



# Guidelines for Water Trading Rules

## Restrictions on trade when water announcements are not generally available

### Rules covered by this guideline

The water trading rules covered by this guideline are contained in sections 12.49–12.52 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 enhance confidence in water markets by preventing:

- inappropriate disclosure of market sensitive information
- persons with access to sensitive market information from trading in those markets before the information is made generally available.

### 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:

- water announcements are made generally available to the water market
- persons or organisations do not undertake trading activities where they are aware of certain decisions, including trading decisions, or water announcements that have not been made generally available.

The rules allow an organisation to implement Chinese wall arrangements to manage information associated with water announcements, where this may impact on an organisation's trading activities.

### Who do these rules apply to?

These rules may apply to individuals, irrigation infrastructure operators and Commonwealth or Basin State agencies. They apply to any person who:

- is responsible for making water announcements, including allocation and carryover announcements; and/or
- is aware of:
  - a decision that has been made, and is to be announced, by an agency of the Commonwealth or a Basin State which will constitute a water announcement
  - a water announcement that has not been made generally available.

Note: The reference to a person who makes a water announcement under section 12.50 is a reference to a member of an agency of the Commonwealth or a Basin State. See information in the section in the *Rule requirements — Water announcements (section 12.49)* of this guideline.

## Scope of the rules

Section 12.50 requires that water announcements be made generally available. Section 12.49(2) sets out the types of announcements that are considered to be water announcements, and these include announcements related to allocation, carryover and government decisions on carryover arrangements, trading restrictions and trading strategies. Any amendment to a previous announcement also constitutes a water announcement.

A person is restricted, under section 12.51, from trading water access rights where they are aware of:

- a decision that has been made, and is to be announced, by an agency of the Commonwealth or a Basin State where the announcement will constitute a water announcement
- a water announcement that has not been made generally available.

For the purpose of this guideline, this will be referred to as ‘market-sensitive information’.

*Person* includes an individual (either acting on their own behalf or on behalf of others), as well as corporate and government bodies.

Note: the prohibition on trade in section 12.51 does not extend to the trade of irrigation rights or water delivery rights.

Basin State and Commonwealth agencies may implement Chinese wall arrangements (i.e. arrangements to restrict or manage access to information) to assist in managing risks associated with inappropriate transfers of market-sensitive information within agencies.

The rules also permit Basin States and Commonwealth agencies active in water markets to adopt trading strategies.

## Rule requirements

### Generally available (section 12.50)

Section 12.50 provides that a person who makes a water announcement must ensure that it is made in a manner that makes it generally available.

The Basin Plan definition of *generally available* states that information is generally available if it has been published in a manner that will, or will be likely to, bring it to the attention of interested members of the public (section 1.07).

Basin State or Commonwealth agencies making water announcements must therefore ensure those water announcements are made in a way that brings the announcement to the attention of interested members of the public.

The MDBA considers that at a minimum, water announcements should be made generally available via publication on a website. However, depending on the nature of the announcement and the intended audience, it may also be appropriate to issue a media release or notification in a relevant newspaper.

The MDBA considers that if an agency has an established method for when and how water announcements are made, which is widely known to relevant interested members of the public, then a water announcement made consistently with the established method would make the announcement generally available.

### **Person not to trade if aware of a decision before a water announcement is made generally available (section 12.51)**

Section 12.51 applies to a person who is aware of:

- a decision:
  - that has been made, and is to be announced, by an agency of the Commonwealth or a Basin State; and
  - that has not been publicly announced; and
  - the announcement of which will constitute a water announcement; or
- a water announcement that has not been made generally available.

If a person is aware of such *market-sensitive information*, which could reasonably be expected to have a material effect on the price or value of a water access right, they must not:

- enter into a contract to trade; or
- if no contract is involved in the trade,
  - apply to an approval authority in relation to the trade; or
  - if no approval is involved in the trade, apply to a registration authority in relation to the trade.

A person is prohibited from *procuring* another person to take such actions (e.g. engaging a third party such as a water broker to enter into a trade), under section 12.51. The restriction on the person's ability to trade will cease once the information has been made generally available.

Note: The MDBA considers that if a range of options are presented to the decision maker, knowledge of the information will not constitute knowledge of a decision.

Note: A person may not enter into an agreement or contract, or otherwise apply to trade if they have prior knowledge of a water announcement. However, if a trade has already commenced, and does not require the steps outlined above, the rule does not prevent a trade from proceeding.

Under the Basin Plan water trading rules, the prohibition on trade includes trades involving a change in the location and/or ownership of a water access right, even where this involves zero dollar consideration (e.g. trade of water access rights as part of a sale of land, or trades between environmental water holders).

## **Water announcement (section 12.49)**

The water announcements covered by the water trading rules include:

### ***1. Allocation and carryover announcements (section 12.49(2)(a) and section 12.49(2)(b))***

Basin States (or their agencies, such as approval authorities) make water announcements that specify the volume of water allocated to a water access entitlement or when water allocations covered by a carryover arrangement may be taken. This also includes amendments to previous allocation and carryover announcements.

### ***2. Public announcement of an agency of the Commonwealth or a Basin State (section 12.49(2)(c))***

There are some instances whereby a water announcement may not be an allocation or carryover announcement but may provide important information that has a material effect on the price or value of water access rights.

A public announcement by an agency of the Commonwealth or a Basin State is a water announcement if:

- the decision relates to actions that the agency is undertaking or may or will undertake; and
- the announcement can be reasonably be expected, if made generally available, to have a material effect on the price or value of water access rights.

Types of water announcements that may be covered include announcements in relation to policies, programs or legislative changes such as:

- implementing or lifting restrictions on trade
- announcement that a government will be buying or acquiring water access rights within certain water sources, or alternatively selling or releasing water access rights
- legislative or policy amendments that alter the tradability of certain rights
- a trading strategy (discussed below)
- amendments to previous announcements (including lifting of restrictions).

### ***3. Trading strategy (sections 12.49(3)(a) and (b))***

A trading strategy is a plan or set of activities designed to achieve a certain set of goals for the trade of water access rights.

Some Basin State or Commonwealth agencies undertake trading activity. The announcement of a trading strategy may itself have a material effect on the price or value of water access rights. Similarly, the announcement of a decision in relation to the trade of a particular water access right may also have a material effect depending on the volume and the type of water access right being traded.

Basin States or Commonwealth agencies may choose to announce their trading strategies. Trading strategies may be used to communicate plans for the delivery, acquisition or disposal of water access rights.

The MDBA considers that if an agency has announced their trading strategy and made the announcement generally available, public announcements of decisions relating to a particular trade of water access right where the trade is consistent with the trading strategy are not considered water announcements. This means that the public announcement of the decision in relation to a particular trade is not required to be made generally available.

For something to be considered a trading strategy, it should provide the market with enough detail so that trades made consistent with the trading strategy are not unexpected in the water market.

The MDBA encourages agencies announcing trading strategies to clearly identify them. Agencies may wish to consider presenting them in a separate document that is clearly labelled as a 'trading strategy'.

Agencies should also be aware that the process used to acquire or dispose of water access rights may be considered to be a trading strategy, e.g. use of a tender process to facilitate trade.

Amendments to previously-announced trading strategies may also be considered as water announcements, if the amendment can reasonably be expected to have a material effect of the price or value of water access rights.

A trading strategy should include (where relevant):

- announcing the intent to trade in certain areas (e.g. trading zones, water sources)
- announcing the intent not to trade in certain areas (e.g. trading zones, water sources)
- details on the proposed acquisition or disposal of water access rights
- identifying the water access rights that will be traded
- the time period that the trading strategy is valid
- the circumstances in which the trading strategy will apply.

The MDBA considers that agencies that choose to announce trading strategies are not required or expected to set out anticipated or reserve prices as part of the trading strategy.

The MDBA considers that a trading strategy does not protect an agency who wishes to trade consistent with their trading strategy if they become aware of a water announcement, which is separate to their trading strategy, before it has been made generally available.

### ***Material effect of a water announcement (section 12.49)***

A water announcement is taken to have a material effect on the price or value of water access rights if the announcement is reasonably likely to influence persons who commonly acquire water access rights (of any kind) in deciding whether or not to acquire or dispose of water access rights. Persons who commonly acquire water access rights could include:

- irrigators
- environmental water holders
- irrigation infrastructure operators
- infrastructure operators supplying urban areas.

For the announcement to be considered to have a material effect, the announcement is not required to influence everyone in the water market; if some are likely to be influenced, the water announcement is taken to have a material effect.

### **Chinese wall arrangements for agencies (section 12.52)**

Chinese walls offer a mechanism for relevant agencies to manage access to information where multiple functions associated with the water market are undertaken within the same agency, e.g. water announcements, trading approvals and/or trading activities. In the absence of Chinese wall arrangements, an agency is deemed to be aware of information where one individual within the organisation is aware of it.

The Basin Plan does not require agencies to implement Chinese wall arrangements; but Chinese wall arrangements may enable staff in an agency to undertake trading activity despite market-sensitive information being known by staff in other parts of the agency.

### ***What is a Chinese wall?***

Chinese walls are barriers designed to restrict the flow of information and knowledge between two or more groups within an organisation. Effective Chinese wall arrangements ensure information concerning water announcements and decisions is not communicated to officers of an agency making decisions to trade.

Without Chinese wall arrangements, everyone within an agency is deemed to be aware of information if one individual within the agency is aware of it.

If an agency decided to implement Chinese wall arrangements, they will need to be developed to suit the individual circumstances of the agency. The level of risk that an agency is exposed to under these rules would inform the extent to which Chinese wall arrangements would need to be implemented.

The MDBA encourages each agency to consider its individual circumstances, governance and legislative requirements to determine whether Chinese wall arrangements should be implemented. If an agency chooses to implement a Chinese wall arrangement, the MDBA encourages these agencies to ensure that the arrangements and controls in place are clearly documented.

### *What makes an effective Chinese wall?*

The mere establishment of a Chinese wall arrangement, which comprises written policies and procedures, is not enough. For an agency to rely on the Chinese walls defence in section 12.52, the Chinese wall arrangement must be effective. The legal case, *ASIC v Citicorp Global Markets Australia Pty Ltd* [2007] FCA 963, outlines elements of an effective Chinese wall arrangement for this particular case, including:

- the physical separation of departments to insulate them from each other
- an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information
- strict and carefully defined procedures for dealing with situations where it is thought the wall should be crossed, and the maintaining of proper records where this occurs
- monitoring by internal compliance officers or internal audits of the effectiveness of the Chinese wall arrangements
- separation of relevant information technology access
- disciplinary sanctions where there has been a breach of the wall.

If required, the MDBA also encourages the separation of reporting lines.

Chinese wall arrangements should be designed to suit each individual agency. Effective Chinese wall arrangements may need to address governance arrangements, policies and protocols, and also include other measures designed to restrict exchanges of information.

### **Other items that agencies should consider further**

#### *Implications of the rules on water market participants during consultation*

The MDBA considers that parties making allocation announcements, carryover announcements or decisions that, when announced, would constitute a water announcement, have a duty of care to inform people with whom they may be consulting on this decision. This is because consulting them may impact on that person's ability to trade prior to the announcement being made generally available.

#### *Advice to decision makers*

The MDBA encourages agency staff who brief decision makers on water announcements, to include information on the consequences of the water trading rules on their decision making, and the timing of their decisions. As these rules may affect the operation of certain trading activity, the decision maker should be aware of the risks associated with delays in making public announcements generally available.

#### *Managing risks associated with individuals*

The water trading rules apply in an individual capacity to staff within agencies that may individually hold or manage water access rights within the Murray–Darling Basin. Agencies may wish to consider how best to identify and manage these risks. An internal register of interest may be appropriate.

## Defined terms

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

**Allocation announcement** means an announcement specifying the volume of water allocated to water access entitlements.

**Carryover announcement** means an announcement made by a Basin State as to when water allocations covered by a carryover arrangement may be taken.

**Generally available** means information is generally available if it has been published in a manner that will, or will be likely to, bring it to the attention of interested members of the public.

**Material effect:** a water announcement if taken to have a material effect on the price or value of water access rights if the announcement is reasonably likely to influence persons who commonly acquire water access rights in deciding whether or not to acquire or dispose of such rights.

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

**Trade:** this 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 the payment of a 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 arrangement; and
- (d) the establishment of a tagged water access entitlement.

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

**Water announcement** means:

- (a) an allocation announcement; or

- (b) a carryover announcement; or
- (c) a public announcement by an agency of the Commonwealth or of a Basin State that:
  - i. is of a decision that relates to actions that the agency is undertaking, or may or will undertake; and
  - ii. can reasonable be expected, if made generally available, to have a material effect on the price or value of water access 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.

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