



Guidelines for Water Trading Rules

Approval processes for trade of water access rights

Rules covered by this guideline

The water trading rules covered by this guideline are contained in sections 12.37–12.39 of Chapter 12 of the Basin Plan. This guideline should be read together with these sections.

Purpose of the rules

The purpose of these rules is to facilitate the trade of water access rights by making approval processes for trades more open and transparent.

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.

Explanation of the rules

These rules require that for all instances where an approval authority restricts a trade, it must provide notice of its decision and the reasons for the decision to each party of the trade (section 12.39). The notice must be provided as soon as practicable, but in any case within 30 days after the decision.

For an interstate trade, the approval authority restricting the trade may request the counterpart interstate authority to provide notice to the interstate party on its behalf.

Where an approval authority has an interest in a water access right being traded, the rules require that the approval authority must disclose to each party the nature of any legal or equitable interest that it has, or a related party has in the proposed trade (section 12.37(1(a))).

The approval authority must also disclose the nature of any commercial interest that it may have (or a related party may have) in a water market intermediary involved in the proposed trade (section 12.37(1(b))).

It is a requirement that the disclosure to the parties involved must be made as soon as practicable, but in any case, before the approval authority approves or rejects the trade (section 12.37(2)).

Where an approval authority has approved a trade that it (or a related party) has been a party to, it must make a public disclosure on its website as soon as practicable (section 12.38).

Who do these rules apply to?

These rules apply to:

- approval authorities that approve trades of water access rights (see *'Defined terms'* at the end of this document for more information).

Rule requirements

Notice of restriction of trade

Section 12.39 requires that an approval authority must give notice to each party involved in a trade when it decides to restrict the trade of a water access right, and the reasons for doing so. Each party means the trade applicants, i.e. the buyer and the seller.

Restrictions on trade include any measure that refuses, prevents, deters, delays, or imposes a condition or barrier on the trade of a water access right (see definition of *'restrict'* in section 1.07 of the Basin Plan).

Notice of disclosure to each party should include:

- the decision to restrict the trade of a water access right; and
- the reasons for the decision to restrict the trade of the water access right.

The rules require that notice is issued as soon as practicable, but no later than within 30 days after the decision to restrict trade.

The notice must be provided by the approval authority that imposes the restriction, or in the case of an interstate trade, notification may be made by the counterpart interstate authority (see below).

Notification process for interstate trades

An *'interstate trade'* means one or more parties to the trade are required to deal with an interstate approval authority, regardless of whether the party is a resident of the Basin State in which the approval authority operates.

Approval authorities only have jurisdiction over trade-related matters in their own state. As such, the restricting authority may not be able to easily notify an interstate party to the trade.

In recognising this issue, section 12.39(2) provides the option for the authority restricting the trade to issue the restriction notice to the interstate authority, and request that the interstate authority notify the interstate party of the restriction.

The interstate authority is required to comply with the request as soon as practicable.

Approval authority to disclose interests

Section 12.37 requires that an approval authority disclose certain information when a trade of a water access right is submitted to an approval authority for approval, if:

- the approval authority (or a related party) has a legal or equitable interest in the water access right that is being traded; or
- an approval authority (or a related party) has a commercial interest in the activities of a water market intermediary involved in the proposed trade.

The approval authority is required to provide the disclosure to each party to the trade. The information disclosed must include:

- the nature of any legal or equitable interest it, or a related party, has in the subject of the proposed trade; and
- the nature of any commercial interest it, or a related party, has in the activities of a water market intermediary involved in the proposed trade.

Disclosure requirements under section 12.37 will be satisfied if the information in the disclosure is relevant, accurate, and complete.

Examples of legal, equitable or commercial interest

The following are examples that the MDBA considers to be legal, equitable or commercial interests requiring disclosure under section 12.37:

Legal/equitable interests

- an approval authority processing trades for which it is either the buyer or seller of the water access right
- an approval authority processing a trade where it either fully or partially owns the entity buying or selling the water access right or
- an approval authority processing a trade where it jointly owns the water access right being bought or sold.

Commercial interests

- an approval authority processing trades submitted to it by a brokerage or exchange service it owns and/or operates
- an approval authority processing trades that involve a brokerage or exchange it owns and/or operates.

The MDBA recommends that approval authorities seek legal advice to identify and determine the nature of any legal, equitable or commercial interests it (or a related party) has in water access rights that may be traded.

What is meant by being a party to a proposed trade under 12.37(1)?

Being a party to a proposed trade includes being a buyer, seller, lessee, or lessor in the trade.

When is an approval authority not required to disclose interests?

Section 12.37(3) provides that an approval authority that is an agency of a Basin State will not be considered to have an interest in the trade of a water access right by virtue of being an agency of the Basin State that administers trade of water access rights. Similarly, this section does not apply to approval authorities who are acting under delegated authority from the relevant Minister. For example, the MDBA considers that where a water access right is held by an agency of a Basin State (or the Minister) other than the approval authority, this should not be considered a legal or equitable interest held by the approval authority. Section 12.37(4) provides that an approval authority is taken to have satisfied the requirements of sections 12.37(1) and 12.37(2) if those requirements have been satisfied by a related party of the approval authority, on behalf of the approval authority. However, the responsibility for providing the disclosure remains with the approval authority and cannot be delegated to a related party.

Approval authority to publicly disclose where it has an interest in a trade

An approval authority is required to publicly disclose when it has approved the trade of a water access right and it, or related party, is a party to the trade, under section 12.38. The intent is for the disclosure to be widely and easily accessible. The requirement to publicly disclose information is triggered when:

- an approval authority has approved the trade of a water access right; and
- the approval authority (or a related party) was a party to the trade.

The disclosure must be published on the approval authority's website and include:

- the fact that the approval authority was a party to the trade
- the way in which the approval authority was a party to the trade (e.g. as a buyer, or a seller, lessee or lessor)
- the fact the approval authority has approved the trade of water access right
- the type of water access right
- the volume of the water access right
- the number of days lapsed between lodgement and approval of the trade
- the price of the trade.

Disclosure should be made as soon as practicable after the trade has been approved. The MDBA considers that this would be within 30 days after the date of the decision.

Defined terms

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

Approval authority, in relation to the proposed trade of a water access right, means a person whose approval is required under state water management law for the trade to proceed.

Where an approval authority is referenced in the water trading rules it refers to the persons whose approval (not just consent) is required under state water management law for the trade of water access rights to proceed.

NOTE: In some cases, an irrigation infrastructure operator (IIO) may be an approval authority through a delegated approval role from a Basin State. For example, the MDBA considers that Goulburn–Murray Water is an IIO that also acts separately as an approval authority.

Similarly, where an agency of a Basin State has a delegated approval role from a Minister, then in this context the agency would be the approval authority, rather than the Minister.

NOTE: Registration authority is not a defined term. It is used in this section to refer to an authority to which trades must be registered under state water management law. This may be the same entity as the approval authority, or it may be a different entity.

NOTE: The **disposal** of a water access right covers trade and transfer of rights where no monetary value is placed on the right. The price of a trade must be reported even if the right is disposed and a price of zero is recorded.

Interstate authority and **interstate party**, in relation to section 12.39 of the Basin Plan, is defined as follows:

if a proposed trade involves a trade of a water access right between the state of the restricting authority and another state:

- (a) the approval authority in the other state is the interstate authority ; and
- (b) a party who acts through the interstate authority is an interstate party.

Related party, in relation to an approval authority, means:

- (a) an entity in which the approval authority has a controlling interest; or
- (b) a natural person who is acting on behalf of the approval authority in return for a commission or fee.

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

Restricting authority, in relation to section 12.39 of the Basin Plan, means an approval authority who decides to restrict a proposed trade of a water access right.

Water access right:

- (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
- (c) 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.

Water market intermediary means any of the following:

- (a) a person who trades tradeable water rights on behalf of another person in exchange for a commission or fee;
- (b) a person who investigates tradeable water right trading possibilities on behalf of a potential water market participant for a commission or fee;
- (c) a person who prepares documents necessary for the trade of a tradeable water right on behalf of a potential water market participant for a commission or fee;
- (d) a person who provides a trading platform or water exchange for tradeable water rights.

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.