Law Council
OF AUSTRALIA

Water Markets Intermediaries—Code and Statutory Trust Accounting regulations

Department of Climate Change, Energy, the Environment and Water

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Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Table of contents

About the Law Council of Australia **3**
Acknowledgements **4**
Executive summary **5**
Legal profession regulation **7**
Overview 7
Harmonisation, uniformity and coordinated regulation 8
Water Markets Intermediaries Code and trust accounting **9**
Proposals for who and what the Code applies to 9
Professional conduct matters 9
Practice matters 9
Proposed Code obligations—best interests 10
Interests of the client 10
Diligence, care and skill 10
Confidentiality of client information 10
Lawful instructions 10
Proposed Code obligations—conflict of interest 11
Multiple fees or commissions 11
Interest in the eligible tradeable water rights 11
Proposed Code obligations—information for clients 11
Proposed Code obligation—complaints handling 11
Proposed Code obligation—insurance 12
Proposed Code obligation –client and trade related records 13
Statutory trust accounting 14
Further Policy Proposal Paper matters **15**
Prohibition on trade where the water markets intermediary has an interest 15
Disclosure of enforcement outcomes 15
Water markets intermediaries performing legal and financial services 15
Recommendations **16**

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

This Law Council submission has been developed with, and incorporates the views of, the Law Society of South Australia and the Law Society of New South Wales.

Executive summary

This submission responds to the July 2024 Policy Proposal Paper—*Water Markets Intermediaries—Code and Statutory Trust Accounting regulations*, and in particular:

- the request for feedback[1] on whether the *Water Markets Intermediaries Code* should apply to regulated persons such as solicitors; whether solicitors are already sufficiently regulated, and the risk of harm to clients if solicitors were not covered by the Code compared with the additional regulatory burden if solicitors were covered by the Code; and
- the exception to application of the statutory trust accounting framework when an eligible water markets intermediary maintains a statutory trust account in accordance with a law of a State or Territory.

The Law Council of Australia recommends:

1. An exemption from the proposed *Water Markets Intermediaries Code* where a *water markets intermediary service* is provided as a legal service by an Australian legal practitioner or law practice under a law of a State or a Territory that regulates the legal profession and provision of legal services.
2. Regulations be made under the *Water Act 2007* (Cth) prescribing a statutory trust account maintained by a legal practitioner or law practice under a law of a State or a Territory that regulates the legal profession and provision of legal services.

The Law Council considers that amendments to the *Water Act 2007* made by the *Water Amendment (Restoring Our Rivers) Act 2023* (Cth) will lead to unnecessary and undesirable dual regulation of *water markets intermediary services* when those same services are provided by legal practitioners and law practices as legal services regulated under State and Territory laws regulating the legal profession and the provision of legal services.

The Law Council appreciates the recognition by the Department of Climate Change, Energy, the Environment and Water that dual regulation is an important policy issue to be addressed in regulations relating to the proposed *Water Markets Intermediaries Code* and *Statutory Trust Accounting regulations.*

Dual regulation of the same service (and hence the provider of that service) under both a Commonwealth, and a State or Territory regulatory scheme, is inefficient and undesirable for a number of reasons, which include:

- an increase in the overall regulatory burden on legal practitioners and law practices, inevitably putting upward pressure on the cost of legal services.
- inconsistent and conflicting professional conduct (including ethical) standards and obligations, noting that as an officer of the court a member of the legal profession has a paramount duty to the court and the administration of justice, which applies across all activities undertaken as a legal practitioner, and can extend to conduct occurring outside of legal practice.

[1] Feedback Point 1, Table 5 at [13]

- inconsistent and conflicting regulatory standards and obligations for legal practitioners and law practices over the manner in which the same activity or service is to be carried out.
- uncertainty and confusion for users of legal services about consumer protections, rights, remedies and avenues for raising and resolving complaints.
- the need for mechanisms to authorise and facilitate cooperation and coordination between Commonwealth, State and Territory regulatory authorities.
- regulation of particular kinds of legal services by agencies other than legal profession regulatory agencies (which are subject to prohibitions from disclosure of information obtained in the course of administering legal profession laws and specific exceptions) inevitably raises complex issues about preservation of the confidentiality of client information and in particular, information that is protected from disclosure by client legal privilege.

The Australian legal profession is already the most comprehensively regulated profession in Australia. As explained in this submission, the State and Territory regulatory frameworks for legal practitioners and the legal services they deliver provide regulatory outcomes that are at least substantively equivalent—and many cases exceed—the regulatory outcomes envisaged for the proposed Code.

Statutory trust accounting controls under State and Territory legal profession laws are in place to ensure that trust money is held by a law practice in a manner that protects the interests of those for whom or on behalf of whom that money is held.

Legal profession laws extensively regulate the management of trust money, trust property and the trust accounting and record-keeping procedures of solicitors and law practices who are specifically authorised to hold trust money and trust property received in connection with providing legal services.

In addition, legal profession laws ensure that interest derived from law practice trust accounts is placed in statutory deposit accounts and/or public purpose funds, or otherwise made available to fund legal aid and the costs of regulation, to support research and law reform, and to fund community education.

Summary

The Law Council submission is that solicitors and law practices who provide a legal service that falls within the scope of a *water markets intermediary service* should only be regulated in relation to that service under State and Territory legal profession laws, including those laws as they relate to trust monies received in connection with those services.

Legal profession regulation

Overview

The legal profession in Australia is regulated at the State and Territory level, under laws regulating all aspects of:

- admission to the legal profession, based on attaining prescribed tertiary academic qualifications; completion of a prescribed program of practical legal training; and meeting the fit and proper person requirements for admission by a State or Territory Supreme Court.
- engaging in legal practice, based on being granted a practising certificate and remaining at all times a fit and proper person to hold a practising certificate; adhering to statutory conditions on practising, which include a prescribed period of supervised legal practice, holding approved professional indemnity insurance, and undertaking continuing professional development; continuous disclosure obligations of matters that affect fitness and propriety to hold a practising certificate; and suspension, variation or cancellation of practising certificates.
- professional indemnity insurance obtained from regulator approved schemes or providers which must meet minimum standards relating to, for example, the level of insurance cover, cover for civil liability (including professional negligence), national coverage, and indemnity for run-off liability.
- fidelity schemes providing a source of compensation for persons who have suffered a loss through defaults by law practices and legal practitioners from fraud or dishonesty in dealing with trust money and trust property.
- trust money and accounting, including authority to receive and hold trust money, establishing and maintaining trust accounts with authorised deposit-taking institutions, authority to withdraw or disburse trust money, internal accounting and record-keeping, annual external examination of trust money and trust accounting records, external investigations and intervention in law practice management by regulatory authorities.
- legal costs, including costs disclosure obligations, costs agreements, billing for legal costs, and independent assessments of legal costs where costs payable are in dispute.
- complaints handling, including assessment and investigation of complaints; resolution of complaints by regulatory authorities and tribunals; mechanisms for alternative dispute resolution; remedies for consumers including compensation orders; and disciplinary sanctions for unprofessional conduct.

In addition, State and Territory legal profession laws provide for the development of, and statutorily recognise or incorporate as subordinate legislation, legal profession rules relating to standards of professional conduct, legal practice and continuing professional development. A breach of a legal profession rule may affect a legal practitioner's entitlement to continue to engage in legal practice, and give rise to disciplinary proceedings and sanctions.

Harmonisation, uniformity and coordinated regulation

While regulation of the legal profession and the provision of legal services has been a matter for each State and Territory, periods of legal profession reform since approximately 2002 have seen the development of a national regulatory approach.

During the period 2002–2006 model legal profession law and regulations were developed by the (then) Standing Committee of Attorneys-General, which were subsequently enacted by each State and Territory as a Legal Profession Act, apart from South Australia which ultimately incorporated the model law into its *Legal Practitioners Act 1981*. This suite of legal profession legislation is based on principles of mutual recognition by each jurisdiction of admission to the profession and practising entitlements (and conditions), uniform or at least harmonised core regulatory standards, and regulatory cooperation and recognition between State and Territory regulatory bodies.

During the period 2010–2012 the Council of Australian Governments (COAG) established a National Legal Profession Reform Project to further microeconomic reform by developing a proposal for a uniform Legal Profession National Law. The draft national law developed for COAG was subsequently refined and adopted by New South Wales and Victoria (from 1 July 2015) and Western Australia (from 1 July 2022) as the Legal Profession Uniform Law.

In addition, uniform professional conduct rules for solicitors—the Australian Solicitors' Conduct Rules (**ASCR**)—have been developed by the Law Council and adopted in every State and Territory apart from the Northern Territory (which is anticipated to adopt the rules in the near future).

In summary, legal profession regulation within and across each State and Territory is based on core standards and regulatory approaches which are either uniform, or at least sufficiently harmonised, so as to not involve significant jurisdictional variations in achieving national policy outcomes that impact the legal profession and the provision of legal services.

The balance of this Law Council submission addresses the alignment between applicable regulatory outcomes for the proposed *Water Markets Intermediaries Code* and *Statutory Trust Accounting Framework* and the regulatory standards in the *Legal Profession Uniform Law Framework* (**Uniform Law** and **Uniform Rules**) that applies across New South, Victoria and Western Australia.

Water Markets Intermediaries Code and trust accounting

Proposals for who and what the Code applies to

The term *legal services* is defined in section 6 of the Uniform Law to mean "work done, or business transacted in the ordinary course of legal practice". Thus, a service of a kind specified in the definition of *eligible water markets intermediary* in section 4 of the *Water Act* would also be a legal service if the service is provided in the ordinary course of legal practice. Water markets intermediaries services that would also be legal services might include services relating to the preparation of documents necessary for the trade or transfer of eligible tradeable water rights, and giving (legal) advice on matters related to trading in eligible tradeable water rights.

The proposals (Issues and Obligations) identified in the Policy Proposal Paper fall into two broad categories—professional conduct matters and practice matters.

Professional conduct matters

Professional conduct matters proposed for the Code, such as obligations about the best interests of the client and conflicts of interest have direct equivalents to the professional responsibilities of solicitors set out in the ASCR, which are in turn derived from the nature of the fiduciary relationship between a legal practitioner and client, as well as ethical and professional responsibility principles established by common law. These include:

- Acting in a client's best interests.
- Being honest and courteous in all dealings in the course of legal practice.
- Delivering legal services competently, diligently and as promptly as reasonably possible.
- Avoiding any compromise to the solicitor's integrity and professional independence.
- Providing clear and timely advice to assist their clients.
- Following a client's lawful, proper and competent instructions.
- Avoiding any conflict of interests.
- Maintaining a client's confidences.
- Honouring any undertakings given in the course of legal practice.

The Law Council considers the corresponding professional conduct responsibilities of legal practitioners are more than sufficient to meet the outcomes of the Code that would apply to a legal practitioner providing an eligible water markets intermediary service. Our analysis is set out below.

Practice matters

As explained in the Overview above, legal profession laws provide comprehensive regulation in the practice areas proposed for the Code, including:

- Provision of information to clients.
- Complaints-handling.
- Professional indemnity insurance.

- Record keeping.
- Disclosing any updates or changes regarding costs to the client.

The Law Council considers the corresponding practice requirements of law practices are more than sufficient to meet the outcomes of the Code that would apply to a legal practitioner providing an eligible water markets intermediary service. Our analysis is set out below.

Proposed Code obligations—best interests

Interests of the client

ASCR Rule 4.1.1 states the fundamental ethical duty that a solicitor must act in the best interests of a client in any matter in which the solicitor represents the client. ASCR Rule 12.1 provides that a solicitor must not act for a client where there is a conflict between the duty to serve the best interests of the client and the interests of the solicitor or an associate of the solicitor. (There are limited modifications to this obligation in relation to commissions to benefits—see below). Further, rule 12.2 provides that a solicitor must not do anything calculated to dispose, or which would be likely to induce a client or third party, to confer a benefit which is in excess of the solicitor's fair and reasonable remuneration for the legal services provided, or which is not reasonably incidental to the performance of the retainer agreement.

Diligence, care and skill

ASCR Rules 4.1.2–4.1.4 state the solicitor's fundamental duties to be honest and courteous in all dealings in the course of legal practice, and to deliver legal services competently, diligently and as promptly as reasonably possible, avoiding any compromise to their integrity and professional independence.

Confidentiality of client information

ASCR Rule 9 states that a solicitor must not disclose information that is confidential to a client, apart from disclosure to others within the law practice or to barristers or other law practices engaged in providing the legal services to the client. There are limited exceptions to this professional obligation, the relevant ones being disclosure expressly or impliedly authorised by the client and disclosure permitted or compelled by law.

Lawful instructions

ASCR Rule 8 states that a solicitor must follow a client's lawful, proper and competent instructions. Further, ASCR Rule 13 requires that a solicitor with responsibility for a matter must ensure completion of the legal services unless the client agrees to terminate the engagement, or discharges the law practice from the engagement, or the engagement comes to an end by operation of law, or the law practice terminates the engagement for just cause and on reasonable notice. "Just cause" includes that the client's instructions are not for a lawful or proper purpose.

Proposed Code obligations—conflict of interest

Multiple fees or commissions

ASCR Rule 12.4.3 envisages that a solicitor may receive a financial benefit from a third party in relation to a dealing on behalf of client but only where the solicitor has:

- advised the client that a commission or benefit is or may be payable, and the nature of that commission or benefit; and
- has advised the client that the client may refuse any referral; and
- the client has given informed consent to the commission or benefit received or which may be received.

Interest in the eligible tradeable water rights

ASCR Rule 12.1 also applies to this proposed Code obligation - a solicitor must not act for a client where there is a conflict between the duty to serve the best interests of the client and the interests of the solicitor or an associate of the solicitor.

Proposed Code obligations—information for clients

The legal services to be provided and related matters will normally be set out in an engagement letter/retainer agreement between the client and law practice. In addition, section 174 of the Uniform Law sets out statutory disclosures, which must be in writing and fulfilled when, or as soon as practicable after instructions are initially given:

- the law practice must disclose the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
- the law practice must provide information about the client's rights to negotiate a costs agreement, to negotiate the billing method, to receive a bill and request an itemised bill; and to seek the assistance of the relevant regulatory authority in the event of a dispute about costs.

If there has been a significant change to anything previously disclosed the law practice must, at the time of or as soon as reasonably practicable after the change, provide the client, in writing, with information disclosing the change, including information about any significant change in the legal costs. This disclosure must include sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to enable the client to make informed decisions about the future conduct of the matter.

Proposed Code obligation—complaints handling

Complaints about the quality of legal services and professional conduct of legal practitioners are lodged with and managed by legal profession regulatory authorities, separate from the practitioner who is the subject of complaint. The scheme of the complaints-handling framework for consumer matters contained in Chapter 5 of the Uniform Law is as follows.

> The objective is timely and effective resolution of disputes and issues between clients and lawyers (in consumer matters).

Any person may make a complaint. In addition, a legal profession regulatory authority may initiate a complaint relating to a disciplinary matter.

The complaints handling authority conducts a preliminary assessment of the complaint, and may request additional information to be provided. Following the preliminary assessment the complaint may be closed with no further action (for example, because the complaint is vexatious, frivolous, or lacking in substance).

The legal practitioner subject to the complaint will be notified of the complaint and may be given a summary or details of the complaint. The legal practitioner is also given an opportunity to respond and make submissions. There are exceptions to this notification requirement—for example where the complainant or another person could be placed at risk of intimidation or harassment.

The complaint may be investigated, and if so, the investigation is not limited solely to matters relating to the actual complaint, but may extend to other legal practice and professional conduct matters.

The complaints handling authority will not take action toward resolving a consumer complaint unless at least one the parties has made a reasonable attempt to resolve the complaint and has failed, or it would be unreasonable to expect the complainant to be involved in an attempt.

The complaints handling authority must attempt to resolve a consumer complaint informally, and may order the parties to that complaint to attend mediation in good faith. If mediation is not successful, the complaints handling authority may further investigate and proceed to making a determination to resolve the complaint.

The complaints handling authority will determine a consumer complaint on the basis of what is fair and reasonable in the circumstances. The remedies that may be ordered can include a caution, an apology, and requiring the work to be redone at no cost or a reduced cost. In addition, the complaints handling authority may make a compensation order to compensate the aggrieved person for loss suffered because of the conduct that led to the complaint.

Proposed Code obligation—insurance

It is a statutory prerequisite for the grant or renewal of a practising certificate that a legal practitioner has or will have professional indemnity insurance (unless exempt[2]) that meets at least the prescribed minimum standards for professional indemnity insurance. Further, a legal practitioner is prohibited from engaging in legal practice unless the legal practitioner holds or is covered by an approved professional indemnity insurance policy.

[2] For example, government legal practitioners, or holders of a statutory office of the Commonwealth are not required to hold professional indemnity insurance.

An approved professional indemnity policy must provide a minimum amount of $2 million (costs inclusive) for each and every claim. The other statutory minimum standards for solicitors are, in summary:

- The insurance must cover any civil liability, including professional negligence, incurred in connection with providing legal services.
- Cover must operate on a "claims made" basis, covering claims made and notified during the period of insurance, and claims made after the period of insurance from circumstances notified during the period of insurance.
- The insurance must cover all current and former principals and employees of the law practice.
- The insurance must provide indemnity for run-off liabilities for a period of seven years from the date the law practice ceases to practice or the date of expiry of the insurance (if not already provided for in another current insurance policy).

Where the amount 'at risk' in a particular client matter is greater than the statutory minimum, normal practice is that the law practice and client will reach agreement about additional insurance coverage—law practices that deal with matters involving amounts greater than the statutory minimum will hold or obtain additional ('top-up') cover for the law practice. This approach would address the proposal for the Code to prescribe a minimum of $5 million.

An approved professional indemnity insurance policy cannot deny future cover in either extent or amount that is less than the minimum standards because of previous claims history, although the cost of the premium may be affected by the prior claims history.

Proposed Code obligation –client and trade related records

ASCR Rule 14 requires that a solicitor with designated responsibility for a matter must ensure that any client documents are returned at the completion or termination of the matter as soon as reasonably possible when requested to do so by the client unless the law practice has an effective lien over the client documents for unpaid costs. Rule 14 also provides that a solicitor or law practice may destroy the client documents after a period of 7 years since completion or termination or the engagement unless there are client instructions or legal obligations to the contrary.

A more complete discussion about how a law practice should manage client documents is contained in the Law Council's Commentary to the ASCR.

In addition to client documents, a law practice is required to open a file in respect of each matter for which the law practice has received instructions, which must include the full name and address of the person, the date of receipt of the instructions, and a short description of the legal services to be provided. In practice, a law practice will maintain detailed records relating to the legal services to be provided. It is noted that detailed records will be necessary to address and respond to, for example:

- professional indemnity insurance claims, which may be made during the 7 years run off liability period after a law practice has ceased practising or the policy has expired;

- complaints, which can be made in relation to matters occurring 3 years before the complaint is made or such longer period as permitted by the complaints handling authority;
- fidelity fund claims, where the only applicable time period prescribed is that a claim must be made within 6 months after the prospective claimant becomes aware of the default (or any such further time allowed by the regulatory authority or Supreme Court.

Statutory trust accounting

The Law Council understands that the Department has separately consulted with Law Societies about statutory trust accounting and regulation for law practices in the States and Territories. Accordingly, this submission does not set out specific details about the prescribed processes, procedures and records required to be generated and maintained by a law practice that operates a trust accounts, in comparison to the proposed requirements set out in the Policy Proposal Paper. However, the Law Council makes the following observations:

- A law practice must not receive trust money unless a principal of the law practice holds a practising certificate authorising the receipt of trust money, or the law practice is otherwise authorised. A principal of a law practice will usual not be so authorised until after successfully completing a law practice management program which includes trust accounting.
- Trust monies may only be held in specifically designated trust accounts, with an authorised deposit taking institution (ADI) approved by the relevant regulatory authority.
- Legal profession laws extensively regulate all aspects of trust monies and trust accounting—see for example Part 4.2 of the Uniform Law and Part 4.2 of the *Legal Profession Uniform General Rules 2015*.
- It is a criminal offence under the Uniform Law for a legal practitioner or any other person to cause, without reasonable excuse, a deficiency in any trust account or trust ledger account, or to fail to pay or deliver trust money.
- In addition to the requirement that a law practice's trust records be examined annually by a qualified external examiner, a legal profession regulatory authority may undertake or appoint a suitably qualified person to undertake an investigation into particular allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs of the law practice.
- Legal profession laws provide for a regulatory authority to intervene in the business and professional affairs of a law practice to protect the interests of the general public or clients, including the appointment of a supervisor of trust money of a law practice or appointment of a manager for a law practice. In addition, a court or tribunal may appoint a receiver for a law practice.
- (As mentioned previously in this submission) interest derived from law practice trust accounts is a significant source of public purpose funding for the States and Territories to fund legal aid and the costs of legal profession regulation.

In summary, the Law Council submits that the existing trust accounting regime for law practices is more onerous than that envisaged in the Policy Proposal Paper, and that duplication of trust accounting regimes would be an unnecessary regulatory burden.

Further Policy Proposal Paper matters

Prohibition on trade where the water markets intermediary has an interest

The Department has proposed an obligation to be included in the Code to prohibit a person providing water markets intermediary services when that person, or a related party, has an interest in the eligible tradeable water rights which are proposed to be traded or transferred.

We consider this obligation may be overly onerous, and that any potential conflict of interest that may arise can be adequately managed by way of prescribed disclosures. A similar model to that which applies for agents under the Property and Stock Agents Act 2002 (NSW)[3] might be suitable as an alternative.

Disclosure of enforcement outcomes

The Department has sought feedback whether the Code should require an intermediary to disclose any enforcement outcome, including payment for an infringement notice or the issuing of a warning in relation to a Code or trust accounting obligation. Our preliminary view is that this obligation may be excessive, and that disclosure of an enforcement outcome should only be required where it is a condition imposed by the enforcement authority.

Water markets intermediaries performing legal and financial services

The Law Council notes the concern expressed in earlier submissions by the Law Society of New South Wales that some activities engaged in by intermediaries may constitute legal services, including the giving of advice in relation to a client's legal rights and obligations under a water contract. Furthermore, the water market is becoming more complex, and there is the potential for derivative type products and contracts to form part of the product range of some service providers. The Law Council supports the view that the Code should clarify that relevant qualifications and authorities that are to be required to perform certain legal and financial services. We suggest that the Code include a statement or qualification to the following effect:

> "Nothing in this Code permits a water markets intermediary to:
>
> (a) provide legal services or engage in legal practice contrary to the laws of a State or Territory regulating legal practice or the provision of legal services; or
>
> (b) provide financial services contrary to Chapter 7 of the *Corporations Act 2001* (Cth)".

[3] Part 3, Div 4 – 5.

Recommendations

1. There should be an exemption from the proposed *Water Markets Intermediaries Code* where a *water markets intermediary service* is provided as a legal service by an Australian legal practitioner or law practice under a law of a State or a Territory that regulates the legal profession and provision of legal services.
2. Regulations should be made under the *Water Act 2007* (Cth) prescribing a statutory trust account maintained by a legal practitioner or law practice under a law of a State or a Territory that regulates the legal profession and provision of legal services.
3. The Code should include a statement or qualification:

   "Nothing in this Code permits a water markets intermediary to:

   (a) provide legal services or engage in legal practice contrary to the laws of a State or Territory regulating legal practice or the provision of legal services; or

   (b) provide financial services contrary to Chapter 7 of the *Corporations Act 2001* (Cth)".

Australian Government

Department of Climate Change, Energy, the Environment and Water

Water Markets Intermediaries -

Code and Statutory Trust Accounting regulations Policy Proposal Paper

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Department of Climate Change, Energy, the Environment and Water

GPO Box 3090 Canberra ACT 2601

Telephone 1800 900 090

Web dcceew.gov.au

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Acknowledgement of Country

We recognise the First Peoples of this nation and their ongoing connection to culture and country. We acknowledge First Nations Peoples as the Traditional Owners, Custodians and Lore Keepers of the world's oldest living culture and pay respects to their Elders past, present and emerging.

Table of Contents

Overview 4
- Why am I receiving this paper? 4
- What is this paper for? 4
- When will these new requirements come into effect? 4
- How to have your say 4
- Online information session 4
- Privacy Notice 5

Introduction 14

Application of the Code 16
- Feedback on application of the Code 16

Proposed Code obligations 19
- Issue 1 – Best interests obligations 19
- Issue 2 – Conflict of interest 21
- Issue 3 – Information provided to clients 22
- Issue 4 – Complaints-handling process 25
- Issue 5 – Authorities 27
- Issue 6 – Broking water accounts 29
- Issue 7 – Insurance 33
- Issue 8 – Record keeping 34
- Civil penalty provisions 36

Statutory trust accounting exceptions and details 37
- Issue 9 - Statutory trust accounting exceptions 37
- Issue 10 - Details for statutory trust accounting framework to be included in the Code 38

Definitions 44
- Issue 11 – Code definition proposals 44

Appendix A – Existing definitions from the RoR Act 45

Appendix B – Roadmap Proposed Recommendations 45

Overview

Why am I receiving this paper?

The Department of Climate Change, Energy, the Environment and Water (DCCEEW) invites you to make written submissions on the various matters canvassed in the policy proposal paper to support the Australian Government in developing and making regulations to enable:

1. the new mandatory Water Markets Intermediaries Code, and
2. effective operation of the statutory trust accounting framework.

This is required by virtue of amendments to the *Water Act 2007*, arising from the *Water Amendment (Restoring Our Rivers) Act 2023*.

You have been invited to participate in this consultation exercise as an eligible water markets intermediary or other interested stakeholder.

What is this paper for?

The policy proposal paper outlines the key policy areas for the development of regulations, including the Code and requests written feedback from stakeholders on the policy proposals in the paper.

Written feedback provided in response to the paper will be considered in the development of a policy position, which will be reflected in an Exposure Draft of the regulations. An Exposure Draft is planned for release by early November 2024.

When will these new requirements come into effect?

The Code and the statutory trust accounting obligations are expected to come into effect on 1 July 2025.

How to have your say

With the new Regulations expected to come into effect on 1 July 2025 and to allow time for development and further consultation on the draft regulations, your input on the policy proposals is sought by no later than **9.00am Monday 26 August 2024**.

If you would like to provide a submission on any of the proposals, please do so by emailing your written submission to water.markets@dcceew.gov.au by the timeframe above.

Submissions received after this time may not be considered. It is also requested that any submission made:

- is written in English, and
- Includes the title of the policy proposal paper, your name and the full legal name of any organisation you represent, and your contact details.

While all submissions will be considered, there is no guarantee that any particular matter or perspective raised in a submission will be accommodated or reflected in the Regulations.

Online information session

An online information session for stakeholders will be held between **10.00 and 11.00am on Thursday 15 August**. A link to register for this online session is included in the email sent with the policy proposal paper.

A copy of the information session slides and a summary of the Q&A will be emailed to those who register for the session.

Privacy Notice

Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not.

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- consent to DCCEEW's collection, use and disclosure of all personal information contained in any such email, including any attachments in accordance with this Privacy Notice, and
- warrant that in respect of any third party personal information provided, you have obtained their consent to their personal information being similarly collected and handled.

Any personal information collected is protected by the Privacy Act 1988 and:

- Will be collected and used by DCCEEW to:
  - A. Register your interest in attending or accessing the information session,
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Further Information

The matters provided for in this paper are further to papers DCCEEW sent to stakeholders in February and May 2024 on key policy areas relevant to the Code development. If you would like to receive copies of these previous papers to assist you in also considering the matters raised in this paper, please reach out to water.markets@dcceew.gov.au

If you do not wish to receive further information about the development of these regulations, please email water.markets@dcceew.gov.au

What are the proposals?

The tables in this Overview provide a summary of the policy proposals for which stakeholder feedback is sought. Further details on the proposals are available in the policy proposal paper.

The tables summarise the policy proposals in the paper:

- Table 1 –Proposals for who and what the Code applies to
- Table 2 – Proposed Code obligations
- Table 3 – Proposals for statutory trust accounting exceptions and details
- Table 4 – Code definition proposals

Table 5 lists matters for which specific feedback is sought throughout the paper.



Table 1 – Proposals for who and what the Code applies to

Issue	Proposal	Proposal No.
Categories of intermediaries	The Code obligations apply regardless of type or category of intermediary (e.g. broker, water exchange).	1
Services provided by water market authorities and irrigation infrastructure operators (IIOs)	The Code would not apply to water markets intermediary services where the fee or commission is a fee charged by a water market authority to approve, allow or register a trade or transfer, or is a fee charged by an IIO to process a trade or transfer where a customer or member wishes to trade externally.	2
Water rights covered by the Code	The Code obligations would not apply where services are being provided for eligible tradeable water rights which are tied to one parcel of land or land holding and where those eligible tradeable water rights cannot be traded or transferred for hold, take or use at another parcel of land or land holding.	3
Trading platform	The Code obligations apply to trading platform services where the trading platform is an online platform where the person or entity providing the platform makes a representation that an eligible tradeable water right is available for sale or purchase, if the person or entity will facilitate the trade or transfer of the eligible tradeable water right in exchange for a commission or fee.	4
Water rights held by IIOs on behalf of other persons	The broking water account obligations (Issue 6) in the Code do not apply to eligible tradeable water rights held by an IIO on behalf of another person.	5

Table 2 – Proposed Code obligations

Issue	Proposed Code obligation	Proposed civil penalty range	Proposal No.
Key: ***Medium = between 200 and 399 penalty units,*** ***High = between 400 and 600 penalty units***			
1 – Best Interests obligations	To place the interests of a client before the interest of the intermediary or a related party.	**High**	6
	To represent the interests of a client diligently, and with care and skill.	**High**	7
	To keep clients' information confidential, and to not misuse this information.	**High**	8
	To act in accordance with lawful instructions provided by a client.	**High**	9
2 – Conflict of interest	To disclose to a client in writing when an intermediary is receiving multiple fees or commissions, or other benefits and the amounts received or to be received, in relation to a trade which involves that client.	**High**	10
	To prohibit a person from providing water markets intermediary services if that person, or a related party, has an interest in the eligible tradeable water rights which are proposed to be traded or transferred.	**High**	11
3 – Information for clients	To provide the following information to a client or prospective client: (a) the services that will be provided, (b) the obligations owed to the client, and (c) the fees/commissions to be charged. For allocation trade-related services, the information should be provided to clients or prospective clients before services are provided for the first time after the obligations commence, and then do not have to be provided again in the following 12 month period, provided the information does not change. After the 12 month period expires, the information has to be provided again before any further intermediary services may be provided. If there is any change to the services being provided, the obligations owed or the fees/commissions to be charged by the intermediary, the updated information must be provided as soon as possible after the change, and before any further intermediary services are provided. For other intermediary services, the information should be provided for every intermediary service, or combination of intermediary services for which a fee or commission is to be charged, before the services are provided by the intermediary. **For (a) above**, if the services that will be provided by an intermediary include transfer of allocation through an intervalley trade (IVT) opening, the intermediary must include information about which method the intermediary will use to allocate successfully transferred volumes (for example, in chronological order or pro rata). If the services include the use of the intermediary's broking water account, the intermediary must disclose how any surplus amounts which are not able to be transferred to their lawful owner, will be dealt with by the intermediary. **For (b) above**, the obligations that need to be communicated to a client are: • Obligations under the Code • Statutory trust accounting obligations • Obligations under the intermediary's internal complaints-handling process • Obligations under Australian Consumer Law • Copies of the documents above, or reference to where these obligations can be found.	**Medium**	12
	To inform a client of trade outcomes, including any reasons for a water market authority rejecting or delaying the processing of an application for the trade or transfer of an eligible tradeable water right, as soon as possible and no later than 1 business day after the intermediary becomes aware of the information.	**Medium**	13

Issue	Proposed Code obligation	Proposed civil penalty range	Proposal No.
Key: ***Medium = between 200 and 399 penalty units,*** ***High = between 400 and 600 penalty units***			
4 – Complaints-handling	To implement and follow a complaints-handling process. The minimum requirements for this process include: • The intermediary is to act in good faith throughout the complaints handling process and make a genuine attempt to resolve the dispute within 30 calendar days of receiving a complaint. • If a complaint is not received in writing, the intermediary is to make a written record of it as soon as practicable after the complaint is received. • The intermediary is to acknowledge receipt of the complaint within 2 business days of receiving the complaint, and provide a copy of the complaints-handling process to the complainant, and a copy of the written record of the complaint (if made verbally). • The intermediary is to respond to the complaint in writing no longer than 10 business days after receiving the complaint. • The intermediary is to notify the complainant of the outcome and conclusion of the complaints handling process within 5 business days of its conclusion.	**Medium**	14
5 – Authorities	To hold written authorities when submitting applications for trades or transfers of an eligible tradeable water right to a water market authority on behalf of clients. These authorities must contain: • Information relating to the period of time or number of trades or transfers for which the authorisation is valid, up to a period of 12 months. • How the authority can be rescinded by the authoriser. • The signature of all water account holders, where the account is held in multiple names. • For company accounts: » The authorisation must be accompanied by an ASIC company extract or an incorporations association extract less than 12 months old. » The signatory must be a Director or Company Secretary, as listed on the ASIC company extract.	**Medium**	15
	To hold written authorities when acting as an agent on behalf of clients. This authority must contain: • All of the elements required in relation to a written authority to submit trades or transfers on behalf of a client. • The terms of the contractual arrangement, for example, the overall trading objective, and funds or water rights to be made available in pursuit of it.	**Medium**	16

Issue	Proposed Code obligation	Proposed civil penalty range	Proposal No.
Key: ***Medium = between 200 and 399 penalty units,*** ***High = between 400 and 600 penalty units***			
6 – Broking water accounts	To maintain one or more 'broking water accounts', including obligations: (a) To notify the ACCC that the eligible water markets intermediary is maintaining one or more broking water accounts and details of those accounts, within 3 months of the first day on which the obligation for an eligible water markets intermediary to maintain a water broking account commences. (b) To transfer into a broking water account any eligible tradeable water rights received on behalf of another person in relation to water markets intermediary services provided by the eligible water markets intermediary. (c) Not to transfer any eligible tradeable water rights into a broking water account, other than rights received as per (b) above. (d) Not to transfer any eligible tradeable water rights into a broking water account in which the intermediary or a related party of the intermediary has an interest. (e) To transfer out of a broking water account any eligible tradeable water rights to the person who is lawfully entitled to receive those rights, to the nearest possible amount able to be transferred. (f) Not to transfer eligible tradeable water rights out of a broking water account, other than for a transfer as per (e) above or to deal with leftover amounts that are not able to be transferred as per (e) above. (g) To prepare a written statement (a broking water account statement) in relation to the broking water account for each financial year of the intermediary, within 3 months after the end of the financial year. (h) (Not to provide information that is false or misleading in a material particular in a broking water account statement. (i) To provide clients with a statement from their client ledger account (for water rights) upon request of the client, within 5 business days of the request. (j) To disclose in writing to a client when eligible tradeable water rights are to be transferred to or from an intermediary's broking water account, and the reasons for the use of the broking water account. The broking water account statement must contain the following information and matters: • Name and address of intermediary • Period covered in statement • Name of water market authority or Basin state agency that issues the broking water account • Broking water account number or licence number • Broking water account name • Opening balance • Closing balance • Client ledger accounts balance (total) • Difference between closing balance and client ledger account balance (total) • Whether there were any overdrawn or surplus client ledger accounts • Declaration by intermediary that information is true and correct • Schedules to be attached: » List of client ledger accounts and their balances » Explanation for difference between closing balance and client ledger accounts balance (total) » Method disclosed for how surplus amounts which are not able to be transferred to their lawful owner, will be dealt with by the intermediary, and method used. » Copy of any statements of any surplus broking water accounts » Copy of any overdrawn or surplus client ledger accounts » Method disclosed for IVT allocation, and method used.	**High**	17
7 – Insurance	To hold professional indemnity insurance covering the provision of water markets intermediary services. The insured amount must be at least $5 million for any one claim and in the annual aggregate, and include an automatic right of reinstatement of the annual aggregate.	**High**	18

Issue	Proposed Code obligation	Proposed civil penalty range	Proposal No.
Key: ***Medium = between 200 and 399 penalty units,*** ***High = between 400 and 600 penalty units***			
8 – Record-keeping	To keep the following client and trade related records for 6 years from creation: • Client details including name, address, phone number, email address • Client instructions • All communicated details of buy or sell offers communicated to or on behalf of clients (other than offers listed on a water exchange or trading platform) • Trade details including volume, zone, price, strike date, name of buyer and seller • Complaints received, responses and notification of outcome of a complaint • Records of transactions within a broking water account, for example, account or licence statements issued by or available from a water market authority • Client ledger accounts for each person an intermediary holds water rights for/on behalf of while providing water markets intermediary services. This ledger may include date of transaction, volume, person and account/licence water rights received from/transferred to, trade/matter reference, reason for transfer, running balance • Broking water account statements as required to be prepared under the Code • Where an intermediary is trading or transferring rights to or from their broking water account, disclosure to a client of such • Information provided in writing to a client at the outset of each engagement • Written authorities required under the Code • Certificate of currency and insurance policy for professional indemnity insurance required to be kept under the Code To keep the following financial and accounting related records in relation to the provision of intermediary services for 6 years from creation: • receipts • records of authorities to withdraw by electronic funds transfer • deposit records • Authorised deposit-taking institution (ADI) trust account statements • trust account receipts and payments cash books • client ledger accounts for each person an intermediary holds money for/on behalf of while providing intermediary services. This ledger may include date, dollar amount received/paid, to whom amount received from/paid to, method of payment, trade/matter reference, reason for transaction, receipt number, running balance • trust account statements and trust account audit reports	**Medium**	19

Table 3 – Proposals for statutory trust accounting exceptions and details

Issue	Proposal	Proposal No.
10 – Statutory trust accounting exceptions – matters to be taken into account when assessing equivalence	The following matters are proposed to be included in regulations: • audit requirements • external examination requirements • requirements in relation to accounting records and practices • obligations in relation to the deposit and receipt of trust funds • the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights including, but not limited to, a trade or transfer that is not part of the transfer of land • the adequacy of the protection of trust monies • the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights which occurs in a different jurisdiction to the scheme, • how interest is dealt with in the scheme • any other matter that the Minister considers relevant	20

Issue	Proposal	Proposal No.
11 – Statutory trust accounting details	**Designation of trust accounts** It is proposed that the name of a trust account must include the legal name of the intermediary and the words 'water markets trust account'. **Trust account statement** It is proposed that the Code require trust account statements to include the following information: • Name and address of intermediary • Period covered in statement • ADI Trust Accounts » Name of ADI that maintains account » ADI BSB and account number » Account name » Accounting period » Opening balance as per ADI Statement » Closing balance as per ADI Statement » Add/less any adjustments » Reconciled ADI balance • Client ledger accounts balance (total) • Whether there is a difference between reconciled ADI balance, and client ledger accounts balance (total) • Whether there were any overdrawn ADI trust accounts or client ledger accounts • Declaration by intermediary that information is true and correct • Schedules to be attached: » Details of any adjustments » List of client ledger accounts and their balances » Explanation for difference between reconciled ADI balance, and client ledger accounts balance (total) » Copy of any statements of any overdrawn ADI trust accounts » Copy of any overdrawn client ledger accounts » Where the intermediary is a trust, unincorporated association or partnership, a copy of up-to-date document which records key individuals and constituent documents (e.g. partnership agreements, details of the committee of management for an unincorporate association, trust deeds) » Where the intermediary is a company, a company extract It is proposed that the Code require intermediaries who are subject to the trust accounting obligations, to provide a client with a statement from that client's ledger account upon request of the client, and for each financial year in which an intermediary has held money on behalf of that client. The end-of year statement is to be provided within 3 months after the end of the financial year to which the statement relates. If requested by a client, the statement is to be provided within 5 business days of the request. **Trust audit report** It is proposed that the Code require an auditor's report to include the following: • Name and address of intermediary • Period covered in the trust account statement • ADI Trust Accounts that have been audited » Name of ADI that maintains account » ADI BSB and account number • Any information which has not been included in the trust account statement, but that the auditor considers should be included in the audit report • Name, address and membership/qualification of auditor • Declaration by auditor • whether they have examined the trust records of the intermediary and are of the opinion that all necessary trust records were produced to them • whether they are of the opinion that the trust records have been kept in accordance with the requirements of the Code • whether anything has come to their attention to indicate the trust account statement is untrue • whether any overdrawn trust accounts or client ledger accounts were restored promptly and whether details were provided to the auditor and included in the report **Eligibility to be an auditor** It is proposed that, to be eligible to prepare a trust account audit report, a person must be: • A member of CPA Australia holding a current Public Practice Certificate issued by that body, or • A member of Chartered Accountants Australia and New Zealand (CA ANZ) holding a current Certificate of Public Practice issued by that body, or • A member of the Institute of Public Accountants (IPA) holding a current Professional Practice Certificate issued by that body, or • A registered company auditor or an authorised audit company (within the meaning given by section 9 of the Corporations Act) It is also proposed that an auditor may not: • Be a related party of the intermediary or any other eligible water markets intermediary. • Be a person who is owed money by the intermediary • Be an employee, director or partner of an entity which has had another contractual relationship with the intermediary (i.e. they have done other work for the intermediary) within the last three years	21

Table 4 – Code definition proposals (Issue 11)

Term	Proposal	Proposal No.
Related party	The following persons are related parties of an intermediary: • If the intermediary is a body corporate » A director, secretary, employee or officer of that body corporate » A director, secretary, employee or officer of a related body corporate (within the meaning of s50 of the Corporations Act 2001) » Spouses, de facto spouses, parents and children of the above • If the intermediary is a partnership, trust or unincorporated association » Partners, trustees or members of the association's committee of management » Spouses, de facto spouses, parents and children of the above • Spouses, de facto spouses, parents and children of the intermediary • An employee of the intermediary • Any person who has been one of the above in the last 6 months	22
Interest	An interest in eligible tradeable water rights means a material personal interest in eligible tradeable rights.	23
Client	It is proposed that a client means a person who engages or proposes to engage an eligible water markets intermediary to provide water markets intermediary services.	24

Table 5 – Additional policy matters for feedback

Issue	Feedback sought	Feedback Point
Where a licenced agent is selling a land holding and eligible tradeable water rights to one purchaser	DCCEEW is seeking feedback about whether the Code should apply to regulated persons, such as real estate agents, conveyancers, or solicitors, who are providing intermediary services (such as preparing documents necessary for trade or transfer) in relation to eligible tradeable water rights, where the trade or transfer of the rights is or will be part of a sale or transfer of land, with the same purchaser/transferee. DCCEEW is interested in stakeholder views about whether these persons are already sufficiently regulated, and the risk of harm to clients if they were not covered by the Code, compared with the additional regulatory burden if they were covered by the Code.	1
Separate obligation for client instruction	DCCEEW is seeking feedback on whether a separate obligation to act in accordance with lawful client instructions is necessary to include in the Code. It is considered that acting in accordance with lawful client instructions would fall within the scope of the proposed obligation to represent the interests of a client diligently, and with care and skill.	2
Disclosure of enforcement outcomes	DCCEEW is seeking feedback from stakeholders about whether the Code should require an intermediary to disclose any enforcement outcome (in relation to the Code or statutory trust accounting obligations), which types of enforcement outcome are appropriate to require disclosure of, and the length of time after the enforcement outcome that the disclosure ought to continue to be made.	3

Introduction

The Code is part of wider Murray–Darling Basin water market reform

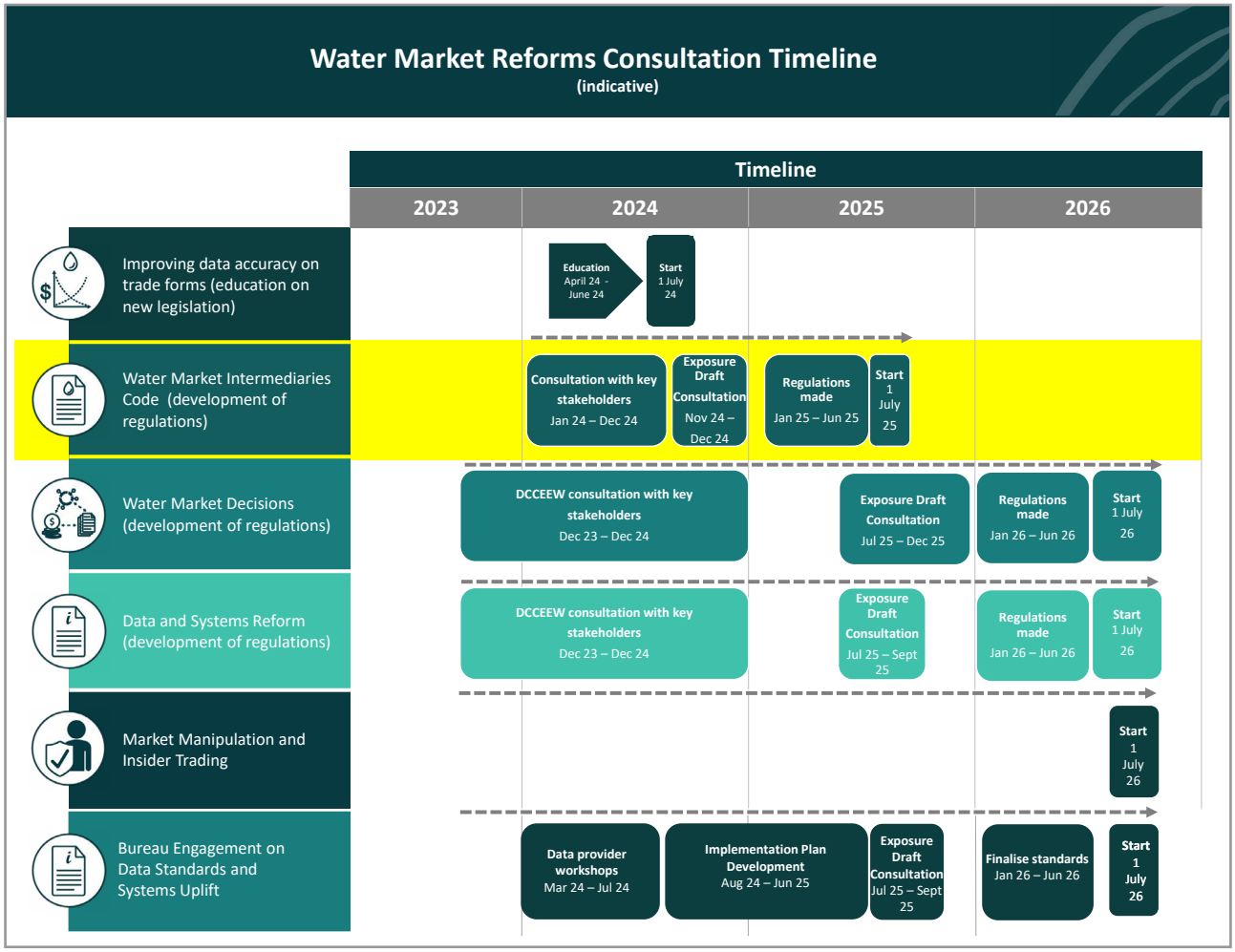
Reform of the Murray–Darling Basin's water markets framework is a key priority of the Australian Government. In October 2022, the Australian Government announced its commitment to implementing the Water Market Reform Roadmap (Roadmap)[1] to restore transparency, integrity and confidence in Murray–Darling Basin water markets. This formed the Australian Government's response to the 2021 ACCC Murray–Darling Basin water markets inquiry – final report (the ACCC Inquiry Report)[2]. The *Water Amendment (Restoring Our Rivers) Act 2023* (RoR Act) includes amendments to the *Water Act 2007* (the Water Act) that relate to the Basin water markets.

There are various reform activities continuing to be progressed following the passing of the RoR Act in December 2023. One of the current key priorities is the development of new regulations that will enable the new mandatory Water Markets Intermediaries Code, and effective operation of the statutory trust accounting framework for water markets intermediaries.

This paper outlines the current proposals for policy issues that need to be considered to enable development of the above regulations, and invites stakeholder views on any or all of these issues.

For more information on the full suite of activities otherwise currently underway, or on the history of this broader water market reform project, please see the water markets reform website[3].

Figure 1: How the development of the Code sits within the wider market reform



1 Water market reform: final roadmap report (dcceew.gov.au)
2 Final report | ACCC
3 Water market reform - DCCEEW

Regulations will include the Code and statutory trust accounting details.

The RoR Act amends the Water Act to place new obligations on eligible water markets intermediaries (intermediaries) in Part 5 of the Water Act.

Part 5 provides a framework for a new mandatory Code to be developed in regulations. Part 5 also establishes a statutory trust accounting framework, which places obligations on intermediaries to use a trust account when they receive money on behalf of another person in the course of providing water markets intermediary services. Part 5 provides that the Code can prescribe details about the new trust accounting requirements and that regulations can include exceptions from the scheme.

Part 5 contains civil penalties for contraventions of certain obligations in Part 5 itself and provides that the Code may contain civil penalties.

Part 5 commences on 1 July 2025, unless proclaimed earlier.

Application of the Code

An eligible water markets intermediary is someone who provides any of the following services:

- trading of eligible tradeable water rights on behalf of another person in exchange for a commission or fee
- investigating eligible tradeable water rights trading possibilities on behalf of a water market participant or a potential water market participant in exchange for a commission or fee
- preparing documents that are necessary for the trade or transfer of eligible tradeable water rights on behalf of a water market participant or a potential water market participant in exchange for a commission or fee
- providing a trading platform or water exchange for eligible tradeable water rights
- giving advice (whether or not for payment of any kind) in the course of providing services of a kind mentioned in paragraphs (a), (b), (c) or (d) to a water market participant or a potential water market participant about trading in eligible tradeable water rights, other than advice that is of a general nature and not provided to address the specific circumstances of the potential water market participant
- making a representation that an eligible tradeable water right is available for sale or purchase, if the person will facilitate the trade or transfer of the eligible tradeable water right in exchange for a commission or fee

Generally, the Code obligations will apply to eligible water markets intermediaries who provide any of the above services, subject to the proposals below.

This section of the paper sets out policy proposals relating to the application of the Code and have been developed based on feedback received on the Discussion Paper. These proposals are summarised in *Table 1* in the Overview.

Proposal 1 - It is proposed that the Code apply regardless of the type or category of intermediary (e.g. brokers, water exchanges)

This proposal is based on feedback from stakeholders in relation to specific proposed obligations, which are detailed further in the paper.

Feedback on application of the Code

Feedback was sought at the Workshops on the application of the Code including a proposal that customer assistance services provided by Basin States or IIOs in their capacity as a water market authority[4] or statutory holder of the bulk entitlement should not attract Code obligations.

Services provided by water market authorities and IIOs

The feedback included that, if customer assistance services were exempted, it should be clear what is a customer service, and what is not. Feedback was also received that stakeholders were uncertain whether the phrase 'for a commission or fee' in the definition of eligible water markets intermediary would capture them as an intermediary. With the clarification that 'for a commission or fee' does not include processing or application fees associated with the approval of a trade, there was minimal concern that Basin States provide any services which would be water markets intermediary services under the definition of eligible water market intermediary. This clarification is also relevant when looking at the services IIOs provide to customers or members.

It is not intended for the Code to capture a water market authority or IIO where they are providing a service as part of their role as a water market authority or the statutory holder of the bulk entitlement.

Proposal 2 - To give effect to this intention, it is proposed that the Code would not apply to water markets intermediary services where the fee or commission is a fee charged by a water market authority to approve, allow or register a trade or transfer, or is a fee charged by an IIO to process a trade or transfer where a customer or member wishes to trade externally.

4 Appendix A includes the definition of water market authority. Broadly speaking, it is a body that approves trades.

Water rights covered by the Code

Feedback was received that it was unclear to which geographical areas the Code applies, and to which water rights. The definition of eligible water markets intermediary refers to services provided in relation to eligible tradeable water rights[5]. Eligible tradeable water rights include rights that can be traded that relate to Basin water resources[6]. The Code will apply regardless of where an intermediary is located geographically, provided that the rights for which they are providing intermediary services relate to Basin water resources.

There was feedback about whether water rights that are still tied to property and are only traded with the sale of land, were eligible tradeable water rights to which the Code applied. There was the question of whether a real estate agent who was selling a property with eligible tradeable water rights tied to that property should be captured by the Code where there is not a market for these rights independent of the market for the property. The feedback received in response to this question was that the Code should not apply to those water rights that are tied to a particular parcel of land.

Proposal 3 - It is proposed that Code obligations would not apply where services are being provided for eligible tradeable water rights which are tied to one parcel of land or land holding and where those eligible tradeable water rights cannot be traded or transferred for hold, take or use at another parcel of land or land holding.

The intention is that Code obligations would not apply where services are being provided for eligible tradeable water rights which are linked to a particular parcel of land or land holding and cannot be traded or transferred elsewhere.

Where a licenced agent is selling a land holding and eligible tradeable water rights to one purchaser

Feedback point 1 - DCCEEW is seeking feedback about whether the Code should apply to regulated persons, such as real estate agents, conveyancers or solicitors, who are providing intermediary services (such as preparing documents necessary for trade or transfer) in relation to eligible tradeable water rights, where the trade or transfer of the rights is or will be part of a sale or transfer of land, with the same purchaser/transferee.

DCCEEW is interested in stakeholder views about whether these persons are already sufficiently regulated, and the risk of harm to clients if they were not covered by the Code, compared with the additional regulatory burden if they were covered by the Code.

Trading platform

There was concern about whether a Basin state agency hosting an online noticeboard would be considered a trading platform service provided by an intermediary. Hosting an online notice board is not intended to be captured as an intermediary service to which Code obligations apply, if the person hosting or providing the online notice board is not offering to facilitate the trade or transfer of the advertised water rights in exchange for a commission or fee.

Proposal 4 - It is proposed that the Code obligations apply to trading platform services where the trading platform is an online platform where the person or entity providing the platform makes a representation that an eligible tradeable water right is available for sale or purchase, if the person or entity will facilitate the trade or transfer of the eligible tradeable water right in exchange for a commission or fee.

5 See Appendix A for definitions of eligible water markets intermediary and eligible tradeable water right.

6 Basin water resources is defined in the Water Act 2007 to mean all water resources within, or beneath, the Murray–Darling Basin, but does not include: (a) water resources within, or beneath, the Murray–Darling Basin that are prescribed by the regulations for the purposes of this paragraph; or (b) ground water that forms part of the Great Artesian Basin.

Water rights held by IIOs on behalf of other persons

Broking water account obligations are proposed in Issue 6 below.

Proposal 5 - It is proposed that these obligations do not apply to eligible tradeable water rights held by an irrigation infrastructure operators (IIO) on behalf of another person. Further detail on this proposal is included in Issue 6.

Consultancy services

Feedback was received that some water market authorities or IIOs may provide consultancy services (for a commission or fee) where, as part of the service, they advise on possible trading opportunities.

It is not proposed to exclude consultancy services solely because they are provided by a water market authority or IIO. Consultancy services may well include services clearly contemplated as intermediary services, such as investigating trading opportunities for a fee or commission, making representations about rights available for trade that they will facilitate for a fee, and giving specific advice in the course of doing so.

Proposed Code obligations

Eight issues for which policy proposals have been developed are set out in this section of the paper relating to the Code obligations, and have been developed based on feedback received on the Discussion Paper. These proposals are summarised in Table 2 in the Overview.

Issue 1 – Best interests obligations

Best interest obligation

The Roadmap recommended an obligation to act in the best interests of a client when providing services typically provided only by brokers.

The Discussion paper sought feedback at the workshops on whether an intermediary providing non-brokerage services (such as a water exchange) should or should not be obliged to act in the best interest of their client. The feedback was consistent that all of the obligations should apply to all eligible water market intermediaries and that an exchange is simply a tool that will follow instructions and match the highest offer – and for that reason, it shouldn't matter if this obligation applies to exchanges as well as intermediaries. For exchanges, meeting a best interests obligation could mean that the exchange is operating correctly, for example, updating in a timely manner, displaying prices and offers etc.

There was also feedback questioning how a 'best interests' obligation would work practically.

There has been consideration of the best way to achieve the intent associated with this obligation, and to ensure that the obligations are clear for intermediaries and are enforceable. It was noted that some of the other proposed Code obligations would also fall within the obligation to act in the best interests of a client.

The primary intention associated with a best interests obligation is for intermediaries to prioritise their clients' interests over their own interests, or a related party's interest.

Feedback was received that it was not necessary to prohibit an intermediary from providing intermediary services to both the buyer and seller for a single trade. Issue 2 below includes a proposal for a disclosure obligation which would apply to this situation.

However, feedback was received that it was unclear how an intermediary could act in the best interests of both the buyer and seller simultaneously. There was support for a focus on professionality in this circumstance, and that care and skill should be taken by intermediaries to represent the interests of every client, including where services are being provided to clients who have opposing interests.

Proposals in relation to this feedback are set out below.

Confidential information

There was feedback that the best interests obligation should encompass requirements for keeping clients' information confidential. Feedback on confidentiality included that a clear obligation on intermediaries not to misuse or disclose confidential information provided by a client would be consistent with good commercial practice and would enhance industry trust in intermediaries. It was noted that similar obligations arise in other comparable industries, such as real estate.

A proposal in relation to this feedback is set out below.

Client instructions

Another obligation that would fall within the scope of a general obligation to act in the best interest of clients is the obligation to act in accordance with client instructions.

The Discussion paper sought feedback on whether an intermediary providing non-brokerage services should not be obliged to follow client instructions. The feedback was that this obligation should apply to all intermediaries. Feedback was also received that the instructions should have to be lawful if the intermediary is required to comply.

It was noted that there is a similar obligation in the Victorian Estate Agents Regulations: "An estate agent or an agent's representative must act in accordance with the lawful instructions of a principal, except if it is contrary to good conduct as an estate agent or agent's representative."

This feedback is reflected in the proposal below.

Separate obligation to act in accordance with client instructions

Feedback point 2 - While there was no feedback which raised an issue with the obligation to act in accordance with client instructions, it is considered that acting in accordance with client instructions would fall within the scope of the proposed obligation to represent the interests of a client diligently, and with care and skill. DCCEEW is seeking feedback on whether a separate obligation to act in accordance with lawful client instructions is necessary to include in the Code.

Proposal for specific obligations

Proposals 6 - 9 - Instead of having a general 'best interests' obligation, it is proposed to include the following specific obligations in a Code, which would apply to all intermediaries:

1. **To place the interests of a client before the interest of the intermediary or a related party.**
2. **To represent the interests of a client diligently, and with care and skill.**
3. **To keep client information confidential and not to misuse this information.**
4. **To act in accordance with lawful instructions provided by a client.**

It is also proposed, based on feedback received that these terms needed more clarity, to define 'client', 'interest' and 'related party' as set out in Issue 11 (Code definition proposals) below.

Communicating buy and sell offers

The Roadmap recommended an obligation to communicate all buy and sell offers to clients in relation to the proposed trade, when providing certain services typically provided only by brokers.

The Discussion paper sought feedback at the workshops on whether an intermediary providing non-brokerage services (such as a water exchange) should not be obliged to communicate all buy and sell offers to a client in relation to a trade proposed by that client.

Feedback was received more generally on the recommended obligation and included that the obligation was not clear, and may be too broad. The question was raised whether this would mean intermediaries would need to communicate each and every parcel of water available for sale to a prospective buyer including the need to advertise offers listed on competitors' platforms. It was also heard that brokers should record and communicate all offers and that not communicating buy and sell offers might also constitute not acting in the best interests of your client.

There has been consideration of the potential for harm that could arise from an intermediary not communicating all buy and sell offers that this proposed obligation would be seeking to address. An intermediary should not be able to gain benefit to themselves or a related party by not communicating a buy or sell offer to a client. It is proposed in the paper above to include an obligation on intermediaries to place the interest of clients before those of the intermediary or a related party, and it is considered that this obligation would also address the circumstances causing potential for harm. It is also proposed above to oblige intermediaries to represent the interests of a client diligently with care and skill, and doing so would likely involve presenting clients with relevant offers.

An intermediary may have multiple clients for which a buy or sell offer would be relevant, unlike real estate agents who receive offers relevant to the one client. It is not considered necessary to prescribe how or in what order an intermediary communicates buy and sell offers to clients as it is a business decision for that intermediary, as long as the intermediary places the interest of clients above their own, and diligently represents the interest of clients with care and skill. To allow effective enforcement of these obligations, an obligation to keep records relating to offers communicated to and on behalf of clients is included in Issue 8 below.

Accordingly, it is not considered that a separate obligation to communicate all buy and sell offers is necessary to include in the Code.

Issue 2 – Conflict of interest

A conflict of interest for intermediaries may arise in the following situations:

- where an intermediary is receiving another fee or commission, or other benefit in relation to a trade involving a client.
- when an intermediary has a personal interest in water rights for which intermediary services are being provided.

Multiple fees/commissions

In the first situation, the other fee, commission or benefit received by the intermediary may influence, or could appear to influence the intermediary. An additional disclosure obligation offers more confidence to a client beyond the obligation to place the interests of a client before the interests of an intermediary.

The Roadmap recommended an obligation to disclose to the client when receiving multiple fees/commissions in relation to a single trade, when providing certain services typically provided only by brokers, excluding trades matched through an exchange platform.

The Discussion paper sought feedback at the workshops on whether an intermediary providing non-brokerage services (such as a water exchange) should have to disclose fees or commissions from trades matched through an exchange. The feedback was that multiple fees/commission should always be disclosed, even on an exchange platform. There was also feedback that there may be other benefits an intermediary may receive from a trade, for example, a broker may be incentivised to go through a certain exchange or another broker, if there is a rebate/ reward scheme. For the disclosure to be meaningful, it was suggested that it ought to include the quantum of the multiple fees/commissions, not just their existence.

Proposal 10 - It is proposed an obligation is imposed on all intermediaries to disclose to a client in writing when they are receiving multiple fees or commissions, or other benefit and the amount of fees or commissions or the benefit received or to be received, in relation to a trade which involves that client.

Issue 8 includes the policy proposal on record-keeping in relation to disclosures made by intermediaries.

Personal interest in rights for which intermediary services are being provided

The Roadmap recommended an obligation on intermediaries to disclose to a client when an intermediary or a related entity has a personal interest in a trade and follow a prescribed process if the client elects to proceed with the trade. The Roadmap's recommendation is set out in full in Appendix B.

Feedback was sought on whether any further detail should be included as part of this obligation. The feedback was that any broker with a personal interest in a trade should complete that trade through another broker, and that there are plenty of brokers in the market for this to be the requirement. It was suggested that an outright prohibition on acting as an intermediary where there is a personal conflict of interest would be a simpler and clearer obligation for industry to understand (and for the ACCC to enforce) than trying to mitigate the impacts of allowing the conflict to exist. It was raised that it was questionable as to whether it is even appropriate for a business offering intermediary services to engage in trading at all.

Proposal 11 - It is proposed an obligation is included to prohibit a person providing water markets intermediary services when that person, or a related party, has an interest in the eligible tradeable water rights which are proposed to be traded or transferred.

In practice, if an eligible water markets intermediary or a related party of the intermediary wishes to trade eligible tradeable water rights in which they have or will have a interest, the intermediary or related party will need to obtain the services of a non-related intermediary to facilitate the trade.

Issue 3 – Information provided to clients

Information to be provided to clients before services are provided

The Roadmap recommended that the Code include an obligation on intermediaries to provide the following information in writing to a client at the outset of each engagement:

a. the services being provided by the intermediary
b. the obligations owed to the client by the intermediary
c. the fees/commissions to be charged by the intermediary.

It is considered appropriate to include further detail about what obligations need to be communicated to clients, to give intermediaries greater confidence that they are meeting this obligation.

The Discussion Paper gave examples of obligations the Code could require communication of, and feedback was sought at the Workshops on any other information or obligations that should be communicated to clients.

The feedback was that the intermediary's obligations under the proposed Code would not be exhaustive of all of the intermediary's obligations to the client. They may also have obligations under contract and the Australian Consumer Law (ACL). A more meaningful disclosure would at least also include a summary of the intermediary's key obligations under the ACL. In line with this feedback, disclosure of an intermediary's obligations under ACL is included in the proposal below.

There was also consistent feedback raising concerns about how the obligation to provide the information would operate in practice. Questions about when the information must be provided, and method were raised.

Timing for providing the information

There was feedback provided that it should be clear when the information is required to be provided, and that a requirement to provide the information 'at the outset of each engagement' was unclear. Feedback included that it may be useful to specify a timeframe for when an intermediary must give an upfront disclosure document to a prospective client (e.g. at least 3 days before entering into an agreement or providing services), instead of the proposed 'at the outset'.

It was suggested that, for allocation trade services, there should be a requirement to provide the information to clients or prospective clients before services are provided, and then the information should only have to be provided to that client again periodically, such as at the beginning of each water year, or sooner if the information is updated. For other intermediary services, it was suggested that requiring the information to be provided for each engagement would not be too burdensome, as usually these trades take longer and involve contracts.

The intention is that this information is provided to a client or prospective client every time an intermediary is offering to provide an intermediary service or a combination of intermediary services for which a fee or commission will be charged, apart from allocation trade-related services. For allocation trade-related services, it is intended that the information should be provided to clients or prospective clients before services are provided for the first time after the obligations commence, and then do not have to be provided again in the following 12 month period, provided the information does not change. After the 12 month period expires, the information has to be provided again before any further intermediary services may be provided.

If there is any change to the services being provided, the obligations owed or the fees/commissions to be charged by the intermediary, the updated information must be provided as soon as possible after the change, and before any further intermediary services are provided.

This disclosure is to occur before intermediary services are provided and must be made in writing. This will ensure that clients are made aware of what services they will receive from the intermediary and what the intermediary will charge for those services, before the services are provided.

Method for providing the information

Feedback received included that a hyperlink within an email should satisfy the obligation and that anything more than this would be overly burdensome.

It was heard that information should be practical and useful to clients – and should achieve the balance between overwhelming, extensive information being provided, versus something simple and clear. It was questioned whether extensive, fulsome information is useful or not useful to clients.

The intention is that the information may be provided electronically, and there should be flexibility with how the information may be provided, for example, within a contract, within an email, as an attachment to an email, or within a link in an email, provided the client's attention is drawn to the link and what it contains. The information may also be split, for example, the services that are being provided and the fee or commission may be contained in an email, while the obligations could be included in an attachment or within a link.

Disclosure of enforcement outcomes

Feedback was received that an intermediary ought to have to disclose to a client if they have, within recent (e.g. the last 4) years: made a payment in satisfaction of an infringement notice for alleged contravention of the Code or statutory trust obligations; been the subject of a public warning notice issued by the ACCC; given (and the ACCC has accepted) an enforceable undertaking under s163 of the Water Act in relation to any of these obligations; or been found by a Court to have contravened any of these obligations.

Feedback point 3 - DCCEEW is seeking feedback from stakeholders about whether the Code should require an intermediary to disclose any enforcement outcomes (in relation to the Code or statutory trust accounting obligations), which types of enforcement outcomes are appropriate to require disclosure of, and the length of time after the enforcement outcome that the disclosure ought to continue to be made.

Intervalley trade

The Roadmap recommended that the Code include an obligation on intermediaries to disclose which method the intermediary is using to allocate successfully transferred volumes following an intervalley trade opening (for example, in chronological order or pro rata). Feedback was sought on any further detail that should be included in this obligation.

The feedback included that different brokers use different methods, and this was not a problem. It was important that intermediaries disclose to their clients what method or methods they are using, so that clients can go elsewhere if they don't like the allocation method/s. Feedback was received that the disclosure should be transparent and not buried, and that the obligation to communicate information to a client at the outset of an engagement could encompass this obligation.

It is proposed below to include the disclosure obligation for IVT methods as part of the information provided to a client before intermediary services are provided.

Broking water account disclosure

It is also proposed below to include information about how surplus amounts in a broking water account will be dealt with by an intermediary, if the intermediary's services include the use of a broking water account. This is detailed further in Issue 6 below.

Proposal for disclosure obligation

Proposal 12 - It is proposed that an intermediary must provide the following information to a client or prospective client:

d) the services that will be provided

e) the obligations owed to the client

f) the fees/commissions to be charged.

For allocation trade-related services, the information should be provided to clients or prospective clients before services are provided for the first time after the obligations commence, and then do not have to be provided again in the following 12 month period, provided the information does not change. After the 12 month period expires, the information has to be provided again before any further intermediary services may be provided. If there is any change to the services being provided, the obligations owed or the fees/commissions to be charged by the intermediary, the updated information must be provided as soon as possible after the change, and before any further intermediary services are provided.

For other intermediary services, the information should be provided for every intermediary service, or combination of intermediary services for which a fee or commission is to be charged, before the services are provided by the intermediary

If the services that will be provided by an intermediary in (a) include:

- transfer of allocation through an intervalley trade (IVT) opening, the intermediary must include information about which method the intermediary will use to allocate successfully transferred volumes (for example, in chronological order or pro rata),
- use of an intermediary's broking water account, the intermediary must disclose how any surplus amounts which are not able to be transferred to their lawful owner, will be dealt with by the intermediary.

The obligations that need to be communicated to a client in (b) above are:

- Obligations under the Code
- Statutory trust accounting obligations
- Obligations under the intermediary's internal complaints-handling process
- Obligations under Australian Consumer Law
- Copies of the documents above, or reference to where these obligations can be found.

Trade outcomes

The Roadmap recommended that the Code include an obligation on intermediaries to inform the client in a timely manner of any reasons for a trade approval authority rejecting or delaying the processing of an application.

Feedback was sought on whether it was appropriate to include a time period within which an intermediary must meet this obligation.

The feedback was that water markets change quickly, so 1-2 business days would be appropriate, however different markets and products may need different requirements or consideration. For example, allocation is a vast market and may need to be a priority. With entitlement, there can be issues with a bank, the timelines are different. Alternatively, it was suggested that intermediaries could specify the time period turnaround in their contracts, and then market participants could choose with their feet.

The feedback included that the requirement should mirror the current requirement with the Victorian obligations for intermediaries who use the broker portal, and that is to notify the account holders of application outcomes no later than the next business day after the day on which the notice is received[7]. While this is broader than reasons for rejection or delay, it is proposed to mirror the Victorian requirement in this respect. Feedback was also received that sometimes the authority does not advise the broker, they only advise the buyer and/or seller, therefore "from when they become aware" is critical. This feedback is reflected in the following proposal.

Proposal 13 - It is proposed that an obligation is imposed on intermediaries to inform a client of trade outcomes, including any reasons for a water market authority rejecting or delaying the processing of an application for trade or transfer of an eligible tradeable water right, as soon as possible and no later than 1 business day after the intermediary becomes aware of the information.

Issue 4 – Complaints-handling process

The Roadmap recommended that the Code include an obligation on intermediaries to implement a complaints-handling process, including obligations to keep records relating to complaints or resolution of complaints.

It was proposed in the Discussion Paper that the Code prescribe the minimum requirements of a complaints-handling procedure that intermediaries must implement, and gave examples of some of the possible minimum requirements.

Feedback was sought on possible other minimum requirements that should be prescribed in the Code and the feedback included that the proposed complaints-handing process could be strengthened by:

- specifying information that an intermediary must provide when responding to a complaint within the proposed 14 days, e.g. what actions the intermediary proposes to take in seeking to resolve the complaint.
- requiring intermediaries to make a genuine attempt to resolve a dispute within a specific timeframe, e.g. within 30 days of having received a complaint.

It was noted that this reform is likely to capture a wide range of entities, some who already have complaints handling procedures and others who do not. The first objective should be to encourage those who do not to implement one, rather than requiring those who already do to change existing standards in the absence of evidence that those standards are problematic.

Feedback was also received that it would be useful to have guidance on appropriate next steps if the business considers the matter resolved but the client does not. It was noted that there are already complaints handling requirements in the Water Act, and that duplication of processes should be avoided.

External complaints handling

Feedback was also received about a potential external dispute resolution process, including:

- an independent complaints handling body would be good for several reasons:
  - » For vexatious complainants, it would be good to have an external party to refer clients to, if the client is unsatisfied with the outcome.
  - » In small businesses, it may be difficult for a client to make a complaint, because the only person they can complain to is the person who they want to complain about.
  - » In small businesses, it is difficult for an internal complaint arbitrator to be truly independent and unbiassed in relation to complaints against colleagues.

7 Microsoft Word - Water Register Interface Common Rules (Version 4. 1March 2016).doc

- an independent complaints handling body who could act as an arbitrator or ombudsman would be beneficial, and this would also provide the ACCC with visibility from the outset.
- the Code could include an external dispute resolution process, aimed at providing clients with a viable option for alternative dispute resolution, such as mandatory mediation, in circumstances where they are unable to resolve complaints with intermediaries using an internal process.
- the Australian Small Business and Family Enterprise Ombudsman (ABSFEO[8]) could be a potential mediator, noting that the ACCC would deal with all Code breaches, so the role of any independent mediator would be "everything but the Code"
- a "wait and see" approach could be taken, with the potential to introduce an independent complaints mediator function in the future, if it seems necessary once the Code comes into force.

ASBFEO usually deals with complaints between businesses, or between business and government agencies. It also has a role in dispute resolution for ACCC Industry Codes, for example disputes between franchisee and franchisors, or suppliers and retailers. Complaints about the conduct of intermediaries where the conduct may be a breach of the Intermediaries Code may be made to the ACCC. Complaints about the conduct of intermediaries where the conduct may be a breach of the Australian Consumer Law may also be made to the ACCC. However, while the ACCC would have a range of tools available to ensure compliance with the Code, including taking enforcement action where appropriate, its role does not extend to resolving individual complaints or disputes.

The intention behind a complaints handling process is twofold:

- to provide an opportunity for a complaint to be resolved between the intermediary and the complainant in the first instance.
- to ensure adequate records are made and kept relating to the complaint

A requirement for an intermediary to include an external dispute resolution process is not currently proposed at this stage.

Complaints handling proposal

Proposal 14 - It is proposed an obligation is imposed on intermediaries to implement and follow a complaints-handling process. The minimum requirements for this process will be prescribed in the Code and are proposed to include the following:

(a) The intermediary is to act in good faith throughout the complaints handling process and make a genuine attempt to resolve the dispute within 30 calendar days of receiving a complaint.

(b) If a complaint is not received in writing, the intermediary is to make a written record of the complaint as soon as practicable after the complaint is received.

(c) The intermediary is to acknowledge receipt of the complaint within 2 business days of receiving the complaint, and provide a copy of the complaints-handling process to the complainant, and a copy of the written record of the complaint (if made verbally),

(d) The intermediary is to respond to the complaint in writing no longer than 10 business days after receiving the complaint and specify what actions the intermediary proposes to take in seeking to resolve the complaint.

(e) The intermediary is to notify the complainant of the outcome and conclusion of the complaints handling process within 5 business days of its conclusion.

8 Welcome | ASBFEO

Issue 5 – Authorities

Written authorities to submit trades or transfers for approval

The Roadmap recommended the Code include an obligation on intermediaries to hold written authorities to submit trades for approval on behalf of clients.

Feedback was sought on whether any further detail should be included as part of this obligation. The feedback was that clarity is important to stakeholders and will reduce burden. For example, stakeholders considered the Victorian requirements for written authorities to be the most user-friendly, because they are the most clear. If requirements are unclear, this can lead to increased burden as intermediaries may need to obtain signatures from multiple parties in relation to one trade.

It was also noted that in existing frameworks, there is a lack of clarity regarding exactly who is able to provide a written authority, and inconsistency between jurisdictions. For example, does it need to be a Company Director, or can it be any signed client authority? If it's the Director, does it need to align with who is listed in the ASIC register? If the Director changes, does it need to be updated or renewed?

Feedback was received that it was not clear whether "written authorisations" would include IT based authorisations and it was not clear what constitutes an authority. For example, the Victorian portal does not accept DocuSign, but does accept digital signatures.

There are various requirements across Basin States and Territories. The Victorian Water Register requires an account holder to authorise an agent (i.e., an intermediary) in order for that agent to use the MyWater portal, to trade on a client's behalf. For an authorisation to be valid, all allocation account holders must sign. For company accounts:

- Authorisers must attach an ASIC company extract or an incorporations association extract less than 12 months old to the application.
- Signatories must be authorised to sign for the company.
- For limited authorisation, the signatory must be a Director or Company Secretary, as listed on the ASIC company extract

Proposal 15 - It is proposed an obligation is imposed on intermediaries to hold written authorities when submitting applications for trades or transfers of an eligible tradeable water right to a water market authority on behalf of clients. These authorities must contain:

- **Information relating to the period of time or number of trades for which the authorisation is valid, up to a period of 12 months;**
- **How an authority can be rescinded by the authoriser;**
- **The signature of all water account holders, where the account is held in multiple names.**
- **For instances where a company account is listed (rather than an individual):**
  - **The authorisation must be accompanied by an ASIC company extract or an incorporations association extract less than 12 months old.**
  - **The signatory must be a Director or Company Secretary, as listed on the ASIC company extract.**

Written authorities to act as an agent

The Roadmap recommended an obligation to hold written authorities to act as an agent on behalf of clients, when providing services typically provided only by brokers.

The Discussion paper sought feedback at the workshops on whether an intermediary providing non-brokerage services would act as an agent. The feedback was that an exchange itself would be incapable of acting as an 'agent', but that this obligation nevertheless makes sense to be applied to all intermediaries, including exchanges – noting that if the exchange never acts as an 'agent', the obligation would never be triggered.

It was also noted that guidance around this obligation may be needed, to distinguish between an authority to submit trades on behalf of a client, versus an authority to act as an 'agent' of a client, where the intermediary is more in charge of their clients' affairs and trades than a regular broker. It was noted that it comes down to the contractual arrangement with the client, and that brokers rarely get a blank cheque to act on behalf of a client – it's typically narrower and more prescribed than that.

Proposal 16 - It is proposed an obligation is imposed on intermediaries to hold written authorities when acting as an agent on behalf of clients. This authority must contain:

- **all of the elements required in relation to a written authority to submit trades or transfers on a behalf of a client, specified in Proposal 15 above.**
- **the terms of the contractual arrangement, for example, the overall trading objective and funds or water rights to be made available in pursuit of that objective.**

Issue 6 – Broking water accounts

The Roadmap recommended an obligation to hold third party tradeable water rights in an account (a broking water account) that is separate from the intermediary's personal tradeable water rights and ensure an independent audit of that account is undertaken once a year.

The Discussion Paper noted that the Code may include further detail about the requirements for the audit of the broking water account and proposed a list of matters for inclusion in an audit report of a broking water account. Feedback was sought on any additional information that should be included in the audit report, and whether any information or documents about the auditor should accompany the report.

There was strong and consistent feedback that it would be challenging for intermediaries to find an auditor who would be able to sufficiently understand water accounts to complete an audit.

Given this feedback, it is proposed not to require an independent audit of broking water accounts each financial year. It is considered that the regulator will have other powers and tools to regulate this area and that auditing is only one tool for ensuring the integrity of broking water accounts.

However, there was consistent feedback that the obligation not to comingle personal water rights with client or third party water rights was not enough in terms of how intermediaries handle third party rights, and that intermediaries should have to account for all transfers in and out of these accounts, similarly to monetary transactions in and out of a trust account. It was considered that the opacity of water broking accounts undermines trust in the industry.

There was feedback that a requirement to prepare a broking water account statement at the end of the financial year in relation to a water broking account but not the obligation to get it audited could be acceptable as an interim measure. The ACCC could have the ability to get a copy of this broking water account statement, showing where the water went and how it was handled.

A proposal for broking water account obligations is set out below in line with this feedback.

Who must comply with broking water account requirements

It is proposed below to include certain broking water account obligations on an intermediary that receives eligible tradeable water rights on behalf of another person in the course of providing water markets intermediary services.

Stakeholders provided feedback that broking water account obligations were not necessary and would be burdensome for IIOs. As the statutory holder of the bulk entitlement, water allocation belongs to the IIO, and customers or members of the IIO have a right (an irrigation right) to receive water from that IIO. An IIO moving allocation off their licence to another licence which only holds rights that the IIO is holding in the course of providing intermediary services may incur an additional transfer fee.

The reasons why some intermediaries use broking water accounts which hold client water rights, include minimising interstate transfer fees for clients, or transferring client water through an IVT opening. An IIO may be less likely to provide these types of intermediary services.

Accordingly, it is proposed in the paper above (Proposal 5) that these broking water account obligations do not apply to eligible tradeable water rights held by an irrigation infrastructure operators (IIO) on behalf of another person. This proposal is included in Table 1 in the Overview.

Broking water account requirements

Proposal 17 - It is currently proposed to require intermediaries (other than an intermediary who is an IIO) who receive eligible tradeable water rights on behalf of another person in the course of providing water markets intermediary services to maintain one or more 'broking water accounts', and to require intermediaries:

(a) To notify the ACCC that the eligible water markets intermediary is maintaining one or more broking water accounts and details of those accounts, within 3 months of the first day on which the obligation for an eligible water markets intermediary to maintain a water broking account arises,

(b) To transfer into a broking water account any eligible tradeable water rights received on behalf of another person in relation to water markets intermediary services provided by the eligible water markets intermediary.

(c) Not to transfer any eligible tradeable water rights into a broking water account, other than rights received as per (b) above.

(d) Not to transfer any eligible tradeable water rights into a broking water account in which the intermediary or a related party of the intermediary has an interest.

(e) To transfer out of a broking water account any eligible tradeable water rights to the person who is lawfully entitled to receive those rights, to the nearest possible amount able to be transferred.

(f) Not to transfer eligible tradeable water rights out of a broking water account, other than for a transfer as per (e) above or to deal with leftover amounts that are not able to be transferred as per (e) above .

(g) To prepare a written statement (a broking water account statement) in relation to the broking water account for each financial year of the intermediary, within 3 months after the end of the financial year.

(h) Not to provide information that is false or misleading in a material particular in a broking water account statement.

(i) To provide clients with a statement from their client ledger account (for water rights) upon request of the client, within 5 business days of the request.

(j) To disclose in writing to a client when eligible tradeable water rights are to be transferred to or from an intermediary's broking water account, and the reasons for the use of the broking water account.

Broking water account statement

It is proposed in (g) above to require these intermediaries to prepare a written statement (a broking water account statement) in relation to the broking water account for each financial year of the intermediary, within 3 months after the end of the financial year.

Proposal 17 (cont) - The broking water account statement is proposed to contain the following information and matters:

- **Name and address of intermediary**
- **Period covered in statement**
- **Broking water accounts**
  - **Name of water market authority or Basin state agency that issues the broking water account**
  - **Broking water account number or licence number**
  - **Broking water account name**
  - **Opening balance**
  - **Closing balance**
- **Client ledger accounts balance (total)**
- **Difference between closing balance and client ledger account balance (total)**
- **Whether there were any overdrawn or surplus client ledger accounts**
- **Declaration by intermediary that information is true and correct**
- **Schedules to be attached:**
  - **List of client ledger accounts and their balances**
  - **Explanation for difference between closing balance and client ledger accounts balance (total)**
  - **Method disclosed for how surplus amounts which are not able to be transferred to their lawful owner, will be dealt with by the intermediary, and method used.**
  - **Copy of any statements of any surplus broking water accounts**
  - **Copy of any overdrawn or surplus client ledger accounts**
  - **Method disclosed for IVT allocation, method used.**

It is proposed in (h) above to include an obligation not to provide information that is false or misleading in a material particular in a broking water account statement, similar to the obligation in respect of trust account statements in the RoR Act.

There was also feedback that it is not always possible to transfer the exact amount out of a broking water account due to rounding to the nearest ML. It is proposed that any leftover amounts be accounted for in the broking water account statement. As set out in Issue 3 above, it is also proposed to include an obligation to provide information, before intermediary services are provided, about how any surplus amounts which are not able to be transferred to their lawful owner from the broking water account, will be dealt with by the intermediary. The broking water account statement is proposed to include the method disclosed as per this requirement, and the method used.

It is proposed to require these intermediaries to keep a record of the broking water account statement as part of client and trade related record-keeping obligations proposed in Issue 8 below. Section 100ZD of the RoR Act allows the ACCC to require, by a notice, an intermediary to give it information or documents an intermediary is required to keep or generate under the Code.

Client ledger account and statement

Feedback was received that an intermediary should have to keep appropriate records of transfers in and out of a broking water account and that a client should be entitled to receive a statement from an intermediary which details any eligible tradeable water rights that an intermediary holds on their behalf.

It is proposed that the Code require intermediaries to keep a record of rights held in a broking water account in client ledger accounts (discussed below under Issue 8). It is proposed in (i) above that the Code require intermediaries to provide clients with a statement from their ledger account upon request of the client. An intermediary must provide this within 5 business days. Client ledger accounts are also required to be kept for trust accounts.

Disclosure of water broking account usage

The Roadmap recommended an obligation on intermediaries to disclose to the client when water rights are to be transferred to/from the intermediary's broking water account which holds client water rights. The Discussion Paper sought feedback on whether any further detail should be included in the Code.

Feedback was received that it is appropriate that intermediaries be required to disclose this, and that transparency of broker activities in relation to these accounts is critical. Stakeholders noted that aggregation of multiple client water rights in a single account in itself is not an issue, as there are legitimate reasons a broker may do this – for example, minimisation of authority fees when trading interstate.

It is proposed in (j) above to include an obligation on intermediaries to disclose in writing to a client when eligible tradeable water rights are to be transferred to or from an intermediary's broking water account, and the reasons for the use of the broking water account.

Issue 8 includes the policy proposal on record-keeping in relation to broking water account disclosures.

Issue 7 – Insurance

The Roadmap recommended an obligation that intermediaries hold professional indemnity insurance. It was proposed in the Discussion Paper that the Code mirror the specific requirement set out in the Australian Water Brokers Association (AWBA) Code of Conduct to hold professional indemnity insurance offering a minimum coverage of at least $5 million for any single claim.

Feedback was sought in the workshops on the amount of coverage that would be appropriate. The feedback was that $5m is sufficient, but that this figure would need to be reviewed over time, noting that some government tender and panel processes require $10m. Stakeholders noted that it can be difficult to secure an insurer to underwrite this type of insurance, and there is a need to ensure that any requirement is achievable in the market. There was also feedback that the "per claim" element of this obligation may increase costs to a level that makes insurance uneconomic and consideration of an "aggregate" cap set at a reasonable level may be more appropriate. It was questioned whether the requirement would apply to the company, or the individual.

In Victoria, intermediaries who wish to use the broker water portal must agree[9] to obtain professional indemnity insurance for an insured amount of not less than $5 million for any one claim and in the annual aggregate and to ensure that the professional indemnity insurance specifically includes the conducting of a water broking business, or similar water market activity, within the scope of the insured coverage and includes an automatic right of reinstatement of the annual aggregate. Evidence of payment of premiums and a certificate of currency for the insurance must be provided to the Department within 14 days of the start of the agreement, and otherwise within a reasonable time of a request by the Department. The certificate of currency for such insurance must specifically refer to the conducting of a water broking business, or similar water market activity, being within the scope of the insured coverage. The intermediary is required to keep maintaining insurance for a period of 3 years after the end of the agreement.

Proposal 18 - It is proposed to include in the Code an obligation on intermediaries to hold professional indemnity insurance covering the provision of water markets intermediary services. The insured amount must be at least $5 million for any one claim and in the annual aggregate, and include an automatic right of reinstatement of the annual aggregate.

For example, an intermediary has a professional indemnity insurance policy with an insured amount of $5m maximum per claim and an aggregate indemnity limit of $5m with one (1) reinstatement. Shortly after the policy period commences, the intermediary notifies a claim that is settled for $5m. The indemnity aggregate limit is exhausted. The reinstatement is triggered resulting in the indemnity aggregate limit of $5m being reinstated and available to pay further claims within the policy period.

Issue 8 below includes requirements relating to record-keeping including the retention of insurance documents.

9 Water Register Auto-Lodgement Interface Access Agreement

Issue 8 – Record keeping

The Roadmap recommended that an obligation be included in the Code for intermediaries to keep records of client instructions, trade details (including strike date) and client details for the period of time (5 years) required under Australian Tax Law.

The RoR Act[10] provides that the Code may deal with the keeping and retention of records for the purposes of the Code, or for the purposes of the statutory trust accounting framework.

The Discussion paper sought feedback on a list of client and trade related records, and a list of financial and accounting related records.

The feedback on client and trade related records was that the intermediary ought to have to create and retain records of:

- Strike date
- All buy and sell offers in relation to the proposed trade (being those offers that need to be communicated to the client), and
- Where there was more than one potential 'match' for the client's buy / sell offer, the reason for the chosen match (e.g. best price, best fit with client needs, etc.)

It was also expressed that for privacy reasons, brokers should only be obliged to collect and record that which is required for fulfilment of enforcement functions under the Code.

The feedback on financial and accounting related records was that the intermediary should have to retain copies of documents demonstrating that they have obtained at least the minimum required amount of professional indemnity insurance.

It was also suggested that the Code require entities that are not legal persons but who are subject to the Code as a result of s100ZH, 100ZJ or 100ZK to retain up-to-date records of their key individuals and constituent documents (e.g. partnership agreements, details of the committee of management for an unincorporate association, trust deeds). It is proposed to require these documents to be attached as schedules to trust account statements (see Issue 10) and to broking water account statements (see Issue 6), but not to include these documents as records that must be kept under the Code.

The Roadmap recommended that records be kept for 5 years, the period of time required under Australian Tax Law. It was proposed in the Discussion Paper that the period for which records must be retained should be 6 years, rather than 5 years, to align with the periods that are relevant to enforcement provisions in the Water Act[11] and the RoR Act[12].

Feedback was sought on the length of time records should be retained. The proposed period of 6 years was generally supported.

10 S100G(2)(c)
11 E.g. S147(1), Court may order person to pay pecuniary penalty for contravention civil penalty provision
12 E.g. S100ZB of the RoR, Order to redress loss or damage suffered by non-parties etc

Proposal 19 - It is proposed to include an obligation in the Code for an intermediary to keep the following client and trade related records:

- Client details including name, address, phone number, email address
- Client instructions
- All communicated details of buy or sell offers communicated to or on behalf of clients (other than offers listed on a water exchange or trading platform)
- Trade details including volume, zone, price, strike date, name of buyer and seller
- Complaints received, responses and notification of outcome of a complaint
- Records of transactions within a broking water account, for example, account or licence statements issued by or available from a water market authority
- Client ledger accounts for each person an intermediary holds water rights for/on behalf of while providing water markets intermediary services. This ledger may include date of transaction, volume, person and account/licence water rights received from/transferred to, trade/matter reference, reason for transfer, running balance
- Broking water account statements as required to be prepared under the Code
- Where an intermediary is trading or transferring rights to or from their broking water account, disclosure to a client of such
- Information provided in writing to a client before services are provided
- Written authorities required under the Code
- Certificate of currency and insurance policy for professional indemnity insurance required to be kept under the Code

It is proposed to include an obligation in the Code for an intermediary to keep the following financial and accounting related records in relation to intermediary services provided:

- receipts
- records of authorities to withdraw by electronic funds transfer
- deposit records
- Authorised deposit-taking institution (ADI) trust account statements
- trust account receipts and payments cash books
- client ledger accounts for each person an intermediary holds money for/on behalf of while providing intermediary services. This ledger may include date, dollar amount received/ paid, to whom amount received from/paid to, method of payment, trade/matter reference, reason for transaction, receipt number, running balance
- trust account statements
- trust account audit reports

It is proposed that the length of time these records must be kept is 6 years from the creation of the record. It is considered that, in order to have effective enforcement, the period of time records must be kept should align with the enforcement provisions. An additional year beyond the Australian Tax law requirements is not considered unreasonable burden.

Civil penalty provisions

The Code may provide that a specified provision/s of the Code are civil penalty provisions[13] and may prescribe a pecuniary penalty not exceeding 600 penalty units for a contravention of a civil penalty provision of the Code[14]. A penalty unit is currently $313.

It was noted in the Discussion Paper that penalties will be considered based on the potential for harm and how penalties may act as a deterrent, in line with the guidelines for framing Commonwealth offences, Infringement Notices and Enforcement Powers[15].

The ACCC has observed that for the Code to be effective, the consequences of contravening it must be sufficiently serious to achieve specific and general deterrence. A critical part of this will be for substantive provisions of the Code to prescribe civil penalty provisions and penalty units of a significant quantum.

All of the proposed Code obligations are intended to be civil penalty provisions.

It is currently proposed in Table 2 in the Overview above that certain Code obligations will attract a higher civil penalty range and other Code obligations will attract a medium civil penalty range. It is proposed that the medium range is between 200 and 399 penalty units, and that the high range is between 400 and 600 penalty units. These ranges have been proposed after consideration of the potential for harm arising from a breach of the obligation, and whether a higher penalty is needed to act as a deterrent, where the cost of compliance may be higher than other obligations.

13 S100K
14 S100J
15 Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers | Attorney-General's Department (ag.gov.au)

Statutory trust accounting exceptions and details

Issue 9 - Statutory trust accounting exceptions

Who does the framework apply to?

The trust accounting framework in the RoR Act applies to any eligible water markets intermediary that receives money on behalf of another person in the course of providing water markets intermediary services. The framework provides that a trust account must be used by intermediaries when they hold money on behalf of someone else. These accounts give client funds more protection, and are used in other industries where funds are held on someone else's behalf.

Exceptions for equivalent statutory trust accounting schemes

The RoR Act provides that the regulations may specify an exception to application of the statutory trust accounting framework (in whole or in part) when an eligible water markets intermediary maintains a statutory trust account in accordance with a law of a State or Territory prescribed by the regulations.[16]

To prescribe a State or Territory law, the Minister must be satisfied that the scheme is equivalent in substance to that established under Division 5 of Part 5 of the RoR Act,[17] having regard to matters prescribed by the regulations. Matters that the regulations may prescribe include:

(a) audit requirements,

(b) external examination requirements,

(c) requirements in relation to accounting records and practices,

(d) obligations in relation to the deposit and receipt of trust funds,

(e) the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights including, but not limited to, a trade or transfer that is not part of the transfer of land,

(f) the adequacy of the protection of trust monies,

(g) any other matter that the Minister considers relevant.[18]

In the Discussion Paper, it was proposed to include the matters above in the regulations. Feedback was sought on any other matters should the Minister consider when assessing whether an existing statutory trust accounting scheme is equivalent.

Feedback included that how a scheme deals with interest should be a relevant consideration. There was a question raised about whether an existing real estate scheme could be used for money related to water markets services, or services provided in a different jurisdiction. For example, whether a real estate agent is able to use their existing NSW trust account scheme for a trade occurring in another state.

Proposal 20 - It is currently proposed that the following matters are prescribed in regulations:

- **audit requirements,**
- **external examination requirements,**
- **requirements in relation to accounting records and practices,**
- **obligations in relation to the deposit and receipt of trust funds,**
- **the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights including, but not limited to, a trade or transfer that is not part of the transfer of land,**
- **the adequacy of the protection of trust monies,**
- **the capacity for the scheme to deal with the trade or transfer of eligible tradeable water rights which occurs in a different jurisdiction to the scheme,**
- **how interest is dealt with in the scheme, and**
- **any other matter that the Minister considers relevant.**

16 S100Q(1)
17 S100Q(2)
18 S100Q(3) and (4)

Issue 10 - Details for statutory trust accounting framework to be included in the Code

The RoR Act sets out statutory trust accounting obligations, and provides that some details for the framework may be specified in the Code, in addition to the regulations to be made for statutory trust accounting exceptions.

The Code is to specify requirements for:

- The designation of trust accounts,[19]
- The approved form for trust account statements and audit reports,[20]
- The information and matters to be contained within trust account statements and audit reports,[21]
- The eligibility requirements for persons preparing a trust account audit report, including any information or documents in relation to that person that must accompany the report.[22]

Designation of trust accounts

A trust account must be designated in the manner specified in the Code including, but not limited to, in relation to the following matters:

- naming of the trust account;
- the inclusion of the words "trust account" in the name;
- the inclusion of the name of the trustee in the name;
- specific naming requirements if the trust account is held by an entity of a particular kind.

In the Discussion Paper, it was proposed that the Code specify that the name of the trust account must include the name of the intermediary (the trustee), the words 'trust account' and an expression to reflect the purpose of the trust account, such as 'water market' or 'water trading'.

The feedback on the proposed naming requirements included that it may be beneficial to clarify the proposed requirements, such as where the intermediary is not a legal person, and may be a trust or other entity. It was also queried whether there are certain words that banks won't permit in the naming of an account, such as "statutory".

Proposal 21 - It is proposed that the Code require the name of a trust account to include the legal name of the intermediary, and the words 'water markets trust account'.

Under the NCCP Act trust accounting requirements, a trust account must be designated as 'the credit service licensee's trust account'[23]. Under the *Corporations Act 2001* (Cth), a financial services licensee has trust accounting requirements, which includes maintaining a trust account 'designated as an account for the purposes of this section of this Act' (s981B).

The expression 'water markets trust account' is included to reflect that the account is for the purpose of eligible water markets intermediaries' trust accounting obligations. The name may also include a registered business name.

Setting up a trust account with an ADI

Feedback was received that banks provide statutory trust account services under existing state schemes and that banks are not set up to provide services for the scheme in the RoR Act.

These existing state schemes may require the ADI to perform certain tasks, or require a type of account that has unique characteristics, and may require proof of an applicant's membership or licence with a professional body.

The requirements in the RoR Act do not include obligations on ADIs, and apart from holding the account with an ADI and naming the account in a certain way, there are no requirements as to the type of bank account that is to be used. There is no requirement to prove to an ADI that a person is an eligible water markets intermediary. However, there is a requirement on intermediaries to notify the ACCC that they are using a trust account, within 3 months of the obligation applying to them.

To give third parties confidence about the way their funds are held by intermediaries, there are protections given to the monies held in these accounts by s100U of the RoR Act, and obligations about what and when money can be paid

19 S100R(3)
20 S100V(2)(a)
21 S100V(2)(b)
22 S100V(3)
23 S98(3)

into and out of the account. Compliance with these obligations is proposed to be considered as part of a yearly audit.

Feedback was received in relation to timing and preparation for the trust accounting requirements before they come into effect on 1 July 2025. An Exposure Draft is planned for release in early November 2024, and DCCEEW expects the Code to be made in regulations in early 2025[24]. This should allow intermediaries enough time to open an account with an ADI and name it as per the Code before 1 July 2025.

Trust account statements

A trust account statement must be prepared for each financial year during which intermediary services are provided, and provided to the ACCC upon request in a written notice. This statement is intended to provide a summary of the intermediary's trust accounting history for that financial year.

As discussed above in relation to Issue 8, the Code may include requirements for retention of copies of trust account statements and audit reports by intermediaries.[25]

The Discussion Paper sought feedback on matters proposed to be required in a trust account statement. Feedback was received that the matters proposed in the Discussion Paper seemed appropriate, and that a form or template would assist intermediaries in meeting this requirement.

24 With a commencement date of 1 July 2025
25 S100V(5)

Proposal 21 (cont) - It is proposed that the Code require trust account statements to include the following information:

- Name and address of intermediary
- Period covered in statement
- ADI Trust Accounts
  - » Name of ADI that maintains account
  - » ADI BSB and account number
  - » Account name
  - » Accounting period
  - » Opening balance as per ADI Statement
  - » Closing balance as per ADI Statement
  - » Add/less any adjustments
  - » Reconciled ADI balance
- Client ledger accounts balance (total)
- Whether there is a difference between reconciled ADI balance, and client ledger accounts balance (total)
- Whether there were any overdrawn ADI trust accounts or client ledger accounts
- Declaration by intermediary that information is true and correct
- Schedules to be attached:
  - » Details of any adjustments
  - » List of client ledger accounts and their balances
  - » Explanation for difference between reconciled ADI balance, and client ledger accounts balance (total)
  - » Copy of any statements of any overdrawn ADI trust accounts
  - » Copy of any overdrawn client ledger accounts
  - » Where the intermediary is a trust, unincorporated association or partnership, a copy of up-to-date document which records key individuals and constituent documents (e.g. partnership agreements, details of the committee of management for an unincorporate association, trust deeds)
  - » Where the intermediary is a company, a company extract

A separate trust account statement may be prepared for each branch office if the branches use separate accounts.

Client ledger account

The Code may require intermediaries to keep a record of trust monies in client ledger accounts (discussed above under Issue 8). The Code may also deal with requirements relating to the provision of information to clients[26].

The Discussion Paper sought feedback on the proposal that the Code require intermediaries to provide clients with a statement from their ledger account:

- upon request of the client
- at the end of each financial year of the intermediary, and
- at the conclusion of each trade.

Feedback was received that requiring an intermediary to provide a statement at the conclusion of each trade may not be appropriate for water markets, and may be too burdensome.

Proposal 21 (cont) - It is proposed that the Code require intermediaries who are subject to the trust accounting obligations, to provide a client with a statement from that client's ledger account upon request of the client, and for each financial year in which an intermediary has held money on behalf of that client. The end-of year statement is to be provided within 3 months after the end of the financial year to which the statement relates. If requested by a client, the statement is to be provided within 5 business days of the request.

Audit reports

An audit report must be obtained for each financial year in which intermediary services are provided, and the report must be provided to the ACCC upon request in a written notice. The purpose of the audit report is to confirm the intermediary's trust accounting history as per the trust account statement.

The Discussion Paper proposed a list of matters that must be included in an audit report, and sought feedback on the proposed matters.

Feedback was received that all money in and out of the trust account should be accounted for, as opposed to a sample of transactions. Under the RoR Act, an auditor has a right of access to financial records of the intermediary for purposes relating to the audit report. The auditor's role is to assess the trust account statement, prepared by the intermediary, against the records of the intermediary.

26 S100G(2)(b)

Proposal 21 (cont) - It is currently proposed that the Code require an auditor's report to include the following:

- **Name and address of intermediary**
- **Period covered in the trust account statement**
- **ADI Trust Accounts that have been audited**
  - **Name of ADI that maintains account**
  - **ADI BSB and account number**
- **Any information which has not been included in the trust account statement, but that the auditor considers should be included in the audit report**
- **Name, address and membership/qualification of auditor**
- **Declaration by auditor**
  - **whether they have examined the trust records of the intermediary and are of the opinion that all necessary trust records were produced to them**
  - **whether they are of the opinion that the trust records have been kept in accordance with the requirements of the Code.**
  - **whether anything has come to their attention to indicate the trust account statement is untrue.**
  - **whether any overdrawn trust accounts or client ledger accounts were restored promptly and whether details were provided to the auditor and included in the report.**

The eligibility requirements for persons preparing a trust account audit report

The Discussion Paper proposed requirements for auditors which are to be prescribed in the Code and sought feedback on the proposed requirements.

Feedback was received that the proposed obligation should be broadened to capture other potential relationships between an auditor and an intermediary, such as:

- whether the auditor is a former employee of the intermediary
- whether the auditor's employer is a related body corporate, or an associated entity of the intermediary (as those terms are defined in the Corporations Act).
- whether the auditor or their employer has had another contractual relationship with the intermediary (i.e. they have done other work for the intermediary) within the last three years.

Proposal 21 (cont) - It is proposed that to be eligible to prepare a trust account audit report, a person must be:

- **a member of CPA Australia holding a current Public Practice Certificate issued by that body, or**
- **a member of Chartered Accountants Australia and New Zealand (CA ANZ) holding a current Certificate of Public Practice issued by that body, or**
- **a member of the Institute of Public Accountants (IPA) holding a current Professional Practice Certificate issued by that body, or**
- **a registered company auditor or an authorised audit company (within the meaning given by section 9 of the Corporations Act).**

It is also proposed that an auditor may not:

- **be a related party of the intermediary or any other eligible water markets intermediary**
- **be a person who is owed money by the intermediary**
- **be an employee, director or partner of an entity which has had another contractual relationship with the intermediary (i.e. they have done other work for the intermediary) within the last three years**

Note on standards

Members of professional accounting bodies CPA Australia, CA ANZ and the IPA must comply with standards set by the Accounting Professional & Ethical Standards Board (APESB). This includes the standard APES 210 Conformity with Auditing and Assurance Standards, which in turn requires members to comply with the standards issued by the Australian Auditing and Assurance Standards Board.

Australian Standards on Assurance Engagements[27], in particular, ASAE 3000 and ASAE 3100, are relevant for auditors who are reporting on an entity's compliance, including a statutory trust accounting framework. Therefore, auditors who are members of the professional accounting bodies would be required to comply with these standards.

27 Other Assurance (auasb.gov.au)

Definitions

Issue 11 – Code definition proposals

Related party

The Code is proposed to refer to related parties in relation to the following obligations:

- The obligation to place the interests of a client before the interests of the intermediary or a related party.
- The prohibition on a person from providing water markets intermediary services when that person, or a related party, has an interest in the eligible tradeable water rights which are proposed to be traded or transferred.
- The obligation to place water rights received on behalf of another person (in the course of providing intermediary services) into a broking water account, other than rights in which the intermediary or a related party has an interest.

Proposal 22 - It is proposed that the following persons are related parties of an intermediary:

- **If the intermediary is a body corporate**
  - **A director, secretary, employee or officer of that body corporate**
  - **A director, secretary, employee or officer of a related body corporate (within the meaning of s50 of the Corporations Act 2001)**
  - **Spouses, de facto spouses, parents and children of the above**
- **If the intermediary is a partnership, trust or unincorporated association**
  - **Partners, trustees or members of the association's committee of management**
  - **Spouses, de facto spouses, parents and children of the above**
- **Spouses, de facto spouses, parents and children of the intermediary**
- **An employee of the intermediary**
- **Any person who has been one of the above in the last 6 months.**

Interest

Proposal 23 - It is proposed that an interest in eligible tradeable water rights is a material personal interest in eligible tradeable rights.

Material personal interest is a term used in other legislation, however it is not defined. Common law interpretations for the use of the term in other jurisdictions are consistent with the policy intention that an interest needs to be of some substance or value , and needs to be held personally by the intermediary or the related party.

Client

Proposal 24 - It is proposed that a client means a person who engages or proposes to engage an eligible water markets intermediary to provide water markets intermediary services.

Appendix A – Existing definitions from the RoR Act

eligible water markets intermediary means a person who provides any of the following services:

(a) trading of eligible tradeable water rights on behalf of another person in exchange for a commission or fee;

(b) investigating eligible tradeable water rights trading possibilities on behalf of a water market participant or a potential water market participant in exchange for a commission or fee;

(c) preparing documents that are necessary for the trade or transfer of eligible tradeable water rights on behalf of a water market participant or a potential water market participant in exchange for a commission or fee;

(d) providing a trading platform or water exchange for eligible tradeable water rights;

(e) giving advice (whether or not for payment of any kind) in the course of providing services of a kind mentioned in paragraph (a), (b), (c) or (d) to a water market participant or a potential water market participant about trading in eligible tradeable water rights, other than advice that is of a general nature and not provided to address the specific circumstances of a water market participant or a potential water market participant;

(f) making a representation that an eligible tradeable water right is available for sale or purchase, if the person will facilitate the trade or transfer of the eligible tradeable water right in exchange for a commission or fee.

6A Meaning of eligible tradeable water right

1. For the purposes of this Act, an eligible tradeable water right means the following:

   (a) a tradeable water right;

   (b) any other right in relation to the taking or use of water that is able to be traded or transferred, other than a right prescribed by the regulations;

   (c) a right prescribed by the regulations;

   to the extent that the right relates to Basin water resources or any other water resource prescribed by the regulations.

2. For the purposes of Parts 5 and 5A, an eligible tradeable water right does not include a right that is a financial product within the meaning of section 761A of the *Corporations Act 2001*.

water market authority, in relation to the proposed trade or transfer of an eligible tradeable water right, means:

(a) a person authorised or required under a law of a State to approve, allow or register the trade or transfer; or

(b) an irrigation infrastructure operator that approves, allows or registers the trade or transfer.

Appendix B – Roadmap Proposed Recommendations

That the code include the following obligations on those who provide intermediary services:

1. To act in the best interests of a client when providing services typically provided only by brokers
2. To provide the following information in writing to a client at the outset of each engagement:
    - the services being provided by the intermediary
    - the obligations owed to the client by the intermediary
    - the fees/commissions to be charged by the intermediary
3. To inform the client in a timely manner of any reasons for a trade approval authority rejecting or delaying the processing of an application
4. To implement a complaints-handling process, including obligations to keep records relating to complaints or resolution of complaints
5. To hold written authorities to submit trades for approval on behalf of clients
6. To hold written authorities to act as an agent on behalf of clients, when providing services typically provided only by brokers
7. To act in accordance with client instructions, when providing certain services typically provided only by brokers
8. To communicate all buy and sell offers to clients in relation to the proposed trade, when providing certain services typically provided only by brokers
9. To disclose to the client when receiving multiple fees/commissions in relation to a single trade, when providing certain services typically provided only by brokers, excluding trades matched through an exchange platform
10. To disclose to the client when an intermediary or a related entity has a personal interest in the trade, and that the water rights they have a personal interest in are to be transferred to/from the intermediary's or related entity's trading water account (that is, not the intermediary's broking water account which is used to hold client water rights). The intermediary should then set out the client's options. Those options may include:
    - seeking their own legal advice
    - using another broker to complete the trade
    - proceeding with the trade as private parties, noting the trade would not be regulated by the code.
    - If the client decides to proceed with the trade as private parties, then the intermediary should:
        - » not be permitted to charge a fee or commission.
        - » get written confirmation from the other party before going ahead with the trade that they understand that the intermediary will engage in the trade as a private party and that the trade will not be regulated by the code.
        - » keep records to show they have met these requirements.
11. To disclose to the client when water rights are to be transferred to/from the intermediary's broking water account which holds client water rights
12. To comply with client funds management and accounting obligations such as annual auditing (under statutory trust accounting framework for client funds) and accounting practices
13. To protect third party tradeable water rights by holding those rights in an account (a broking water account) that is separate from the intermediary's personal tradeable water rights and ensure an independent audit of that account is undertaken once a year
14. To hold professional indemnity insurance
15. To keep records of client instructions, trade details (including strike date) and client details for the period of time (5 years) required under Australian Tax Law
16. To disclose which method the intermediary is using to allocate successfully transferred volumes following an intervalley trade opening (for example, in chronological order or pro rata).

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