



Guidelines for Water Trading Rules

Introduction

There is a range of rules operating at the state level that govern the trade of water in the Murray–Darling Basin. These rules can be found in state government legislation and the policies of irrigation infrastructure operators, except interstate trade, for which the Murray–Darling Basin Authority (MDBA) performs a coordinating role on behalf of South Australia, Victoria and New South Wales.

The water trading rules set out in Chapter 12 of the *Basin Plan 2012* are intended to provide greater clarity and consistency for the water market across the whole of the Basin. They set out a consistent framework for water trading across the states, without duplicating existing rules.

The Basin Plan water trading rules apply to the Commonwealth, the Basin States, irrigation infrastructure operators and individual market participants. The rules address three broad aspects of market operation:

- reducing restrictions on trade
- improving transparency and access to information
- maintaining market integrity and confidence.

The Basin Plan water trading rules contribute to achieving the Basin water market and trading objectives set out in Schedule 3 of the *Water Act 2007*. These objectives are 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
- minimise transaction cost on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions
- 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
- recognise and protect the needs of the environment
- provide appropriate protection of third-party interests.

Section 26 of the *Water Act 2007* sets out the scope of the water trading and transfer rules in more detail, including that they may deal with:

- the rules governing the trading or transfer of tradeable water rights, including the removal of restrictions on trade

- the processes by which tradeable water rights are traded or transferred
- the availability of information to enable the trading or transfer of tradeable water rights.

The water trading rules apply only to Murray–Darling Basin water resources. See definition of Basin water resources under *Defined terms* at the end of this document for more information.

Rules covered by this guideline

This introduction guideline document is divided into two parts:

- **Part A** includes information on the application of the water trading rules, the water access rights to which the rules apply, use of the term ‘trade’ and examples of trades covered by the rules and other general information.
- **Part B** contains information on the rules which require all water market participants to have the right to trade free of certain restrictions.

Part A should be read as an accompaniment to other *Guidelines for water trading rules*.

Defined terms

This guideline contains a number of defined terms. These terms are defined in the *Basin Plan 2012*, the *Water Act 2007* or the *Water Markets Rules 2009*. An explanation of these terms can be found at the end of this document.

Who do the water trading rules apply to?

These rules apply to:

- the Commonwealth (including the Murray–Darling Basin Authority)
- Basin States
- irrigation infrastructure operators
- individuals participating in water markets.

Explanation of the water trading rules

The Basin Plan water trading rules do not apply to water access rights of a kind that are not able to be traded under state water management law (section 12.02).

The water trading rules require that all water market participants have the right to trade free of certain restrictions. Addressing these types of restrictions ensures that all people can participate in Basin water markets subject to a common set of rules.

The rules provide that a person may trade a water access right free of any condition as to the holding, buying, selling, obtaining, accepting, or terminating of a separate water delivery right, works approval or water use approval (section 12.06).

The rules also provide that a water access right can be traded free of any restriction that:

Part A

- relates to the person being, or not being, a member of a particular class of persons (section 12.07)
- relates to the purpose for which the water relating to that right has been, or will be, used (with limited exceptions) (section 12.08)
- arises from the fact that water might be transported or used outside the Murray–Darling Basin (section 12.10)
- is based on the fact that a water resource is overallocated (for trade within that water resource) (section 12.13)
- is based on the historical or anticipated level of use of the water access right (except restrictions necessary to account for differences in reliability or water availability between places) (section 12.14).

Under the rules, a person may:

- take and use water free of any restriction arising from the fact that the person acquired the water access right by trade (section 12.09)
- participate in a carryover arrangement free of a restriction arising from the fact that the water access right was acquired by way of trade (section 12.12)
- trade water allocation made available under a carryover arrangement in the same way that other water allocations are able to be traded (except where the carried over allocation is not yet available to be taken) (section 12.11)
- trade a water access right or an irrigation right free of any condition requiring them to hold, buy, sell, obtain, accept, terminate or vary the volume/share of a water delivery right (section 12.15).

The water trading rules set out circumstances in which recovery of loss or damage is available through private action (section 12.05).

The rules allow for restrictions on trade for breaches of state water management law (section 12.27).

Certain provisions of the water trading rules do not apply to some types of restrictions on trades where they are imposed pursuant to certain intergovernmental agreements (section 12.02).

Part A: General provisions for the rules

Part A of this guideline sets out the general provisions that should be considered for the purposes of the Basin Plan water trading rules. It includes commonly used terms, application of these terms, examples and the overarching provisions that apply to the rules.

What is a water access right?

A water access right is defined in the *Water Act 2007*:

- (a) means any right conferred by or under a law of a state to do either or both of the following:
 - (i) to hold water from a water resource;
 - (ii) to take water from a water resource; and
- (b) without limiting paragraph (a), includes the following rights of the kind referred to in that paragraph:
 - (i) stock and domestic rights;
 - (ii) riparian rights;
 - (iii) a water access entitlement;
 - (iv) a water allocation; and
 - (v) includes any other right in relation to the taking or use of water that is prescribed by the regulations for the purposes of this paragraph.

What is a water delivery right?

A water delivery right is defined in the *Water Act 2007* to mean a right to have water delivered by an infrastructure operator. However, the Basin Plan water trading rules apply to a water delivery right, if:

1. the water delivery right is held against an irrigation infrastructure operator; and
2. the irrigation infrastructure operator is entitled to impose a fee on the termination/surrender of the right, or services provided in relation to that right; and
3. the *Water Charge (Termination Fees) Rules 2009* regulate any fees that may be imposed.

Many irrigation infrastructure operators have issued explicit water delivery rights (sometimes referred to as 'delivery entitlements' or 'delivery shares') setting out the right's volume/unit share and relevant part of the irrigation network, and setting out the terms and conditions applicable to their water delivery rights in a delivery contract with each of their customers.

Others have specified the details of a water delivery right (volume/unit share and relevant part of the irrigation network) as part of the delivery contract itself.

Regardless of whether the water delivery right is part of the delivery contract or a separate right, if the rights meet the criteria in rule 12.03, then the water trading rules apply.

What is a trade under the Basin Plan water trading rules?

The Basin Plan does not provide an exhaustive definition of what is considered to be a trade. Trade is defined in section 1.07(2) and (3) in the Basin Plan.

In the Basin Plan, a reference to trade includes a reference to transfer.

To avoid doubt, trade includes:

- (a) a trade that does not involve a 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 agreement; and
- (d) the establishment of a tagged water access entitlement.

Under the Basin Plan 'acquired by way of trade' means where a person:

- has purchased, received, obtained or accepted a water access right from another person; or
- holds a water access right in a particular location by means of a trade from another location.

Note: Activities which the MDBA do not consider to be trades are considered in a later section.

What water access rights do the Basin Plan water trading rules apply to?

The Basin Plan water trading rules apply to water access rights that are able to be traded under state water management law. If a water access right is not tradeable under state law, the Basin Plan water trading rules cannot make it tradeable (section 12.02(1) of the Basin Plan).

Basin States are responsible, through their legislation, for deciding what water access rights are tradeable and what types of water access rights are not tradeable.

Difference between trading for a change in location and trading for a change of ownership

Change of ownership of water access rights occurs when a person (or any other legal entity) that owns (or holds) a water access right trades that right to another person (or legal entity).

Change of location of water access rights generally occurs when a person changes the location at which water to which the water access right relates can be taken.

In some instances, Basin States allow for a change of ownership, but not for a change of location of a water access right. For example, some Basin States allow for ownership of stock and domestic rights to change, but not the location.

The MDBA considers in instances where state water management law provides only for a change of ownership for a water access right, the Basin Plan water trading rules are relevant only to those ownership restrictions. The Basin Plan water trading rules do not have the effect of enabling changes in location for these kinds of water access rights.

The MDBA is not aware of any water access rights for which state water management law allows for a change in location and not a change in ownership. However, if state water management law did provide for water access rights that only allow a change of location (and not a change of ownership), the water trading rules do not have the effect of enabling changes in ownership.

Relationship between the trade of water access entitlements and the trade of water allocations

Although there is a clear relationship between water access entitlements and the water allocations associated with those entitlements, they are considered to be separate water access rights.

The ability to trade a water access entitlement may be different to the ability to trade the water allocation associated with that entitlement. For example, a water access entitlement may not be tradeable under state water management law but the water allocation available under that entitlement may be tradeable.

What is a restriction on trade?

Under the Basin Plan (Section 1.07) the definition of restrict, in relation to trade, is taken to include refuse, prevent, deter, delay or impose a condition or a barrier on; and 'restriction' has a corresponding meaning. Examples of trade restrictions may include:

- applying a condition to a traded water access right (such as reducing the volume of the water access right)
- unreasonably delaying the processing of an application to trade
- a Basin State not having the administrative framework required to facilitate trade
- deterring an applicant from submitting an application to trade.

Elements of a trade transaction

The MDBA has formed the opinion that a trade may have certain elements:

- administrative (in all cases)
- location related (only when a change in location of the right is required)
- wholesale accounting (in some instances).

Administrative elements

All trades involve an administrative element, whether they involve a change of ownership or change in location. This may involve lodging an application (via electronic or paper means), registering a change of ownership or moving water between accounts. In each case something is required to be done by the applicant (or an agent acting on behalf of the applicant) and the approval/registration authority.

Location-related elements

Location-related elements apply to trades that involve a change of location; it does not apply to trades that only involve a change of ownership.

A trade may result in a change to the location at which the water relating to a water access right may be taken. If the location at which water to which a water access right relates changes, it is considered to be a trade of the water access right.

In the case of trades within or between regulated systems or within unregulated systems, section 12.16 requires they be free of restrictions on changing location, subject to restrictions allowable for physical or environmental reasons (section 12.18).

In the case of trades within or between a groundwater SDL resource units or between surface water and groundwater SDL resource units, a sufficient level of hydraulic connectivity is required between the two locations.

Wholesale accounting elements

Wholesale accounting elements only apply in trades that involve a change in location. Although, not all change of location trades will have a wholesale accounting element. Wholesale accounting elements would only be applied to trades that cross management boundaries. In cases where trades cross management boundaries, an accounting adjustment may be required at a 'wholesale level' to account for the water moving between the two locations. The wholesale accounting element does not apply to trades involving a change of ownership only.

Management boundaries that may require a wholesale accounting adjustment to occur to reflect the trade include those between:

- Basin States
- sustainable diversion limit resource units
- water resource plan areas
- trading zones.

Examples of trades

Scott is an irrigator who holds a Victorian water share that is associated with water use licence A. Licence A states that Scott can extract water at location A. Scott applies to vary his water share to now be associated with water use licence B, such that the extraction point for the water becomes location B. This is a change of the location at which water can be taken. Given that it is possible to change both the ownership and location of Victorian water shares (i.e. they meet the conditions under section 12.02), this would constitute a trade of a tradeable water access right and is subject to the water trading rules.

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Adam is an irrigator who holds two NSW water access licences (WALs), one in the Murrumbidgee regulated river water resource and the other in the NSW Murray regulated river water resource. 50 ML of water is allocated to his WAL in the Murrumbidgee. Adam applies to transfer 25 ML from this WAL to his WAL in the NSW Murray regulated river. This is a change of the location at which water can be taken. Given that it is possible to change both the ownership and location of NSW water allocations (i.e. they meet the conditions under 12.02), this constitutes a trade of a tradeable water access right and is subject to the water trading rules.

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Cameron is an irrigator who holds a water access entitlement in the South Australian River Murray prescribed watercourse. Cameron decides to enter into a share-farm arrangement with a friend, in which Cameron will retain ownership of his land but transfer ownership of part of his water access entitlement to his friend's licence. This is a change in ownership, but the location of the water right does not change. Given that it is possible to change both the ownership and location of South Australian water access entitlements (i.e. they meet the conditions under 12.02), this would constitute a trade of a tradeable water access right and is subject to the water trading rules.

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Isaac holds a supplemented water allocation in Queensland's Condamine River. Isaac enters into an agreement with Sandra, who has a property on the Balonne River, to lease his water allocation to Sandra for a period of two years. Under the agreement, Sandra will have all of the benefits and responsibilities associated with holding the water allocation. This arrangement constitutes a lease for the purposes of the *Water Act 2000* (Qld). Given that it is possible to transfer the ownership and change the location of Queensland water allocations (i.e. they meet the conditions under 12.02), and a lease meets the definition of a 'trade' under 1.07(3), this trade is subject to the water trading rules.

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Mr and Mrs Johnson are irrigators who hold a water access entitlement. They wish to give this entitlement as a gift to their child who has recently purchased part of their farm. Mr and Mrs Johnson apply to have their water access entitlement transferred to the child's ownership. This is a

change in the ownership of a tradeable water access right, even though no payment or goods have been exchanged. Therefore this trade is subject to the water trading rules.

Activities not covered by the Basin Plan water trading rules

The MDBA has formed the opinion that the following activities are not considered to be trades under the Basin Plan water trading rules, and therefore are not subject to the rules:

- surrendering a water access right to a Basin State (this does not apply in situations where the water access right is re-issued or 'swapped' into another type of water access right or is reissued in another water source)
- consolidating water access rights of the same type and owned by the same entity into the one water access entitlement
- subdividing a water access right into more than one water access right with no change in entity between the source and subdivided water access rights
- conversion of water access rights between priority or reliability classes (without a change of location or ownership)
- devolution of a water access right from one person to another by operation of the law (i.e. the passing of a jointly owned right from one joint owner to the other joint owner upon the death of one of the joint owners).

Certain provisions do not apply to trades conducted pursuant to inter-governmental agreements

The Basin Plan water trading rules allow for the Commonwealth or Basin States to enter into agreements with respect to, and to implement arrangements relating to, the shepherding of water for environmental purposes.

Exemptions by permitting certain types of restrictions to be applied to certain types of trades in order to implement water shepherding arrangements are provided by sections 12.02(2), (3) and (4). The exceptions are limited to the application of the following provisions:

- classes of persons (section 12.07)
- purpose for which water is used (section 12.08)
- take and use of water after a trade (section 12.09)
- level of use of water access right (section 12.14).

These sections do not prevent the application of restrictions on the trade of a water access right, as long as the restrictions and types of trade satisfy the following requirements.

The restrictions satisfy the requirements if they are imposed in furtherance of an agreement that:

- is between the Commonwealth and a Basin State or between two Basin States; and
- relates to a trade of environmental water to, from or between places; and
- is for the purpose of achieving one or more environmental outcomes.

The trade satisfies the requirements if the trade is either:

- of a kind that state water management law permits only for held environmental water; and did not permit prior to the entry into an agreement of a kind referred to above; or
- is part of a sequence of trades that is being conducted in furtherance of an agreement referred to above and contains a trade of a kind that state water management law permits only for held environmental water; and did not permit prior to the entry into an agreement.

Recovery of loss or damage

Section 12.05 of the water trading rules provides an avenue for a person to recover, through court proceedings, loss or damages arising from acts of non-compliance with some of the rules. Thus, a person may take action against another person, other than an agency of a Basin State, in order to recover loss or damages.

Persons may include, e.g. private individuals, the Commonwealth and irrigation infrastructure operators. This avenue to recover loss or damage applies only to the sections listed in the table below.

The sections of the Basin Plan to which the recovery of loss or damage applies

Item	Section
1	12.06 Separate rights
2	12.07 Class of persons
3	12.08 Purpose for which water is used
4	12.09 Take and use of water after a trade
5	12.10 Use outside the Murray–Darling Basin
6	12.11 Trade of water allocation which has been carried over
7	12.12 Access to carryover for traded water access rights
8	12.13 Overallocation
9	12.14 Level of use of water access right
10	12.15 Trade must not be conditional on water delivery right
11	12.16 Free trade of surface water
12	12.17 Trade not to be subject to volumetric limit
13	12.21 Exchange rates not to be used in a regulated system
14	12.23 Restrictions on the delivery of water under a tagged water access entitlement established on or after 22 October 2010
15	12.24 Trade within a groundwater SDL resource unit
16	12.25 Trade between groundwater SDL resources units
17	12.26 Trade between groundwater and surface water
18	12.28 No unreasonable restriction of trade of water delivery rights
19	12.30 Irrigation infrastructure operator must give reasons for restricting trade of water delivery right
20	12.32 Irrigation infrastructure operator to specify water delivery rights and give notice
21	12.33 Irrigation infrastructure operator to give notice if water delivery right is changed

Item	Section
22	12.34 Irrigation infrastructure operator to specify irrigation rights and give notice
23	12.35 Irrigation infrastructure operator to give notice if irrigation right is changed
24	12.51 Person not to trade if aware of water announcement before it is made generally available

Private legal proceedings do not involve the MDBA and are not subsidised by the MDBA.

The MDBA may seek to intervene in private legal proceedings brought under the water trading rules or other laws where it considers it is in the public interest to do so.

Restrictions allowable for breaches of state water management law

Section 12.27 of the water trading rules clarifies that the water trading rules do not prevent a Basin State or an infrastructure operator imposing a restriction on the trade of a water access right because a person has:

- committed an offence; or
- failed to pay fees or charges.

Part B: Right to trade free of certain restrictions

The Basin Plan contains a number of rules (sections 12.06 to 12.15) aiming to ensure that all water market participants have access to the same rights to trade surface and groundwater water access rights that are tradeable water access rights. These rules apply to all trades of surface water and groundwater water access rights, in and between all types of water resources.

These rules are intended to ensure that no new or additional conditions are imposed on water access rights as a result of them being traded. They do not prevent a person from electing to trade a water access right that already has restrictions or conditions imposed upon it as a condition of the water access right.

The rule requirements for each of the following sections are set out separately as follows:

- section 12.06 – separate rights
- section 12.07 – class of persons
- section 12.08 – purpose for which water is used
- section 12.09 – take and use of water after a trade
- section 12.10 – use outside the Murray–Darling Basin
- section 12.11 – trade of water allocation which has been carried over
- section 12.12 – access to carryover for traded water access rights
- section 12.13 – overallocation
- section 12.14 – level of use of water access right
- section 12.15 – trade must not be made conditional on water delivery right.

Separate rights (section 12.06)

A person may trade a water access right (such as a water access entitlement) without the trade being conditional on a separate location-related right (section 12.06).

Section 12.06 states that a person may trade a water access right free of any condition as to the holding, buying, selling, obtaining, accepting, or terminating of a separate location-related right. A location-related right means any of the following:

- water delivery right
- works approval
- water use approval.

Therefore, the trade should not be restricted by being made conditional on a requirement in relation to a separate location-related right. It means that certain conditions in relation to a separate location-related right should not be imposed concurrently with, or because of, the trade of a water access right. Therefore, consideration for a trade approval should only be considered with reference to criteria relevant to the water access right being traded.

Requiring a person to hold, buy, sell, obtain accept or terminate a separate location-related right as a condition of a trade may act as a barrier to trade. Addressing these types of restrictions ensures that trade of water access rights is not unnecessarily restricted, and people can manage their water access entitlements and water allocations separately from their water use and delivery requirements.

Class of persons (section 12.07)

A person may trade a water access right free of any restriction that relates to the person being, or not being, a member of a particular 'class of persons', as provided by section 12.07. Examples of 'classes of persons' would include (but are not limited to):

- environmental water users or environmental water holders
- hydroelectricity generators
- land owners or non-land owners
- urban water authorities
- rural water authorities
- catchment management authorities
- irrigation infrastructure operators
- cultural groups.

Restricting a trade based upon the class of persons (including the identity or characteristics of a party to the trade) would be a barrier to trade. Providing a right to trade free of such restrictions ensures that opportunities to trade water access rights are not restricted to only a selected group or groups.

The MDBA considers that for a class of persons to exist, it should have the capacity to have more than one member, but it need not have more than one member at a point in time to constitute a class.

The MDBA considers that a restriction on the trade of a class of water access right does not equate to a restriction on trade because holders of these rights could be considered a class of persons.

Section 12.07 does not override or take precedence over section 12.27 of the Basin Plan. Section 12.27 clarifies that nothing in the water trading rules prevents Basin States from imposing a restriction to the trade of a water access right if a person has breached state water management law by committing an offence or failing to pay fees or charges.

Purpose for which water is used (section 12.08)

Section 12.08 provides that a person may trade a water access right free of restrictions on the trade relating to the purpose for which the water has been, or will be, used. Providing a right to trade free of such restrictions will increase the efficiency of Basin water markets and reduce barriers to trade.

Water access rights may be issued for a specific purpose. In these instances, the water under these water access rights can generally only be used for the purpose for which the water access right is issued. Examples of specific purpose include:

- stock and/or domestic water access rights
- environmental water access rights
- urban, town or critical human water supply water access rights
- cultural use water access rights
- power generation water access rights
- research water access rights.

The water trading rules do not require a Basin State to remove the specific purpose for which a water access right has been issued. Any condition on the water access right on the use of that water for a specific purpose would continue to apply. However, the water trading rules provide that such a condition cannot be imposed as a condition or consequence of trading a water access right.

There are two exemptions to section 12.08 that are intended to address potential risks to third parties. These are:

- stock and/or domestic water access rights
- water access entitlements issued and designated for urban water supply under state water management law (including town water supply and other similar urban water utilities).

However, it should be noted that the rules apply to the allocations made against such entitlements.

The rule requirement set out by section 12.08 does not prevent a Basin State from making urban water supply water access entitlements or stock and/or domestic rights tradeable, nor does it require a Basin State to make them tradeable. This is a decision for the relevant Basin State.

Take and use of water after a trade (section 12.09)

Section 12.09 provides that a person may take or 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 ability to restrict the take or use of water under a water access right (after it has been traded) can act as a barrier to trade. Addressing these types of restrictions will reduce barriers to trade in Basin water markets.

This section does not prevent all restrictions relating to take and use of water after a water access right has been traded.

For this rule, it may be useful to consider whether a restriction is being imposed because a person acquired a water access right by way of trade or whether the restriction would still apply if the person did not acquire the water access right by way of trade.

Examples of the types of restriction that could be inconsistent with this rule include where:

- water allocation acquired by way of trade is subject to different water use limits compared to a water allocation which was not traded
- take or use of a water allocation for a particular purpose is prohibited because the water allocation was acquired by trade.

This rule does not prevent Basin States from restricting the take and/or use of water for a particular class or type of water access right as a whole.

Use outside the Murray–Darling Basin (section 12.10)

A person may trade a water access right free of restrictions arising from the fact that water extracted under the right might be transported or used outside the Murray–Darling Basin, as provided by section 12.10. This means that:

- trade of a water access right may not be restricted because the water extracted under the water access right might be transported or used outside the Murray–Darling Basin
- a condition cannot be imposed as a result of the trade, preventing water extracted under the water access right from being transported or used outside the Murray–Darling Basin.

Trade of water allocation which has been carried over (section 12.11)

A person may trade a water allocation free from any restriction arising from the fact that the water allocation was carried over from the previous water accounting period under a carryover arrangement, as provided by section 12.11. This rule is important in ensuring that the rights of water access right holders are protected.

This means that:

- trade of a water allocation may not be restricted for a reason relating to the fact that the water allocation was carried over; and
- a condition may not be applied on the water allocation during or as a result of the trade of the water allocation because that water allocation was carried over.

However, this section does not apply if:

- a carryover announcement is required before any water allocation is permitted to be taken; and
- no such announcement has yet been made.

What is carryover?

The Basin Plan does not define carryover but defines ‘carryover arrangement’ ‘as an arrangement which allows a water access right holder to retain water allocations not taken in a water accounting period for possible take in the next water accounting period (section 1.07).

Generally, the amount of carryover is based upon the water access entitlement that is held, with the carryover applied to the water allocation issued against the entitlement.

Examples of the types of restriction that could be inconsistent with this rule include:

- restrictions preventing carried over water allocations from being traded
- changing the security (e.g. risk of spill) or accessibility of traded carry over water allocation

- a restriction applied to traded carry over water allocation that would not apply to trade of water allocation that had not been carried over.

Access to carryover for traded water access rights (section 12.12)

Section 12.12 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. This rule ensures that the ongoing right to carryover is protected for traded water access rights.

A trade of a water access right may result in a change to the water resource to which the water access right relates, e.g. interstate or inter-valley trades. These types of trades may involve the cancellation of one water access right (in the origin water resource) and a new water access right being issued elsewhere (in the destination water resource). When this occurs, it may not be feasible to maintain the carryover arrangements from the former (origin) resource in the new (destination) water resource.

In cases where trade results in a change of the water resource and the carryover arrangement for the destination water resource is different from that of the origin water source, the carryover arrangement for the destination water resource can be applied.

The MDBA considers that where access to carryover is determined by the volume of water access entitlement held, a restriction that has the effect of allowing carryover access only to water allocation made in respect of a water access entitlement, but not water allocation traded to an account associated with the water access entitlement, is likely to be inconsistent with subsection 12.12(1). This is because the access is determined with reference to whether or not a person acquired the water allocation by way of trade.

Note: A trade of a water access right that results in a change to the water resource to which the water access right relates involves a rate of conversion and is therefore an exchange rate trade. Hence, this rule must have regard to the rules for exchange rate trade at sections 12.21 and 12.22. A description of the rules on exchange rate trade is in the *Guidelines for Water Trading rules: Use of exchange rates*.

Relationship between sections 12.11 and 12.12

Although both sections 12.11 and 12.12 relate to carryover arrangements, they apply differently:

- section 12.11 protects water allocation that has been carried over from discriminatory trade restrictions
- section 12.12 protects the right to participate in carryover arrangements into the future if the water access right is traded.

Trade in overallocated water resources (section 12.13)

A person may trade a water access right within a water resource free of any restriction based on the fact that a water resource is overallocated, as provided by section 12.13.

In Section 4 of the *Water Act 2007*, overallocation is defined as:

- there is an overallocation for a water resource plan area if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of the water access rights at a given time exceeds the environmentally sustainable level of take.

Trades within a water resource will not cause further overallocation in that water resource, and does not, in itself, increase the level of water usage.

Restrictions on trade which intend to address overallocation only have a limited impact and place the burden exclusively on parties that trade. Addressing these types of restrictions ensures that the property rights of traded water are maintained.

Level of use of a traded water access right (section 12.14)

A person may trade a water access right free of any restriction based on the historical, or anticipated level of use of the water access right, as provided by section 12.14.

However, a Basin State is permitted to apply a restriction where a trade:

- is between two places; and
- a restriction is necessary to address a difference in reliability or availability of water that could be taken between the two places.

For example, a restriction may be valid for trade from a regulated system to an unregulated system because the reliability between the two systems could be vastly different, as well the fact that water availability may change because water in an unregulated system cannot be delivered from storage. However, such a restriction should not factor in the proportion of available water actually taken historically, or anticipated to be taken after the trade.

Note: Differences in reliability or availability between two locations have been addressed historically through exchange rate trade. However, the Basin Plan water trading rules prohibit the use of exchange rates except in limited circumstances. More information on the use of exchange rates is described in the *Guidelines for Water Trading Rules: Use of exchange rates*.

Trade must not be conditional on water delivery right (section 12.15)

Section 12.15 states that a person may trade a water access right or an irrigation right free of any condition that would require the person to hold, buy, sell, obtain, accept, terminate, or vary the volume or unit share of, a water delivery right.

Requiring a person to hold, buy, sell, obtain accept or terminate or vary a volume or unit share of a water delivery right as a condition of a trade acts as a barrier to trade.

If the water delivery right is of a kind referred to in section 12.03 of the water trading rules, then section 12.15 applies. This means that even though the water delivery right may remain linked to a water access right or an irrigation right, section 12.15 requires that the part of the right that relates

to delivery (i.e. the water delivery right, including conditions of delivery and potential termination fee) should not be required to be altered because of a trade of the irrigation right or water access right part of the right.

Note: If the right holder wishes to alter their water delivery right at the same time or as a consequence of the trade of the water access right or irrigation right, this is not prohibited by section 12.15; section 12.15 provides protection against such changes being imposed as a condition of the trade, contrary to the wishes of the right holder.

This section does not prevent an irrigation infrastructure operator from requiring security as a condition of the trade of irrigation right where water delivery right is retained. Such a requirement should only be necessary where irrigation right is being sold. A person facing an unreasonable request for security from their irrigation infrastructure operator may seek to transform their irrigation right into a separate water access entitlement, where the Water Market Rules limit the volume of security an irrigation infrastructure operator may require.

Further information on irrigation rights and water delivery rights can be found in the *Guidelines for Water Trading Rules: Rules for irrigation infrastructure operators*.

Defined terms

The following definitions are contained in the *Basin Plan 2012*, the *Water Act 2007*, or the *Water Market Rules 2009*.

Agency of a State means:

- (a) a Minister of the Crown for the State; or
- (b) a Department of State for the State; or
- (c) a body (whether incorporated or not) established or appointed for a public purpose by or under a law of the State (including a local government body); or
- (d) a body established or appointed by:
 - (i) a Governor of the State; or
 - (ii) a Minister of the Crown for the State; or
 - (iii) if the State is the Australian Capital Territory—the Australian Capital Territory Executive; or
- (e) a person holding or performing the duties of:
 - (i) an office established by or under; or
 - (ii) an appointment made under;a law of the state (other than the office of head of a Department of State for the state (however described)); or
- (f) a person holding or performing the duties of an appointment that is made by:
 - (i) a Governor of the State; or
 - (ii) a Minister of the Crown for the State; or
 - (iii) if the state is the Australian Capital Territory—the Australian Capital Territory Executive; (otherwise than under a law of the state); or
- (g) a company in which the state, or a body corporate referred to in paragraph (c) or (d), has a controlling interest.

Basin water resources means all water resources within, or beneath, the Murray–Darling Basin, but does not include:

- (a) water resources within, or beneath, the Murray–Darling Basin that are prescribed by the regulations for the purposes of this paragraph; or
- (b) groundwater that forms part of the Great Artesian Basin.

Carryover announcement means an announcement made by a Basin State as to when water allocations covered by a carryover arrangement may be taken (section 1.07 of the Basin Plan).

Carryover arrangement means an arrangement that allows a water access right holder to retain water allocations not taken in a water accounting period for possible take in the next water accounting period (section 1.07 of the Basin Plan).

Location-related right means, for the purposes of section 12.06, any of:

- water delivery right

- works approval
- water use approval

Overallocation is defined in section 4 of the Act as follows: there is an overallocation for a water resource plan area if, with full development of water access rights in relation to the water resources of the area, the total volume of water able to be extracted by the holders of water access rights at a given time exceeds the environmentally sustainable level of take for those water resource. Note: overallocation is different to 'overuse'.

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

Termination fee means a fee payable to an operator by a holder of a right of access for terminating access or surrendering a water delivery right.

Transformation, in relation to the whole or a part of an irrigation right against an irrigation infrastructure operator, means the transformation of the whole of that right, or a part of that right, in accordance with transformation arrangements, into a water access entitlement (*Water market Rules 2009*, section 3).

Trading zone: Schedule 3 of the Act states that 'trading zones means zones established to simplify administration of a trade by setting out the known supply source or management arrangements and the physical realities of relevant supply systems within the zone so that trade can occur within and between zones without first having to investigate and establish the details and rules of the system in each zone'.

Trading zones exist in most regulated systems throughout the Basin, ranging in size from relatively small zones in Queensland water supply schemes to the whole of a water resource in the case of the South Australian Murray.

Disclaimer: This Guideline is one of a series of guidelines on the water trading rules and as such it may be appropriate to also consider the information that is set out in other guidelines.

The provisions in the *Water Act 2007* and the *Basin Plan 2012* govern the water trading rules. All decisions regarding the water trading rules need to be made by reference to these laws. This Guideline is intended as guidance only and does not constitute legal advice. Users should seek their own legal advice where appropriate. This Guideline has no statutory force.

Whilst decisions in relation to water trading rules may consider this Guideline, decisions will be based on the aforementioned laws. Reasonable care has been taken in the compilation of this Guideline, however the Murray–Darling Basin Authority does not guarantee or warrant the accuracy, or completeness, or currency of its contents and shall not be liable for any loss or damage that may be occasioned directly or indirectly through the use of or reliance on this Guideline.

Note that the Guideline will be a living document, to be updated from time to time, in consultation with relevant stakeholders, in order to incorporate new knowledge and best practice.