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The Hon. Keith Pitt MP
Minister for Resources, Water and Northern Australia
PO Box 6022
Parliament House
Canberra ACT 2600

By email: Keith.Pitt.MP@aph.gov.au

Dear Minister,

At the Murray-Darling Basin Ministerial Council meeting on 17 December 2019 and in a letter of 29 January 2020 from the Hon. David Littleproud MP to me (**Attachment A**), the Australian Competition and Consumer Commission (ACCC) was asked for any insights it was able to provide about overseas ownership, monopoly ownership, unhelpful speculation, whether changes to trading rules would be required, and the registration of brokers across state borders.

ACCC Inquiry into markets for tradeable water rights in the Murray-Darling Basin

On 8 August 2019, the Treasurer directed the ACCC to hold an inquiry into markets for tradeable water rights relating to water in the Murray-Darling Basin (the Inquiry). The *Competition and Consumer (Price Inquiry - Water markets in the Murray-Darling Basin) Direction 2019* (the Inquiry Direction) is at **Attachment B**.

The ACCC is required to provide an interim report to the Treasurer by 31 May 2020 and a final report by 30 November 2020.

The ACCC has undertaken and continues to engage in a range of processes to respond to the Treasurer's direction. The key steps taken are outlined below.

In October 2019, the ACCC released an issues paper and invited public submissions by 29 November 2019. The ACCC received over 130 submissions, including from irrigators, industry representative groups, infrastructure operators, environmental groups, indigenous representative groups, government bodies and members of the public. The submissions have been published on the ACCC website in accordance with the *Competition and Consumer Act 2010* (CCA)¹, subject to privacy and confidentiality requirements.

¹ <https://www.accc.gov.au/focus-areas/inquiries-ongoing/murray-darling-basin-water-markets-inquiry/submissions>

In November 2019, the ACCC held public forums in ten locations across the Murray-Darling Basin. Approximately 800 people attended the forums across the ten locations.

The ACCC has issued requests for information from a range of businesses and other relevant participants in the Murray-Darling Basin water trading markets. While some requests are of a voluntary nature, the ACCC has also used compulsory information gathering powers to obtain necessary information for the Inquiry.

Limitations on the ACCC providing information to the Ministerial Council

The Inquiry is being conducted under Part VIIA of the CCA which restricts disclosure of confidential or protected information. Much of the information that has been obtained by the ACCC for the purposes of the Inquiry is confidential or protected information.

Further, the ACCC is continuing to gather and analyse substantial volumes of information, including through further information requests.

Accordingly, this response reflects the information and observations that the ACCC is currently in a position to provide. Given the enormous volume of data and information we have obtained dating back to 2012, and the inherent complexity of water markets in the Murray Darling Basin, there is a very significant challenge for our team in reaching any substantive conclusions at this stage of the inquiry, and hence our responses below are quite limited. Having said that, we remain on track to meet the inquiry deadlines, and I am very confident we will in future be able to provide the most comprehensive analysis ever conducted of water markets in the Murray Darling Basin.

Information to assist the Ministerial Council

Overseas ownership

The Ministerial Council asked the ACCC about the impacts of overseas ownership. Overseas or foreign ownership is not expressly listed as a matter to be taken into consideration in the Inquiry Direction, and the ACCC does not have access to data that would enable it to properly identify and trace any impacts arising specifically from foreign ownership.

The ACCC notes that foreign ownership and investment is primarily a matter for the Foreign Investment Review Board (FIRB). When examining foreign investment proposals in the agricultural sector, the FIRB typically considers the effect of the proposal on: the quality and availability of Australia's agricultural resources (including water), land access and use, agricultural production and productivity, Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners, biodiversity, and employment and prosperity in Australia's local and regional communities.²

The ACCC notes that the Senate Economics Committee is currently conducting its Review of foreign investment proposals against the national interest test, and levels of foreign ownership of water are a matter for that inquiry. Further information can be found here: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Terms_of_Reference.

² https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5735 see EM, p. 36.

The Australian Tax Office maintains a Register of Foreign Owned Water Entitlements under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth). The register is intended to provide greater transparency about the level of foreign ownership of Australia's water entitlements. The Treasurer publishes an annual report of data derived from the register. The most recent report was published March 2019 (**Attachment C**).³ The register is subject to statutory review by the Productivity Commission.

Monopoly ownership

Monopoly ownership or being in a position of market power is not illegal under the CCA *per se*. However, the exercise of market power with anticompetitive purpose or effect is prohibited under Part IV of the CCA. The ACCC's Inquiry relates to markets for tradeable water rights in the Murray-Darling Basin. Identifying the relevant markets is complex in this context, as water trading markets in the Basin involve a range of geographic and temporal considerations, as well as product characteristics.

The ACCC is in the process of gathering data about water ownership and water trading necessary for it to form views on the level of competition within these markets. The ACCC is collecting data from a number of sources including from Basin state registers and from large investors and corporate farmers, including listed and unlisted companies.

The ACCC Inquiry will provide its assessment of the performance of the water markets, including issues of market concentration and market power with a view to identifying any benefits and harms to effective market operation in due course.

Unhelpful speculation

Speculation refers to trading activity undertaken to take advantage of price movements in a commodity or asset market. Speculators are attracted to markets where price movements occur relatively frequently. Investment for speculative purposes is a feature of many markets and is not *per se* illegal under the CCA. Indeed, it can be beneficial to a market by reducing instability and providing depth and liquidity. Investor presence in water markets, including those making speculative trades, increases options for water users to manage risk. These benefits presume that speculators, like other market participants, are price takers.

However, speculation can sometimes be 'unhelpful' in the sense that there is potential for markets to operate inefficiently as a result of market manipulation. The ACCC is inquiring into the activities of investors in the Murray-Darling Basin water markets to identify their effects and whether the conduct causes harm. We will report on our findings in due course.

Consider if changes are required to trading rules

The water trading rules in Chapter 12 of the *Murray-Darling Basin Plan* apply to the Australian Government, the Basin states, irrigation infrastructure operators (IIOs) and individual market participants.

The rules only apply to water access rights that can be traded under state water management law. Under the Basin Plan water trading rules, free trade of surface water is required within and between regulated systems, and within unregulated systems, except where a restriction meets certain criteria. These criteria include the presence of a physical constraint, lack of connectivity, or the need to protect the environment.

³ <https://firb.gov.au/about-firb/publications/register-foreign-ownership-water-entitlements-report-registrations-30-june>

Basin states have their own trade rules which must be consistent with the requirements of the Basin Plan. Basin state rules include rules relating to carryover and inter-valley and interstate trade. In addition, there are trading rules, policies and procedures administered by Basin state trade approval authorities and IIOs. The total number of trading rules in the Basin is estimated to be in the thousands.

The Inquiry Direction requires the ACCC to consider the management of constraints on the storage or delivery of water. This includes adjustments made to give effect to trades and inter-valley transfers. The ACCC will therefore consider the operation of the trading rules in the context of interstate water markets.

The ACCC's Inquiry is assessing how markets are operating. We are seeking to identify existing problems and potential improvements. The ACCC will then consider how improvements could be made or implemented. This may lead to recommendations for amendments to certain trading rules, amongst other options.

Registration of brokers across state borders

The Inquiry is required to consider the role and practices of water market participants, including water brokers. In the southern Murray-Darling Basin, market participants often rely on brokers to provide information about the market and to facilitate the buying and selling of water products.

The ACCC notes that brokers must comply with the general competition and consumer law protections in the CCA, which include prohibitions on collusion and other types of anti-competitive conduct and agreements.

The ACCC has previously noted that water market intermediaries (brokers and exchanges) play an important role in the water market by providing a broad spectrum of services which may include bringing buyers and sellers together, advising their clients on price and water trading rules, negotiating with a trading partner, and assisting in completing the necessary paperwork to obtain regulatory approvals. By bringing together multiple potential traders, intermediaries can contribute to increased market liquidity and depth, reduce searching and transaction costs, improve information availability and otherwise reduce transaction costs associated with water trade. In short, competitive and competent water market intermediaries can make a substantial contribution to the development of efficient water markets.⁴

The conduct of water brokers is included in the Inquiry Direction, and we note there have been public calls for enhanced broker regulation. The ACCC is examining information provided to the Inquiry through submissions, responses to compulsory and voluntary information notice and stakeholder forums. We will use this information to identify potential misconduct by brokers, including competition and fair trading issues such as collusion and false or misleading representations. We will also use this information to identify practices that could impact competition and market efficiency, including information asymmetries.

The Inquiry is examining the use of brokers' accounts for holding clients' funds and the potential use of water trust accounts. We are also examining the current practices of brokers regarding the disclosure of competing interests, for example when they act for a related party.

⁴ ACCC 2010, *Water market intermediaries: industry developments and practices*, ACCC, Canberra, p.2

Following a detailed assessment of the evidence before the Inquiry, the ACCC will make findings and consider what, if any, further regulation of brokers is warranted to assist the functioning of water markets. If the ACCC finds there is a need to recommend registration of brokers, the Inquiry will consider the appropriate model(s) to effect such regulation consistently across state borders in the Basin, and taking into account regulatory costs.

We trust this information assists the Murray-Darling Basin Ministerial Council. We look forward to sharing the Inquiry reports once completed and engaging extensively with Ministerial Council members.

Yours sincerely,



Mick Keogh
Deputy Chair

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