are also able to access information on bulk environmental entitlements from the Victorian Water Register.<sup>39</sup>

The ACCC considers there is still room for improvement of the information available. Issues with existing information include:

- difficulty in reconciling publicly available sources of information and a lack of sufficient detail on the information available:<sup>40</sup> for example, some sources list environmental water entitlements held by all environmental water holders in Victoria, while others only list those held by the VEWH.
- lack of real-time information in a form that can be easily analysed by stakeholders (with information generally only available at certain times of the year, for example, as part of a monthly or annual report).
- information on the specific water shares held by environmental water holders is only available at some expense to stakeholders.

The ACCC is concerned that these issues make it difficult for stakeholders to understand the level of held environmental water relative to consumptive entitlements held in each catchment or trading zone; which entity holds these entitlements; and the specific details of each entitlement.

<sup>37</sup> Department of Environmental, Land, Water and Planning, *Victorian Water Accounts 2014-15*, p. 30

<sup>38</sup> Department of Environmental, Land, Water and Planning, *Victorian Water Accounts 2014-15*, p. 35

<sup>39</sup> Details of environmental water holdings in Victoria can be found on the Victorian Water Register. Other sources are the VEWH Annual Report, VEWH Seasonal Watering Plan, and the Victorian Water Accounts prepared by the Victorian Water Register. Information on the holdings of the Commonwealth Environmental Water Holder (CEWH) and the Murray-Darling Basin Authority (MDBA) can be found on their websites.

<sup>40</sup> Although it is possible to gather information on the total environmental water entitlements CEWH and the MDBA holds in a particular geographic area, it is difficult for stakeholders to find out further information: for example, the details (e.g. volumes, reporting and metering requirements etc.) of specific entitlements.

It is important for stakeholders to be able to access details of environmental water holdings down to the level of catchment or trading zone in a timely manner, as this will contribute to a shared understanding of the level of, and the management of, held environmental water by all water users. The ACCC considers that this could be facilitated by the introduction of a Victorian Environmental Water Register. This register would include the details of all entitlements held by all environmental water holders operating in Victoria (including the identity of the holder of the environmental water) and act as an authoritative source on all environmental water held in Victoria. Such a register has been established in NSW.<sup>41</sup>

#### **Recommendation Seven**

The ACCC recommends that the Victorian Government establish a Victorian Environmental Water Register. This register would include the details of all entitlements held by all environmental water holders operating in Victoria.

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<sup>41</sup> See <http://ewr.water.nsw.gov.au/ewr/main/ewrHome>, accessed August 2017.