

EXPLANATORY STATEMENT

Select Legislative Instrument No. 33, 2014

Issued by authority of the Assistant Treasurer

Corporations Act 2001; Payment Systems and Netting Act 1998; Competition and Consumer Act 2010; and the Australian Securities and Investments Commission Act 2001
Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014

Section 1364(1) of the *Corporations Act 2001* (the Corporations Act), section 18 of the *Payment Systems and Netting Act 1998* (the PSN Act), section 172 of the *Competition and Consumer Act 2010* (the CCA) and section 251(1) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) each provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act.

In addition, regulations may be made pursuant to the provisions of the Corporations Act, the ASIC Act and the PSN Act detailed in Attachment A.

The purpose of the *Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation) is to:

- ensure that tradeable water rights and certain arrangements in relation to tradeable water rights are carved out from the definition of a derivative for the purpose of financial markets and services regulation under the Corporations Act and a financial product under the ASIC Act;
- ensure that the financial markets and services licencing regimes and market misconduct provisions in the Corporations Act will not apply to the Wallumbilla Gas Trading Exchange and its market participants. The amendments will also declare the gas trading exchange agreement to be a market netting contract; and
- prescribe new professional standards schemes at the Commonwealth level.

Water trading exemptions

The Regulation addresses legal uncertainty as to whether basic tradeable water rights (these include water access rights, water delivery rights and irrigation rights) and certain arrangements to buy and sell these rights could be considered as a derivative in the Corporations Act. The Regulation clarifies that basic tradeable water rights are not derivatives and therefore not subject to financial markets and services regulation under the Corporations Act and unconscionable conduct and consumer protection regulation in relation to financial services under the ASIC Act.

The Regulation will apply to certain tradeable water rights, contracts to buy and sell certain tradeable water rights and derivative contracts whether entered into before or after the commencement date of the Regulation. The Regulation will reduce the regulatory obligations that water market participants may potentially be required to comply with and will not directly or indirectly impose additional obligations or alter existing property rights or contractual rights.

Bona fide options and futures contracts in respect of tradeable water rights will not be included in the carve out and will be considered to be derivatives for the purposes of the Corporations Act.

As a consequence, the provisions in the Corporations Act and the ASIC Act relating to financial services, financial markets and clearing and settlement facilities will not apply to certain basic tradeable water rights and certain arrangements in relation to basic tradeable water rights.

Schedule 1 of the Regulation was released for public consultation via the Treasury public consultations website for a period of four weeks, closing on 7 June 2013, and released again for a period of one week, closing on 4 March 2014. Direct consultation occurred with thirteen government authorities, twenty-five irrigation and agricultural industry organisations, three water brokers and five other industry organisations. A number of issues were raised and have been addressed in Schedule 1 of the Regulation.

The Office of Best Practice Regulation has advised (reference number 13757) that a Regulation Impact Statement for Schedule 1 of the Regulation is not required.

The Legislative and Governance Forum for Corporations has been consulted in the making of the amendments, as required under the *Corporations Agreement 2002*. No adverse views have been expressed.

Gas trading exchange

The Australian Energy Market Operator (AEMO), at the request of the Standing Council on Energy and Resources has developed a voluntary gas trading exchange at Wallumbilla, Queensland (the exchange will facilitate the wholesale trading of gas), which is expected to commence operating on 20 March 2014. Ordinarily, the trading of a physical product would not be a derivative for the purposes of the Corporations Act. However, it is possible that the netting of delivery obligations proposed by AEMO will take certain transactions outside that exemption.

The gas trading exchange will be subject to the National Gas Law and the National Gas Rules and be regulated by the Australian Energy Regulator.

Financial markets and services regulation would therefore impose unnecessary and burdensome regulation. The Regulation ensures that these regulations do not apply to the AEMO with respect to its operation of the Wallumbilla exchange and participants on the Wallumbilla exchange.

The Regulation will apply to AEMO and its market participants upon the commencement of operation of the Wallumbilla exchange, following the commencement of the Regulation.

Schedule 2 of the Regulation was released to the Gas Supply Hub Reference Group (GSHRG) on 17 January 2014. The GSHRG is comprised of representatives from the gas industry, including pipeline operators, shippers, producers, retailers, users and governments. No adverse views were expressed.

Schedule 2 of the Regulation was not released for public consultation since the Regulation directly affects only the Operator and the market participants trading on the Wallumbilla Gas Trading Exchange. These were adequately consulted through the GSHRG. The Ministerial Council for Corporations was consulted on 17 February 2014.

The Office of Best Practice Regulation has advised (reference number 15173) that a Regulation Impact Statement for Schedule 2 of the Regulation is not required.

Professional standards schemes

Professional Standards legislation in each state and territory operates, where applicable, to limit the civil liability of professionals and others while still maintaining appropriate protection for consumers of professional services through such measures as compulsory insurance cover and complaints procedures.

Provision is made in the ASIC Act, the Corporations Act, and the CCA for the prescription of state and territory schemes. The effect of prescription is to limit occupational liability under certain federal legislation in the same way it is limited under relevant state legislation.

The Regulation amends the *Competition and Consumer Regulations 2010*, to prescribe the following professional standards schemes:

- The Law Institute of Victoria Professional Standards Scheme;
- The Bar Association of Queensland Scheme;
- The Institute of Chartered Accountants in Australia (NSW) Scheme;
- The Institute of Chartered Accountants in Australia (WA) Scheme;
- The Institute of Chartered Accountants in Australia (ACT) Scheme;
- The Institute of Chartered Accountants in Australia (NT) Scheme;
- The Institute of Chartered Accountants in Australia (Qld) Scheme;
- The Institute of Chartered Accountants in Australia (SA) Scheme;
- The Institute of Chartered Accountants in Australia (Vic.) Scheme;
- The CPA Australia Limited Professional Standards Scheme;
- The Professional Surveyors Occupational Association Scheme; and
- The Engineers Australia Northern Territory Professional Standards Scheme.

The prescription of the schemes has the effect of limiting the occupational liability of members of the schemes relating to an action for contravention of section 18 of the Australian Consumer Law (schedule 2 to the CCA) in the same way as occupational liability is limited under State and Territory laws.

- Section 18 of the Australian Consumer Law (schedule 2 to the CCA) prohibits misleading and deceptive conduct by persons in trade or commerce.

The Regulation also amends the *Australian Securities and Investments Commission Regulations 2001* and *Corporations Regulations 2001* to prescribe the following professional standards schemes:

- The Law Institute of Victoria Professional Standards Scheme; and
- The Bar Association of Queensland Scheme.

The prescription of the schemes has the effect of limiting the occupational liability of members of the schemes relating to an action for contravention of section 12DA of the ASIC Act, or section 1041H of the Corporations Act in the same way as occupational liability is limited under State and Territory laws.

Section 12DA of the ASIC Act deals with misleading or deceptive conduct in relation to financial services; and part 7.10 of the Corporations Act deals with market misconduct and other misconduct relating to financial products and financial services.

The Regulation also amends the tables in the *Australian Securities and Investments Commission Regulations 2001*, *Corporations Regulations 2001* and *Competition and Consumer Regulations 2010* to remove the unnecessary inclusion of prescribed dates and renumber the items.

The Commonwealth has not consulted on this regulation. The Professional Standards Council seeks the opinion of independent actuarial consultants and calls for public comment on professional standards schemes via public notification in major newspapers circulating throughout the relevant jurisdictions prior to approving schemes. Further consultation was not considered necessary.

Details of the Regulation are set out in [Attachment B](#).

A statement of the Regulation's compatibility with human rights is set out in [Attachment C](#).

There are no statutory pre-conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation commences on the day after registration.

ATTACHMENT A

AUTHORISING PROVISIONS

Section 1364(1) of the *Corporations Act 2001* (the Corporations Act), section 18 of the *Payment Systems and Netting Act 1998* (the PSN Act), section 172 of the *Competition and Consumer Act 2010* (the CCA) and section 251(1) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) each provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act.

In addition, the following provisions in the Corporations Act, the PSN Act and the ASIC Act may apply:

- Paragraph 761D(3)(d) of the Corporations Act provides that the Governor-General may make regulations that declare anything not to be a derivative for the purpose of Chapter 7 of the Corporations Act.
- Paragraph 791A(1)(b) of the Corporations Act provides that the Governor-General may make regulations that exempt a person from the requirement to hold an Australian Market Licence.
- Paragraph 911A(2)(k) of the Corporations Act provides that the Governor-General may make regulations that exempt a person from the requirement to hold an Australian Financial Services Licence.
- Paragraph 820A(1)(b) of the Corporations Act provides that the Governor-General may make regulations that exempt a person from the requirement to hold a Clearing and Settlement Facility Licence.
- Paragraph 1045A(1)(a) of the Corporations Act provides that the Governor-General may make regulations that exempt a person from Part 7.10 of the Corporations Act.
- Section 5 of the PSN Act provides that an arrangement can be declared a netting market by the regulations for the purposes of the PSN Act.
- Paragraph 12BAA(8)(p) of the ASIC Act provides that the Governor-General may make regulations that a facility, interest or other thing is not a financial product for the purposes of Part 2, Division 2 of the ASIC Act.

ATTACHMENT B

Details of the Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Corporations Act 2001* (the Corporations Act), the *Competition and Consumer Act 2010* (the CCA), the *Payment Systems and Netting Act 1998* (the PSN Act) and the *Australian Securities and Investments Commission Act 2001* (the ASIC Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Amendments

Schedule 1 – Water trading exemptions

Item [1]

Item 1 of Schedule 1 provides that the unconscionable conduct and consumer protection provisions in relation to financial products and services detailed in the ASIC Act, will not extend to tradeable water rights, or certain arrangements with respect to tradeable water rights.

Item [2]

Item 2 of Schedule 1 replaces existing subregulation 7.1.04(8) with a new subregulation 7.1.04(8) and inserts new subregulations 7.1.04(9) and 7.1.04(10) into the *Corporations Regulations 2001*.

Paragraph 7.1.04(8)(a) provides that tradeable water rights *per se* will not be considered to be derivatives for the purposes of Chapter 7 of the Corporations Act.

Paragraph 7.1.04(8)(b) provides that arrangements between a buyer and seller, which relate to the transfer of ownership of tradeable water rights or replacement water rights will not be considered to be a derivative for the purposes of the Corporations Act.

However bona fide options and futures contracts in respect of tradeable water rights will not be included in the carve out and will be considered to be derivatives for the purposes of the Corporations Act.

The terms ‘buy’ and ‘sell’ are to be read broadly, and are capable of covering those situations where there is no monetary exchange, or where some other form of valuable consideration is provided.

Subregulation 7.1.04(9) provides that the arrangements described in 7.1.04(4) to (8) are not derivatives, whether or not a matter mentioned in those subregulations are described in subsection 761D(1) of the Corporations Act. This subsection replicates the former subsection 7.1.04(8), other than the additional inclusion of the replacement subsection 7.1.04(8).

Subregulation 7.1.04(10) defines the term ‘replacement water rights’ and clarify that the term ‘tradeable water rights’ has the same meaning as in the *Water Act 2007*.

The definition of ‘replacement water rights’ is designed to capture scenarios where the form of a tradeable water right sold by one party may not be strictly identical to that received by the other party. A replacement water right includes a water right arising out of a transformation arrangement. Transformation arrangements are arrangements of the kind referred to in paragraph 97(1)(a) of the *Water Act 2007* and the *Water Market Rules 2009*. Transformation arrangements provide for the transformation of the whole or a part of an irrigation right against an irrigation infrastructure operator, in accordance with transformation arrangements, into a water access entitlement.

The non-singular ‘tradeable water rights’ is used in subregulations 7.1.04(8) and (10) because the plural of the term is used in the definitions in the *Water Act 2007*. The singular can be taken as a reference to the plural, and vice versa by virtue of the operation of section 23 of the *Acts Interpretation Act 1901*.

The exclusion of tradeable water rights and certain arrangements in relation to tradeable water rights from being a derivative will result in those rights, and trades in those rights, not falling within the definition of a financial product solely on the basis of being a derivative. Paragraph 764(1)(c) of the Corporations Act provides that a derivative is a financial product.

As a consequence, the provisions in the Corporations Act and the ASIC Act relating to financial services, financial markets and clearing and settlement facilities will not apply to certain basic tradeable water rights and certain arrangements in relation to basic tradeable water rights.

Part 7.6 of the Corporations Act requires that a person who carries on a financial services business must hold an Australian Financial Services Licence covering the provision of the financial services. Section 766A of the Corporations Act provides that certain dealings in a financial product, financial product advice and market making in relation to financial products will be a financial service.

Part 7.2 of the Corporations Act provides for a licensing regime in relation to financial markets. Section 767A defines a ‘financial market’ with reference to offers or invitations to acquire or dispose of financial products.

Part 7.3 of the Corporations Act provides for the licensing of clearing and settlement facilities. Section 768A defines a ‘clearing and settlement facility’ with reference to transactions relating to financial products.

Schedule 2 – Gas trading exchange

Item [1]

Item 1 of Schedule 2 inserts new subregulation 1.0.02(1) into the *Corporations Regulations 2001*. Subregulation 1.0.02(1) defines the term ‘qualifying gas exchange product’ as an arrangement for the physical delivery of natural gas or related goods or services, including pipeline capacity and defines the term ‘qualifying gas trading exchange’ as the AEMO carrying out functions as set out in the National Gas Law.

Item [2]

Item 2 of Schedule 2 inserts new subregulation 7.6.01(1) into the *Corporations Regulations 2001*. This exempts the operator and market participants from the requirement to hold an Australian Financial Services Licence in relation to a qualifying gas exchange product traded on the qualifying gas trading exchange.

Item [3]

Item 3 of Schedule 2 inserts new subregulation 7.10.03 into the *Corporations Regulations 2001*. This exempts market participants trading qualifying gas exchange products on a qualifying gas trading exchange from market misconduct provisions detailed in Part 7.10 of the Corporations Act.

Item [4]

Item 4 of Schedule 2 inserts new subregulation 9.12.05 into the *Corporations Regulations 2001*.

- Subregulation 9.12.05(1) exempts the operator from the requirement to hold an Australian Market Licence in relation to its role of operating a market in qualifying gas exchange products on the qualifying gas trading exchange.
- Subregulation 9.12.05(2) exempts the operator from the requirement to hold a Clearing and Settlement Facility Licence in relation to its role in clearing and settlement arrangements for qualifying gas exchange products on the qualifying gas trading exchange.

Item [5]

Item 5 to Schedule 2 declares the gas trading exchange agreement to be a market netting contract. This ensures that in the event one party to the contract defaults, non-defaulting participants will have legal certainty that they are only liable for their net obligations to the failed participant, rather than their gross obligations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Regulation):

- ensures that tradeable water rights and certain arrangements in relation to tradeable water rights are carved out from the definition of a derivative for the purpose of financial markets and services regulation under the *Corporations Act 2001* and carved out from the definition of a financial product under the *Australian Securities and Investments Commission Act 2001*;
- exempts the Australian Energy Market Operator from the requirement to hold an Australian Market Licence, Clearing and Settlement Facilities Licence and Australian Financial Services Licence with respect to its operation of the Wallumbilla Gas Trading Exchange and market participants from the requirement to hold an Australian Financial Services Licence and from market misconduct provisions with respect to trading activities in relation to qualifying gas exchange products on the exchange. This Legislative Instrument will also declare the gas trading exchange agreement (the agreement under which the trading in the gas trading exchange will occur) to be a market netting contract; and
- prescribes new professional standards schemes to limit the civil liability of certain occupational groups under relevant Commonwealth legislation in the same way as it is limited under State and Territory legislation. These schemes maintain appropriate protection for consumers of professional services through such measures as compulsory insurance cover and complaints procedures.

Human rights implications

This Legislative Instrument does not engage any of the applicable human rights or freedoms.

This Legislative Instrument ensures that financial markets and services regulation under the Corporations Act and unconscionable conduct and consumer protection regulation in relation to financial services under the ASIC Act does not apply to water and gas trading. This Legislative Instrument also prescribes new professional standards schemes to limit the civil liability of certain occupational groups. It does not infringe on any individual rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.