



Australian Government



Review of the operation of Section 12.02 of the Basin Plan

Review Report

July 2021

Published by the Murray–Darling Basin Authority

MDBA publication no: 36/21

ISBN (online): 978-1-922396-67-9



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Acknowledgement of the Traditional Owners of the Murray–Darling Basin

The Murray–Darling Basin Authority pays respect to the Traditional Owners and their Nations of the Murray–Darling Basin. We acknowledge their deep cultural, social, environmental, spiritual and economic connection to their lands and waters.

The guidance and support received from the Murray Lower Darling Rivers Indigenous Nations, the Northern Basin Aboriginal Nations and our many Traditional Owner friends and colleagues is very much valued and appreciated.

Aboriginal people should be aware that this publication may contain images, names or quotations of deceased persons.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
BED	Bulk Entitlement Delivery
CEW	Commonwealth Environmental Water (used in NSW-CTH MoU)
CEWH	Commonwealth Environmental Water Holder
DELWP	Victorian Department of Environment, Land, Water and Planning
DPIE	NSW Department of Planning, Industry and Environment
DNRME	Queensland Department of Natural Resources, Mines and Energy
EWH	Environmental water holder
HEW	Held environmental water
MDB	Murray–Darling Basin
MDBA	Murray–Darling Basin Authority
MOU	Memorandum of Understanding
NSW	New South Wales
PEW	Planned environmental water
PPMs	Pre-requisite policy measures
VEWH	Victorian Environmental Water Holder

Glossary

This glossary endeavours to provide practical meanings of terms as they relate to water trade within the Murray–Darling Basin.

Active management means a water management operational tool being developed for use in unregulated river systems in the Northern Basin, with the aim of ensuring that held environmental water remains in-stream so that it can be used for its intended environmental purpose.

Basin Plan 2012 (Cth) is a legislative instrument made under the *Water Act 2007* (Cth). The purpose of the Basin Plan is to provide for the integrated management of Basin water resources in a way that promotes the objects of the Act. It sets sustainable diversion limits for Basin water resources. It also includes the Basin Plan Water Trading Rules.

Basin Plan Water Trading Rules form Chapter 12 of the Basin Plan. The rules only apply to water access rights that can be traded under state management law, and which relate to Basin water resources.

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

- water resources within, or beneath, the Murray–Darling Basin that are prescribed by the regulations
- groundwater that forms part of the Great Artesian Basin.

Basin State means New South Wales, Victoria, Queensland, South Australia or the Australian Capital Territory.

Environmental water holder (EWH) means a person who holds held environmental water.

Held environmental water (HEW) means water available under:

- a water access right
- a water delivery right
- an irrigation right

for the purposes of achieving environmental outcomes (including water that is specified in a water access right to be for environmental use).

Irrigation right means a right that a person has against an irrigation infrastructure operator to receive water that is not a water access right or a water delivery right.

Planned environmental water (PEW) means water committed by the Basin Plan, a water resource plan or a plan made under a state water management law, or any other instrument made under a law of a state for the purposes of achieving environmental outcomes.

Pre-requisite policy measures (PPMs) are measures consisting of a policy to:

- credit environmental return flows for downstream environmental use, or
- allow the call of held environmental water from storage during unregulated flow events.

Return flows means the volume of water that returns to rivers after it has been used. Return flows can:

- run off the land straight into rivers and creeks
- seep through the earth into groundwater and return to rivers that way
- exit wetlands or continue along the watercourse after it has been delivered for the environment.

Trade¹ includes **transfer**, and includes:

- a trade that does not involve the payment of consideration
- a trade between places under which ownership of the right being traded does not change
- the establishment of a leasing arrangement
- the establishment of a tagged water access entitlement.

Water access entitlement means a perpetual or ongoing entitlement, by or under a law of a State, to exclusive access to a share of the water resources of a water resource plan area.

Water access right means any right by or under the law of a state or territory to hold water from a water resource and/or take water from a water resource, and includes:

- stock and domestic rights
- riparian rights
- a water access entitlement
- a water allocation.

Water allocation means the specific volume of water allocated to water access entitlements in a given water accounting period.

Water delivery right means a right to have water delivered by an infrastructure operator.

¹ See section 1.07(2) and (3) of the Basin Plan for a non-exhaustive definition of trade.

Executive Summary

The Basin Plan water trading rules² have been designed to promote the Basin water market and trading objectives and principles set out in the *Water Act 2007* (Water Act). These objectives include facilitating efficient water markets and protecting the needs of the environment. Just as the Basin Plan's environmental and other outcomes are being implemented through accrediting state water resource plans, the Basin Plan water trading rules are being implemented through state water trading rules being made consistent with the Basin Plan. As there are in excess of 1,500 state trading rules, this is a substantial body of work.

Subsections 12.02(2) to (4) of the water trading rules were designed to ensure that the water trade rules do not limit the ability of the Commonwealth and Basin States to effectively utilise held environmental water³ (the section 12.02 exemption).

Under section 12.02 (5) of the water trading rules the Murray Darling Basin Authority (MDBA) must complete a review of the section 12.02 exemption by 1 July 2020⁴.

This review has focussed on the following questions:

- To what extent has the section 12.02 exemption been used?
- Have agreements been established or modified to utilise the section 12.02 exemption?
- Has the section 12.02 exemption operated as intended?
- Should the section 12.02 exemption be retained, amended or repealed?

The MDBA has found no evidence that Environmental Water Holders (EWHs) have relied on the section 12.02 exemption. As there is no evidence of the exemption having been used, the question of whether the exemption has operated as intended does not arise.

In conducting the review, the MDBA is required to obtain, and have regard to, the [advice of the Australian Competition and Consumer Commission \(ACCC\)](#)⁵. The ACCC has recommended repealing the section 12.02 exemption so that all trades of Held Environmental Water (HEW) are subject to the same arrangements as any other trade.

Basin States and EWHs support the retention of the section 12.02 exemption at this time.

If, as appears to be the case, the section 12.02 exemption has not been used, then no efficiency costs arise from the provisions. While repealing the section 12.02 exemption would address an inconsistency with the objectives of the Basin Plan water trading rules, the practical impact would only be notional. Repeal would remove a potential avenue for protecting environmental needs through trade.

² See Chapter 12 of the *Basin Plan 2012*

³ See paragraphs 694 to 707 of the Basin Plan Explanatory Statement:
<https://www.legislation.gov.au/Details/F2012L02240/Explanatory%20Statement/Text>

⁴ See section 12.02(5) of the Basin Plan.

⁵ See section 12.05(6) of the Basin Plan.

The MDBA maintains the section 12.02 exemption should remain in the Basin Plan as environmental water holders might need to use it in future. It would be prudent to wait for the full implementation of Basin Plan support mechanisms such as accredited water resource plans to be in place prior to removing the section 12.02 exemption. Implementation of these Basin Plan support mechanisms will help identify if any issues around trade of environmental water need to be addressed.

The section 12.02 exemption may, one day, be useful or even necessary.

Options for retaining, amending or repealing the section 12.02 exemption have been assessed against criteria for market efficiency, protecting environmental outcomes, the costs of implementation and administration, and risk.

As a stand-alone amendment to the Basin Plan, repealing section 12.02 exemption does not meet the threshold of significance required to undertake an amendment of the Basin Plan, and is not considered an appropriate use of time and effort.

The balance of advantage favours retaining the section 12.02 exemption for the time being. The MDBA will monitor the operation of the provisions, and continue to monitor the reform of Basin state trading rules. Depending on improvements to Basin state trading rules, it may be appropriate to amend section 12.02 at a time when other amendments to the Basin Plan are needed.

Operation of Section 12.02

Introduction

The Basin Plan water trading rules commenced on 1 July 2014 and apply to a range of entities, including state and federal governments and their departments and EWHs. All entities, including EWHs, trading water access rights (for commercial or non-commercial purposes) in the Murray–Darling Basin, are subject to the Basin Plan water trading rules.

The Basin Plan water trading rules were developed consistent with the Basin water market and trading objectives in Schedule 3 of the [Water Act](#). These objectives are:

- a) 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 permit water trading;
- b) minimise transaction costs on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions;
- c) enable the appropriate mix of water products to develop, based on water access entitlements which can be traded either in whole or in part, either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time;
- d) recognise and protect the needs of the environment; and
- e) provide appropriate protection of third-party interests.

Although as raised by the ACCC in their advice on the Review, a number of these objectives are relevant to this review, the MDBA consider that objectives a) and d) are of particular relevance.

Objective a) relates to facilitating opportunities to trade in shared water resources. The Basin Plan water trading rules are designed to ensure trade is free from certain types of restrictions, particularly restrictions that are discriminatory in nature. Restrictions on trade can compromise water market efficiency by preventing or limiting water moving to its most productive use.

Objective d) is to recognise and protect the needs of the environment. The Basin Plan ensures that water is shared between consumptive users and the environment. Efficient water markets and the delivery of HEW are both essential elements of implementing the Basin Plan.

To establish and maintain integrity in Murray–Darling Basin water markets, the Basin Plan water trading rules are designed to have uniform application. However, section 12.02 provides an exemption, so that some restrictions on trade can be imposed in certain circumstances.

The section 12.02 exemption was a transitional measure designed to allow States to apply certain trade restrictions if they were imposed for the purposes of inter-governmental agreements to protect the delivery or transfer of HEW for environmental purposes. The provisions were to be reviewed in 2020, by which time it was expected that arrangements for delivery of HEW would be more clearly developed.

The provision reflects the importance of environmental outcomes to the Basin Plan, even though that protection was inconsistent with the objectives of the Basin Plan water trading rules.

Section 12.02 of the Basin Plan is reproduced below.

Basin Plan 2012, Chapter 12, Part 1, Section 12.02

12.02 Application of Chapter to certain water access rights

Chapter does not apply to non-tradeable water access rights

- (1) This Chapter does not apply to water access rights of a kind that are not able to be traded under State water management law.

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

- (2) Sections 12.07, 12.08, 12.09 and 12.14 do not prevent the application of restrictions on a trade of a water access right if:
 - (a) the restrictions satisfy subsection (3); and
 - (b) the trade satisfies subsection (4).
- (3) For paragraph (2)(a), restrictions satisfy this subsection if they are imposed in furtherance of an agreement that:
 - (a) is between the Commonwealth and a Basin State or between Basin States; and
 - (b) relates to trades of held environmental water to, from or between places; and
 - (c) is for the purpose of achieving one or more environmental outcomes.
- (4) For paragraph (2)(b), a trade satisfies this subsection if the trade is either:
 - (a) of a kind that State water management law:
 - (i) permits only for held environmental water; and
 - (ii) did not permit prior to the entry into an agreement of the kind referred to in subsection (3); or
 - (b) part of a sequence of trades that:
 - (i) is being conducted in furtherance of an agreement of a kind referred to in subsection (3); and
 - (ii) contains a trade of a kind referred to in paragraph (a).

Review of subsections (2) to (4)

- (5) The Authority must complete a review of the operation of subsections (2) to (4) by 1 July 2020.
- (6) In conducting the review, the Authority must obtain, and have regard to, the advice of the ACCC.

Note: After conducting the review, the Authority might seek to amend the Basin Plan under Subdivision F of Division 1 of Part 2 of the Act.

Scope of review

This review considers how the exemption in sections 12.02 (2) to (4) contribute to Basin Plan outcomes, including:

- environmental outcomes (Basin Plan section 5.03) and
- trading in the water market (Basin Plan section 5.07).

This review examines:

- the use of the section 12.02 exemption to date
- whether agreements have been established or modified to utilise the section 12.02 exemption
- whether the section 12.02 exemption has operated as intended
- the future of the section 12.02 exemption.

As required by section 12.02(5), this review only addresses the operation of the section 12.02 exemption for environmental water trades. It does not canvass any of the other arrangements for environmental water trade and delivery, some of which are longstanding and predate the Basin Plan. The ACCC in their advice have also raised concerns about certain arrangements for environmental water delivery. These will be addressed separately.

Development and operation of the section 12.02 exemption

The Basin Plan water trading rules are designed to contribute to achieving the Basin water market and trading objectives set out in Schedule 3 to the Water Act. Part 2 of the Basin Plan water trading rules is designed to ensure trade is free from certain types of restrictions. Restrictions on trade can compromise water market efficiency by preventing or limiting water moving to its most productive use.

When developing the Basin Plan water trading rules, the MDBA obtained and had regard to the [advice of the ACCC](#), as required under the Water Act⁶. Recommendation 3-F of the ACCC advice was that:

Water access entitlements and water allocations held by environmental water holders should be treated no differently to water access entitlements and water allocations held by any other person

Restrictions on trade, particularly discriminatory restrictions, may compromise the objectives of the Basin Plan water trading rules.⁷ Restrictions constrain the capacity of market participants to realise opportunities for transactions that increase the value of water use and for innovation in new water trading products and services.

⁶ Section 42(2) of the Water Act states the Authority must obtain, and have regard to, the advice of the ACCC.
⁷ <https://www.mdba.gov.au/publications/policies-guidelines/strategic-priorities-basin-plan-water-trading-rules>

On 9 June 2012, the Ministerial Council, comprising Commonwealth and Basin State ministers, made the following comment on the draft Basin Plan water trading rules⁸ :

Council requests that the trading provisions be clarified to ensure that they do not impose unintended restrictions on Commonwealth and Basin States trading activity, particularly those intended to deliver the Commonwealth's 'bridging the gap' commitment or trading of environmental water.

The section 12.02 exemption was designed to address this concern.

At the time of developing the exemption, a Memorandum of Understanding between NSW and the Commonwealth (*Memorandum of understanding in relation to shepherding of water for the environment*) (the MoU) had been in place since July 2010. The MoU was between NSW and the Commonwealth and was designed to facilitate the shepherding of water through the Menindee Lakes system. The section 12.02 exemption was designed to allow arrangements set out in the MoU and associated policies.

It was not the intent of the section 12.02 exemption to provide a blanket exemption for the delivery of HEW. The section 12.02 exemption was designed as a narrow exemption, where the environmental outcome was considered of primary importance.

When developing the section 12.02 exemption, the MDBA identified four areas where arrangements under the suite of proposed policies may be inconsistent with the Basin Plan water trading rules, and limited the effect of the exemption to the following sections:

- 12.07 – class of persons
- 12.08 – purpose for which water is used
- 12.09 – take and use of water after a trade
- 12.14 – level of use of water access right⁹.

The purpose of the section 12.02 exemption was twofold:

- to allow special delivery arrangements for HEW (i.e., discriminating against non-EWH's)
- enable Basin States to place additional restrictions on the trade of HEW.

The MDBA included other conditions to limit the ability to use the section 12.02 exemption. The section 12.02 exemption requires that an inter-governmental agreement is in place that:

- is between the Commonwealth and a Basin State or between Basin States, and
- relates to trades of HEW to, from or between places, and
- is for the purposes of achieving one or more environmental outcomes.

⁸ https://www.mdba.gov.au/sites/default/files/archived/revised-BP/AttachmentA_Main.pdf

⁹ Section 12.14 provides that a person may trade a water access right free of any restriction on the historical or anticipated level of use of the water access right.

Section 12.02 (5) provides for a review of the operation of the 12.02 exemption. As part of the review, the MDBA is required to seek advice from the ACCC¹⁰ on the operation of the section 12.02 exemption.

Process for the review

On 3 March 2020, the MDBA requested the ACCC provide advice on the operation of the section 12.02 exemption. To facilitate the review, the MDBA sought, in early 2020, information from Basin States and EWHs. The MDBA asked EWHs about:

- trades and agreements that would be relevant to the section 12.02 exemption – have they used or relied upon the section 12.02 exemption?
- how environmental water in general is delivered, including the methods by which environmental water is ordered.

The MDBA provided the responses to the ACCC. A summary of Basin State and EWH responses is in Appendix A.

The ACCC, in developing its advice on the section 12.02 exemption, undertook its own consultation with the Commonwealth Environmental Water Holder (CEWH), Basin States and EWHs¹¹.

A summary of the [ACCC advice](#) is in Appendix B.

The MDBA's review of the section 12.02 exemption has had regard to:

- [Advice from the ACCC](#) on the operation of the section 12.02 exemption. This advice also included broader ACCC views and concerns regarding the movement and delivery of HEW by Basin States. The ACCC advice relates to matters outside the scope of this review which are addressed separately.
- Information provided by Basin States and EWHs.

Intergovernmental Agreements

As noted above, to minimise the use of the section 12.02 exemption, the Basin Plan includes a condition that an Intergovernmental Agreement is in place for the exemption to be used.

The MDBA has identified three Agreements which may meet the description in section 12.02(3):

1. Memorandum of Understanding in relation to the shepherding of water for the environment (between NSW and the Commonwealth, July 2010)¹²
2. Memorandum of Understanding in relation to water for the environment (between NSW and the Commonwealth September 2009)¹³

¹⁰ Section 12.02(6) of the Basin Plan requires the MDBA to obtain and have regard to the advice of the ACCC.

¹¹ Refer section 2.02 of the ACCC advice, at page 6.

¹² <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-nsw.pdf>

¹³ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/nsw-mou.pdf>

3. Memorandum of Understanding in relation to shepherding and use of water for the environment (between Queensland and the Commonwealth, July 2010)¹⁴

The purpose of these agreements was to support the efficient and effective delivery of Commonwealth HEW in each state. As such, these Agreements only set out high-level principles by which parties work together to achieve environmental outcomes.

Generally, the MoUs do not address the methods or processes for the delivery of HEW. The MDBA has identified and reviewed a large number of operating agreements that set out more detailed arrangements for the delivery of HEW between Basin States and the Commonwealth. However, advice from the EWHs is that they have not relied on the section 12.02 exemption under these agreements to deliver HEW.

The ACCC identified two other possible intergovernmental agreements, that could meet the requirements of section 12.02(3), being:

- Pre-requisite policy measures and in-stream adjustments for return flows¹⁵
- Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin (2013)¹⁶

A summary of the Intergovernmental agreements for environmental water delivery that were identified and considered by the MDBA during the review is in Appendix C.

Trades of environmental water

In order for the section 12.02 exemption to apply, the relevant intergovernmental agreement must relate to trades of environmental water, to, from or between places¹⁷.

As outlined by the ACCC advice, and consistent with the MDBA's findings, there are a range of administrative mechanisms used to deliver HEW throughout the MDB. These administrative mechanisms can involve a number of steps to achieve the desired outcome. Some of these steps may be trade, others may not be.

EWHs and State water management departments tend to consider the arrangements under which they deliver HEW as not being trades. This interpretation may have influenced responses to the MDBA inquiries about the use of the section 12.02 exemption. Some EWHs may have said they have not relied on the section 12.02 exemption, on the basis that they do not regard a transaction as a trade and therefore not subject to the Basin Plan water trading rules.

¹⁴ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-qsl.pdf>

¹⁵ For example, see Overview of Pre-requisite policy measures in Victoria: https://www.mdba.gov.au/sites/default/files/pubs/overview-of-ppms-in-victoria%20-%20updated-august-2019_0.pdf

¹⁶ <https://www.coag.gov.au/sites/default/files/agreements/iga-on-implementing-water-reform-mbd-9-august-2019.pdf>

¹⁷ Section 12.02(3)(b)

It is understood that an EWH, such as the CEWH, may conduct a series of allocation trades to position HEW for delivery. These parts of the process are trades and are subject to the Basin Plan water trading rules.

HEW may be being delivered in ways other than trade processes. To the extent that EWHs are using mechanisms outside of trading frameworks to deliver HEW, the section 12.02 exemption would not be relevant.

Positions about the future of the 12.02 exemption

As noted above, the MDBA sought the views of the CEWH, Basin State EWHs and the ACCC regarding whether the section 12.02 exemption should be retained, and, if so, whether the section 12.02 exemption should be amended.

The ACCC provided the following opinion on the section 12.02 exemption:

As Basin States are not relying on the 12.02 provisions, and consistent with the ACCC's 2010 advice, considerations for reform should include the repeal of the 12.02 provisions so that all HEW movements (where the location where the water can be taken is changed) are treated as trades, and subject to all inter-valley trade (IVTs) limits and other trading restrictions that apply to any other trade between the same two locations.

The CEWH noted that despite not having used the section 12.02 exemption, there are circumstances where the exemption could be used to complement water delivery activities, including when the pre-requisite policy measures are implemented. Therefore, it would like the exemption to remain in place, unchanged.

Other EWHs indicated that while they had not used the section 12.02 exemption, they would like to retain it, as it could be useful in future as some aspects of environmental watering arrangements are still transitional.

State water management departments supported this view. While transitional work is being undertaken to ensure greater consistency with Basin Plan water trading rules, Basin States recommended the section 12.02 exemption be retained.

It is clear from the responses received, and the MDBA's own assessment in undertaking the review that the section 12.02 exemptions are not well known, understood or clear. The current section 12.02 exemptions are open to wide interpretation and are very complex in nature.

Options and assessment

This section sets out the options for the future of the section 12.02 exemption, the criteria for assessing the options and the conclusions to the analysis.

Options

Option 1: Retain the section 12.02 exemption unchanged

The section 12.02 exemption could be retained in its current form, maintaining the status quo.

Option 2: Retain the section 12.02 exemption until state water trading rules are consistent with the Basin Plan water trading rules

The section 12.02 exemption was intended to be a transitional measure. At the time of developing the Basin Plan, Basin States trading rules were inconsistent with the Basin Plan water trading rules. The section 12.02 exemption provided more flexibility for HEW to be used effectively while Basin States brought their trading rules into line with the Basin Plan. This option would be consistent with the exemption's original intention.

Option 3: Amend the section 12.02 exemption

Through the course of this review, it was apparent that the current section 12.02 exemption is complex and both difficult to understand and apply. The wording in the exemption is unclear and may not achieve its intended purpose.

This option contemplates amending the section 12.02 exemption, so that it is retained for its benefits, while redrafting the section to simplify and clarify the purpose and operation of the provision. As an exemption, that is indirectly expressed, to an already complex set of provisions, there would be a value to streamlining the section, while also making clear that it is a last resort, with the necessary circumstances to be defined.

Option 4: Retain the section 12.02 exemption until other measures are in place

The section 12.02 exemption could be retained until other measures, which would perform the same function, are in place. Possible options are:

- a. Retain the section 12.02 exemption until accredited water resource plans are in place throughout the Basin. The Basin Plan sets out the requirements for accrediting water resource plans (WRPs) in relation to protecting environmental water and groundwater trade (see Chapter 10, Part 6 and Part 8). Accredited water resource plans could provide some of the protection section 12.02 does, making the section redundant.

At the end of May 2021, 13 WRPs had been accredited. None of the 20 NSW WRPs have so far been accredited.

- b. Retain the section 12.02 exemption until there are agreements for delivery of HEW across the Basin.

There are presently three MoUs between the Commonwealth and states in place that satisfy 12.02 (3). Two are with NSW and the other is with Queensland. There are none with Victoria, South Australia or the Australian Capital Territory.

Option 5: Repeal the section 12.02 exemption

The section 12.02 exemption could be removed from the Basin Plan water trading rules. The ACCC's view is that the differential treatment of HEW is not consistent with the majority of the Basin's water market and trading objectives. ACCC advice is that repeal should be considered, so that all HEW movements are treated as trades, and subject to the same intervalley transfer limits and other trading restrictions that apply to any other trade assessment criteria.

Options Assessment

The objectives of the Basin Plan water trading rules are to facilitate efficient water markets, minimise transaction costs, facilitate innovation, and protect the needs of the environment and third-party interests (see Water Act, Clause 3 of Schedule 3). The MDBA has used these objectives as the basis for criteria against which to assess the five options.

Another factor that the MDBA considered is that rarely do all criteria point in the same direction. There usually are trade-offs. Given this, a weighting of assessments against the criteria is required. Relevant considerations include whether some criteria have priority over others, the relative size of the impacts, and the priorities and anticipated impacts.

Criteria 1: Impact on water market efficiency

This criterion considers the impact of each option on the Basin water markets and the ability for water to be traded to the most productive uses. As considered by the ACCC advice, generally, the differential treatment of HEW under Basin Plan water trading rules:

- hinders wide participation in the water market by non-EWHs, potentially limiting the extent of non-EWHs (including irrigators) realising the full value of their water holdings¹⁸;
- hinders efficient water markets through the lack of transparency of environmental water trades. Good information about transactions is important for decisions made by buyers and sellers. A lack of transparency reduces participants' confidence in water markets.
- the CEWH, Basin State EWHs and private EWHs are all active participants in the water market and trade water holdings to meet their objectives like any other water market participants. Restricting the ability for environmental trading could prevent the development of new water products¹⁹.

Criteria 2: Contribution to protecting environmental needs

Improving environmental outcomes is the central purpose of the Water Act reforms. The relevant question is the contribution section 12.02 has or might make to protecting environmental needs.

¹⁸ ACCC advice, at page 1.

¹⁹ ACCC advice, at page 15.

As with any potential reform, implementation and administration issues, and risks need to be considered in an assessment of the options for the section 12.02 exemption.

Criteria 3: Implementation and administration

Developing and implementing new arrangements can be resource intensive and incur costs. Once established, the new arrangements need to be administered. Implementation and administration costs need to be identified and compared with the benefits of the change.

In relation to the section 12.02 exemption, setting rules for environmental trades so that they are consistent with the Basin Plan water trading rules is important. On the other hand, the costs of delivering and administering a change need to be weighed against the value of trading rules being consistent with the market efficiency policy objective.

Criteria 4: Risks

An assessment of options needs to have regard to the chances of things going wrong. This includes obstacles to implementation that delay or modify the change. Even if a change is implemented, the change may have unintended consequences, or the measure may not have the intended effect.

The more complex the rules, the greater the risk of misinterpretation and differences of interpretation, and the higher the costs of administration and compliance.

Assessment

A central element of the Basin Plan water trading rules is that trade is not subject to discriminatory restrictions. The effect of the section 12.02 exemption on water market efficiency is that it treats HEW differently from other water trades. In this way, it limits the potential movement of water to its most productive use. As a discriminatory provision, the section 12.02 exemption is inconsistent with the water market efficiency objective of the Basin Plan water trading rules.

On the other hand, it could be argued that, under the Water Act, environmental objectives have priority over water market efficiency. If that is correct, then, everything else equal, the section 12.02 exemption should be retained. However, everything else is not equal.

The review has found no evidence that any environmental water trade has relied on the section 12.02 exemption, including through the recent drought, when perhaps it was most likely to be used. Methods other than trade mechanisms may have been used to facilitate environmental water delivery, although the evidence is incomplete on whether these arrangements are required to facilitate efficient environmental water delivery.

EWHs support retaining the provision. The reason appears to be that it is an exemption that may one day be useful or even necessary. It is a measure of last resort, an exemption whose existence provides a degree of comfort.

Table 1 presents a summary of the assessment of the options against the criteria. This is followed by a discussion that weighs up the options.

Table 1: Summary of assessment options

Option	Water market efficiency	Environmental needs	Implementation and administration	Risks
1. Retain the 12.02 exemption	Inconsistent	Protects environmental trades	<p>No implementation costs, as already in place.</p> <p>By defining an exemption, the section 12.02 exemption entails administration and compliance costs.</p>	<p>A reputation risk for Basin Plan water trading rules responsibility to facilitate water market efficiency.</p> <p>The complexity of the provisions may mean they are not providing the intended protections for environmental water delivery.</p>
2. Retain the section 12.02 exemption until state water trading rules are consistent with the Basin Plan requirements and then repeal.	Inconsistent so long as the section 12.02 exemption is in place	Protects environmental trades so long as the section 12.02 exemption is in place	<p>No additional administration costs.</p> <p>Repeal requires a legislative amendment to the Basin Plan.</p>	<p>Making state water trading rules consistent with the Basin Plan has proved vastly more complicated and taken longer than expected. This may mean section 12.02 would be in place for some time. The amendment may not meet the threshold of significance required for a legislative amendment of the Basin Plan</p>
3. Amend the section 12.02 exemption	Inconsistent to the extent discrimination remains	Protects environmental trades	Requires an amendment to the Basin Plan by legislation	The amendment may not meet the threshold of significance required for a stand-alone legislative amendment of the Basin Plan

Option	Water market efficiency	Environmental needs	Implementation and administration	Risks
<p>4. Retain the section 12.02 exemption until:</p> <p>(i) WRP accreditation</p> <hr/> <p>(ii) MoUs for shepherding environmental water</p>	<p>Inconsistent</p> <hr/> <p>Inconsistent</p>	<p>Protects environmental trades</p> <hr/> <p>Protects environmental trades</p>	<p>None (WRPs are to be accredited anyway, though satisfying the intent of the section 12.02 exemption may impose some extra costs on the accreditation process)</p> <hr/> <p>Developing the additional MoUs would be resource intensive, even with being able to reference the existing MoUs</p>	<p>Given that the accreditation requirements in Chapter 10, Part 6 and 8 are not relevant to surface water trade, the accredited WRP provisions may not have the same effect as the section 12.02 exemption.</p> <p>A reputation risk for Basin Plan water trading rules' responsibility to facilitate water market efficiency.</p> <hr/> <p>As MoUs are negotiated instruments, they may take unintended directions</p> <p>A reputation risk for Basin Plan water trading rules' responsibility to facilitate water market efficiency.</p>
<p>5. Repeal the section 12.02 exemption (consistent with ACCC's advice)</p>	<p>Consistent</p>	<p>Dependant on other measures, which appear to have been relied on so far.</p>	<p>Requires an amendment to the Basin Plan by legislation</p>	<p>Risk that other measures are deficient in protecting environmental outcomes or are inconsistent with the Basin Plan.</p>

Option	Water market efficiency	Environmental needs	Implementation and administration	Risks
				The amendment may not meet the threshold of significance required for a stand-alone legislative amendment of the Basin Plan.

Discussion

Assessment against each of the criteria needs to be brought together, in order to determine the option having the greatest balance of advantage.

The weakness of conditionally retaining the section 12.02 exemption (Option 4 (a) and (b)) is that there would be potentially significant costs to developing either option, without there being any guarantee either option would achieve the protection provided by the section 12.02 exemption. To the extent the new measures discriminate in favour of environmental trades, they would be inconsistent with the market efficiency objective.

Offering no improvement in relation to either market efficiency or environmental trade protection, and entailing implementation costs, means that Option 4 should not be pursued.

Retaining the section 12.02 exemption (Option 1) perpetuates the market efficiency issue emphasised by the ACCC advice. So long as it is in place, it compromises the reputation of the Basin Plan water trading rules as an instrument for facilitating more efficient water markets.

The remaining options are to retain the section 12.02 exemption until states water trading rules are consistent with the Basin Plan, amend the section 12.02 exemption or repeal the exemption.

Repealing the section 12.02 exemption would address the problem of inconsistency with market efficiency. However, in practice, if the available evidence is accurate, repeal may make no difference, either to the efficiency of the water market or to protecting environmental trades, because the section 12.02 exemption appears not to have been used.

If, as appears to be the case, the exemption has not been used, then there have been no efficiency costs arising from the section 12.02 exemption. Equally, for the same reason, they would not have provided protections for environmental trade. Having regard to these two considerations alone could suggest the section 12.02 exemption should be repealed so as to remove an inconsistency of the Basin Plan water trading rules with the water market efficiency objectives of the Water Act, albeit

that the gain is one of appearance rather than practice. Repeal would sacrifice a potential avenue for protecting environmental trades.

In relation to minimising the costs of administration and of compliance with the Basin Plan water trading rules, repealing the section 12.02 exemption would have merit. The Basin Plan water trading rules are complicated. By defining an exemption from them, the section 12.02 exemption compounds the complexity. A reform that simplified the rules would be useful for that reason alone.

Repeal would require legislative amendment. As a stand-alone amendment, repealing the section 12.02 exemption may not meet the threshold of significance required for legislative amendment of the Basin Plan.

The section 12.02 exemption could be amended to simplify and clarify the provision. Redrafting the provision would absorb scarce resources. This question is whether the value of a redrafted section 12.02 exemption would exceed the resource cost of the exercise. Given that the consequence for market efficiency of the provision is academic, the value of the redrafting is debatable. As a legislative amendment would be required, this option is subject to the same threshold of significance legislative considerations as the other options requiring legislation.

The final option (Option 2) is to retain the section 12.02 exemption until state water trading rules are consistent with the Basin Plan. This option has the merit of staying with the original intent of the section 12.02 exemption. Although achieving consistent state rules will be some time off, given the limited reliance on the section 12.02 exemption, the efficiency costs of retaining it are moot. At the same time, the section 12.02 exemption would remain as a potential way of delivering environmental outcomes.

For these reasons, this review concludes that the section 12.02 exemption should be retained and repealed when state trading rules are consistent with the Basin Plan.

Conclusion

The purpose of the Basin Plan is to ensure that water is shared between all users, including environmental and cultural, to achieve a healthy, working Basin. The goal is to ensure that the Basin's rivers can support communities and industries in the long term through the sustainable use of water from a healthy river system. Efficient water markets and the effective delivery of HEW are elements of the Basin Plan to help achieve these outcomes.

The review has found that the balance of advantage favours retaining the section 12.02 exemption for the time being. So long as work continues to make state water trade rules consistent with the Basin Plan water trading rules, the rationale for the section 12.02 exemption remains current and relevant. As a minor change to the Basin Plan, a stand-alone amendment to repeal the section 12.02 exemption may not meet the threshold of significance required to undertake an amendment of the Basin Plan.

The MDBA will monitor the operation of the section 12.02 exemption and the progress with the reform of Basin state trading rules. Depending on improvements to Basin state trading rules, it may be appropriate to amend the section 12.02 exemption at a time when other amendments to the Basin Plan are needed.

Appendix A: Summary of Basin State and EWH responses

In undertaking this review, the MDBA examined whether:

- Agreements or Memoranda of Understanding have been established and/or modified to facilitate the 12.02 exemption
- The section 12.02 exemption has operated as intended
- There have been trades under the section 12.02 exemption that should not have occurred
- The section 12.02 exemption is still required.

Commonwealth Environmental Water Holder

The following information was provided by the Commonwealth Environmental Water Office

The CEWH owns water access entitlements. Its holdings are the result of government purchases of entitlements and investment in more efficient water infrastructure, as part of a suite of national water reforms in the MDB. As at 30 June 2020, the Commonwealth environmental water holdings total 2,876 GL of water access entitlements with a long-term average annual allocation²⁰ of 1,989 GL²¹.

In its response to the Review the CEWH advised the MDBA that it delivers environmental water in accordance with its [Framework for Determining Environmental Water Use](#)²². The framework guides the CEWH's decision-making process to make Commonwealth HEW available for use in accordance with several policies, including the MDBA's Annual Environmental Watering Priorities²³ and the Basin Plan. The CEWH provided the MDBA with records for each transaction in the period 2016-17 to 2019-20 and advised that summaries of its historical water use in each of the Basin catchments was publicly available on its website²⁴. The CEWH does not consider delivery of its environmental water holdings are trades.

Victoria

The following information was provided by the Victorian Environmental Water Holder

The Victorian Environmental Water Holder (VEWH) owns water access entitlements, like water access entitlements used by consumptive users. The VEWH advised the MDBA that it holds Victoria's HEW, as well as entitlements on behalf of [The Living Murray \(TLM\) program](#)²⁵. Victorian environmental water access entitlements may also be subject to additional rules and conditions that

²⁰ Allocation is water actually available to use or trade in any given year, including new allocations and carryover.

²¹ <http://www.environment.gov.au/water/cewo/about-commonwealth-environmental-water>

²² <https://www.environment.gov.au/water/cewo/publications/framework-determining-cew-use>

²³ <https://www.mdba.gov.au/publications/mdba-reports/environmental-watering-plan>

²⁴ <http://www.environment.gov.au/water/cewo/catchment>

²⁵ <https://www.mdba.gov.au/sites/default/files/pubs/TLM-2009-Overview-Fact-Sheet.pdf>

relate to delivery and return flows. The VEWH works with catchment management authorities amongst others to ensure environmental water entitlements are used to achieve the best environmental outcomes.

Generally, for the delivery of HEW within Victoria, HEW owned by the CEWH and committed for use in Victorian environmental sites is traded to the VEWH and delivered by the VEWH under the delivery provisions in VEWH's environmental water entitlements. There is an exception to this arrangement in the Wimmera system. CEWH has a supply agreement with Grampians Wimmera-Mallee Water and can deliver HEW directly under that agreement.

VEWH's water access entitlements include delivery conditions that provide for the shepherding of environmental water known as return flows. With the permission of the Northern Victoria Resource Manager, water for the environment delivered through upstream sites can be used again downstream. This forms part of Victoria's prerequisite policy measures (PPMs)²⁶ under the Basin Plan.

The VEWH indicated that they use a shepherding arrangement for the delivery of HEW to South Australia using trade processes. Although they do not rely on the section 12.02 exemption to facilitate the delivery of HEW to SA, the VEWH consider that there may be an opportunity or necessity to use the section 12.02 exemption for the delivery of HEW between Victoria and NSW.

Queensland

The following information was provided by the Department of Natural Resources and Mines and Energy

Queensland employs a rules-based approach to the delivery of HEW more akin to 'planned environmental water' (PEW). Queensland's water planning framework documents include desired outcomes, measures and strategies for achieving the outcomes. These documents collectively include rules that identify and protect environmental flows and for sharing water during drought periods, for e.g., event management rules for announcing access to flow in the Lower Balonne and Border Rivers that protect water entitlements (including those held by the CEWH) and support environmental outcomes in the downstream floodplains. Queensland's approach is particularly suited to these water systems, as there is limited flow regulation and storages to call on water releases in that part of the Basin.

All water access entitlements in Queensland specify a purpose; however, none have a purpose of 'environment', which reflects Queensland's approach to water planning and meeting environmental objectives.

²⁶ https://www.water.vic.gov.au/_data/assets/pdf_file/0029/429743/Overview-of-PPMs-in-Victoria.pdf

New South Wales

The following information was provided by the Department of Planning, Industry and Environment

NSW advised that trades of HEW between environmental licences, such as those held by the Department of Planning Industry and Environment's Environment, Energy and Science Group and CEWH, are undertaken using standard trading frameworks. The delivery of an order made by an environmental licence is not undertaken using trade. Like all licence types, an environmental licence in NSW is required to have a work approval to which water can be ordered for use.

South Australia

The following information was provided by the Department for Environment and Water

South Australia advised that HEW in South Australia is traded through the normal trade mechanisms and are the same as trades of consumptive water.

Australian Capital Territory

This information was provided by the ACT Government – Environment, Planning and Sustainable Development

Currently, the ACT does not deliver any HEW. The ACT is developing interstate water trading rules and protocols in collaboration with NSW, MDBA and DAWE to allow interstate trade of water into and out of the ACT into the Murrumbidgee River system and southern connected basin.

Appendix B: Summary of ACCC advice on the 12.02 exemption

As required under section 12.02(6) of the Basin Plan the MDBA obtained and had regard to the advice of the ACCC in undertaking this review. The ACCC²⁷ advised:

- no Basin State currently relies on the section 12.02 exemption, and are using other mechanisms to deliver HEW,
- no Basin State considers that the section 12.02 exemption is necessary to ensure their current trading arrangements comply with the Basin Plan water trading rules, and
- Basin States have indicated they are generally in favour of maintaining section 12.02 exemption for possible future use.

The ACCC also reiterated its 2010 advice²⁸ to the MDBA on the Basin Plan water trading rules that:

- an exemption from water trading rules for EWHs were not necessary,
- differential treatment of HEW can lead to adverse impacts on third parties and/or the water trading system by:
 - hindering wide participation in the water market by non-EWHs, or leading to the segregation of the market,
 - affecting system constraints and deliverability of water held by non-EWHs,
 - altering the characteristics of water access rights held by EWHs and others,
 - impacting the price of water access rights held by EWHs and others, and
 - limiting the incentive for water market intermediaries to innovate.

Due to these possible risks, the ACCC's view is that reform of the trading rules for HEW is warranted. The ACCC advice stated²⁹:

As Basin States are not relying on the 12.02 provisions, and consistent with the ACCC's 2010 advice, considerations for reform should include the repeal of the 12.02 provisions so that all HEW movements (where the location where the water can be taken is changed) are treated as trades³⁰, and subject to all inter-valley trade (IVTs) limits and other trading restrictions that apply to any other trade between the same two locations.

²⁷ <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/water-trading-rules-advice-to-the-murray-darling-basin-authority-about-section1202>

²⁸ Rule advice 3-E and 3-F, see pages 47 to 53 and page 276:

<https://www.accc.gov.au/system/files/Water%20trading%20rules%20-%20final%20advice.pdf>

²⁹ <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/water-trading-rules-advice-to-the-murray-darling-basin-authority-about-section-1202/accc-advice> at page 5.

³⁰ The ACCC did acknowledge that there may be some specific cases where an exemption may be justified to protect the environment; no information was provided to test this.

Advice related to the movement of HEW

Although beyond the scope of this Review, the ACCC has also raised potential inconsistencies with the Basin Plan water trading rules relating to the mechanisms used by EWHs to move HEW across trading zones. The ACCC notes that Bulk Entitlement Delivery processes in NSW, return flows into and along the River Murray, and Active management (and similar processes) in the Northern Basin may not be consistent with the Basin Plan water trading rules.

The ACCC is of the view that these movements of HEW carried out by EWHs may be ‘trades’ within the meaning of the Basin Plan water trading rules. The ACCC also advises that the EWHs do not share its view and that the current HEW arrangements are not treated by Basin States as trade for the purposes of Basin State water management laws.

The ACCC has also raised broader concerns about the movement of HEW. Specifically, the level of transparency around the delivery of HEW arrangements and the effect this has on the efficient operation of water markets in the MDB. The lack of reporting around some of the Basin States HEW arrangements undermines the role and legitimacy of EWHs and HEW and creates a loss of confidence among market participants more generally.

The ACCC has recommended that as the agency responsible for enforcing the Basin Plan water trading rules, the MDBA could investigate possible contraventions and/or inconsistencies regarding them.

Appendix C: Summary of Intergovernmental agreements considered in the review

Memorandum of Understanding in relation to shepherding of water for the environment between New South Wales and the Commonwealth 2010³¹ (NSW Water Shepherding MoU)

This MoU formed the basis for the development of the section 12.02 exemption (as stated, its origins results from the NSW Environmental Water Use MoU NSW (2009), described below). The MoU commenced in July 2010 and is still in effect.

The MoU applies to the delivery of Commonwealth Environmental Water (CEW) in the MDB (other than its guiding principles)³². The MoU, whilst shaped to deliver environmental water to the Menindee Lakes expanded its application also, to the Barwon Darling unregulated River and intersection streams and, if required, other unregulated rivers (subject to the terms of the MoU). This MoU ensured a commitment by the relevant parties to restoring the health of rivers and wetlands in the MDB.

The primary objectives³³ of this MoU are to:

- optimise the use of all water for the environment,
- provide the capacity to deliver water to high priority environmental assets, and,
- provide protection for environmental flows (for in stream environmental watering) to pass through the system (as far as transmission losses allow).

Notable guiding principles in the MoU include:

- water that has been the subject of water shepherding actions cannot be subsequently traded for consumption, and NSW Water Sharing Plans (WSPs) will include rules to facilitate that³⁴,
- CEW may be managed to give effect to the objectives of the agreement using:
 - Water trading, which is open to all water users and which will be used in preference to water shepherding; or
 - Specific arrangements that provide for the management of CEW for the environment in accordance with the objectives of the MoU.

³¹ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-nsw.pdf>

³² MoU op cit., clause 17.

³³ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-nsw.pdf> (MOU) - clause 14.

³⁴ Clause 15(c) states, “Water that has been the subject of water shepherding actions cannot be subsequently traded for consumption”.

The MoU contends water shepherding is not a trade of HEW. Also, that if environmental water delivery is achieved by trading, then it will be through means that are open to all users³⁵.

The MoU also considers when regulated water moves from a regulated water source to an unregulated water source³⁶. Importantly, water delivered to any remote location (particularly downstream of Menindee Lakes) pursuant to a licence that may be shepherded consistent with this MoU must be accounted as a debit on that licence, even though no water may have been extracted by a work nominated by that licence³⁷.

Memorandum of Understanding in relation to Water for the Environment (the NSW Environmental Water Use MoU) 2009³⁸

This MoU was developed in response to a series of events. Firstly, the CEWH purchased 240 GL of water access entitlements throughout NSW, including entitlements in the Murrumbidgee Valley under the [Restoring the Balance in the MDB program](#)³⁹. In May 2009 NSW put a trade embargo⁴⁰ on the purchase of water for the environment. This MoU marked the first steps of an understanding between NSW and the Commonwealth of the benefits of investing in water and the need to negotiate a bilateral agreement to ensure all water for the environment can be protected from access by downstream consumptive users.

Until more permanent arrangements were to be set in place NSW committed to endeavour to shepherd Commonwealth holdings for environmental watering acquired by the Commonwealth. In achieving the objectives, a breakthrough step acknowledged the need for NSW to repeal embargoes on water purchases for the environment⁴¹.

Memorandum of Understanding in relation to shepherding and use of water for the environment between the Commonwealth of Australia and the State of Queensland 2010⁴² (*Queensland Water Shepherding MoU*)

In November 2008 Queensland passed the Water (Commonwealth Powers) Act 2008, following the signing of the Murray–Darling Basin Intergovernmental Agreement⁴³. It also amended a number of Queensland’s water resource plans to put into effect the Queensland Government’s decision to gift 10.6 GL of unallocated water to the Commonwealth⁴⁴.

³⁵ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-nsw.pdf> (MOU) - clause 16(d)(i)

³⁶ Ibid – clause 21.

³⁷ Ibid – clause 36(d).

³⁸ <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/nsw-mou.pdf>

³⁹ Objectives of (RtB program) were to: reduce consumptive water use; provide water for the environment; and through those measures, ease the transition to the upcoming Basin Plan.

⁴⁰ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gaz_Gazette%20Split%202009_2009-80.pdf

⁴¹ Refer clauses 22 to 24 of the MoU.

⁴² <https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/shepherding-qsl.pdf>

⁴³ https://www.coag.gov.au/sites/default/files/agreements/Murray_Darling_IGA.pdf

⁴⁴ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2009/5309T1061.pdf>

This MoU was a consequence of requisite processes that were necessary to deal with, how the water would be regulated after it crossed the border, in particular, via environmental water shepherding or existing water sharing rules⁴⁵. Also, it witnessed a similar commitment to that of NSW by Queensland, i.e., to restore the health of rivers and wetlands in the MDB. Thus, this intergovernmental agreement is equivalent in nature to the first-mentioned MoU above, made between the Commonwealth and NSW.

This MoU required the relevant parties to develop and implement arrangements providing for environmental water shepherding.

Pre-requisite policy measures and in-stream adjustments for return flows

As stated, discussions between the ACCC and the Victorian Department of Environment, Land, Water and Planning (DELWP) gave rise to a potential further agreement that may satisfy s 12.02(3)⁴⁶. DELWP now considers that an existing intergovernmental agreement between NSW and Victorian Governments could meet the requirements of the s 12.02(3) provisions in future in certain circumstances. This agreement, which relates to Pre-requisite Policy Measures (PPMs) and in-stream trade adjustments for return flows⁴⁷ was made pursuant to clause 113 of the Murray–Darling Basin Agreement⁴⁸.

Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin (2013)

The ACCC suggested that the Intergovernmental Agreement on Implementing Water Reform in the MDB between the Commonwealth and the Basin States (2013, revised in August 2019) meets the requirements set out in subsection 12.02(3) of the Basin Plan water trading rules.⁴⁹ This agreement proposed that NSW will progress solutions to better manage environmental water. For example, NSW shall use ‘Active management’ processes to actively manage HEW in-stream in the Barwon–Darling and relevant water sources in the lower Macquarie–Bogan and lower Gwydir unregulated water sharing plan.

A recent example illustrating these processes is found in the management of the 2020 Northern Basin first flush event as set out below.

⁴⁵ Clause 30 of the MOU.

⁴⁶ ACCC advice, at page 8.

⁴⁷ This trial was earmarked under the Trade Adjustment Project. However, this trial, while agreed in principle, was not used in 2019-20 but may go ahead 2020-2021 or 2021-2022.

⁴⁸ Clause 113 of the Murray–Darling Basin Agreement relates to the exchange of water (by agreement) between NSW and Victoria.

⁴⁹ ACCC advice, at page 11.

2020 Northern Basin first flush flow event

From late January to the end of April 2020, widespread rain fell across various parts of north-west NSW and Queensland. This created significant inflows to parts of the Northern MDB. As a result, a set of temporary restrictions on water extractions across NSW rivers of the MDB were introduced under the provisions of the NSW Water Management Act. In short, Water Sharing Plans introduced new rules which ensured water released for the environment stayed in the rivers for its intended environmental purpose. This was achieved by providing that licence holders must only take water in accordance with an announcement, known as Active management⁵⁰. The restrictions were imposed to responsibly manage the first flows and prioritise water, including for environmental needs which had been exacerbated by the extreme drought.

In March 2020 NSW commissioned an independent assessment to recommend strategies⁵¹. The Independent Panel recommendations included:

- NSW and Queensland should adopt an active event-based management approach to providing flows through the Barwon-Darling system. Flow management strategies should be implemented as soon as possible to protect first flushes, protect low flows, shepherd environmental releases, enhance system connectivity, and improve water quality⁵².

⁵⁰ https://www.industry.nsw.gov.au/_data/assets/pdf_file/0009/274095/active-mgmt-barwon-darling-wsp.pdf

⁵¹ <https://www.industry.nsw.gov.au/water/allocations-availability/northern-basin-first-flush-assessment#:~:text=The%20Independent%20Panel%27s%20final%20report,Northern%20Basin%20First%20Flush%20event.>

⁵² https://www.industry.nsw.gov.au/_data/assets/pdf_file/0017/321650/independent-assessment-final-report-overview.pdf at page 95.

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