

EXPLANATORY STATEMENT

Select Legislative Instrument No. 97, 2014

(Issued by the Authority of the Parliamentary Secretary to the Minister for the Environment)

Subject- *Water Act 2007*

Water Amendment (Interactions with State Laws) Regulation 2014 (No. 1)

The Governor-General may, under section 256 of the *Water Act 2007* ('Act'), make regulations prescribing matters required or permitted by the Act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Basin States (New South Wales, Victoria, Queensland, and South Australia) have each passed laws referring to the Commonwealth Parliament, for the purposes of paragraph 51(xxxvii) of the Constitution, the power to enact Parts 1A, 2A, 4, 4A 10A and 11A of the Act as originally enacted, and to make express amendments to these provisions.

Subsection 250E(1) of the Act, a referred provision under Part 11A, provides that regulations may modify the operation of Commonwealth water legislation so that:

- (a) provisions of the Commonwealth water legislation do not apply to a matter that is dealt with by a law of a referring State specified in the regulations; or
- (b) no inconsistency arises between the operation of a provision of the Commonwealth water legislation and the operation of a law of a referring State specified in the regulations.

Section 250A of the Act defines 'Commonwealth water legislation' to mean the Act, the regulations and other instruments made under the Act: this includes the *Basin Plan 2012* ('Basin Plan'). The Basin Plan, other than the Basin water trading rules in Chapter 12, commenced on 24 November 2012. The trading rules will commence on 1 July 2014. The long-term average sustainable diversion limits (SDLs) will take effect on 1 July 2019.

The *Water Amendment (Interactions with State Laws) Regulation 2014 (No. 1)* ('Regulation') amends the *Water Regulations 2008* ('Principal Regulations') to extend transitional recognition of a number of state water resource plans ('State plans').

The Regulation is a referred regulation, and is the second regulation to extend transitional coverage for state water resource planning arrangements. The first regulation, the *Water Amendment (Interactions with State Laws and Water Information) Regulation 2013* ('first transitional Regulation'), was made in November 2013.

Consistent with the requirements of the *Intergovernmental Agreement on Murray-Darling Basin Reform – Referral*, all Basin States have been consulted on the Regulation, and have agreed to the Regulation being made.

Transitional and interim water resource plans

Part 11A of the Act provides, as a transitional measure, for the continuing operation of relevant Basin State plans for a defined period after the Basin Plan first takes effect by recognising:

- transitional plans - State plans made on or before 25 January 2007, when the former Prime Minister, the Hon. John Howard, announced Commonwealth intervention in the Murray-Darling Basin; or

- interim plans - State plans that are made on or after 25 January 2007, but prior to the commencement of the Basin Plan. The period of recognition for interim plans is the later of 31 December 2014 or five years after the plan is made.

Provisions of State plans that are inconsistent with the Basin Plan override the Basin Plan to the extent of the inconsistency. Transitional plans cease to be recognised under the Act on the date specified in Act and the Principal Regulations, if the transitional plan has not ceased to have effect under state law before that date.

As the Basin Plan SDLs do not commence until 1 July 2019, and recognition of many of the transitional and interim water resource plans expires before this time, the Commonwealth agreed to extend recognition of these plans to ensure a seamless transition to Basin Plan compliant water arrangements.

Modified operation - provisions relating to transitional water resource plans

In November 2013, the first transitional Regulation amended the Principal Regulations to provide for extended transitional recognition for a number of Victorian and South Australian plans. This Regulation also modified the operation of section 54 of the Act by providing that the section does not apply in relation to a State area specified Part 2 of Schedule 5 of the Regulations until after the day specified.

The Regulation is the second regulation to modify the operation of the provisions of the Act relating to State plans discussed above for the purposes of section 250E of the Act. The Regulation provides for an extended period of recognition for all State plans listed in the Regulation.

The effect of the Regulation is that the Basin Plan will not apply to any matters that are dealt with by provisions of these State plans which are inconsistent with the Basin Plan, with the exception of the Basin plan trading rules, which will apply from 1 July 2014.

The Regulation provides extended transitional recognition for all of Queensland's plans, and for Victorian South Australian plans that were not included in the first transitional Regulation.

The Regulation also provides extended recognition for New South Wales' ('NSW') plans, which are extended to 30 June 2015 to enable NSW to make replacement transitional plans by 1 July 2019. One NSW plan, the *NSW Border Rivers Regulated Water Source 2009 – Water Sharing Plan*, is extended to 30 June 2019 as the plan expires under NSW law at that time.

States have also nominated a shorter transitional extension for at least one water resource plan area to enable accreditation procedures to be tested.

The accreditation day for each plan preserves the original date that the transitional or interim plan was taken to have been accredited under the Act or sets a modified accreditation date where a plan has been amended and has been assessed no less consistent with the Basin Plan by the Murray-Darling Basin Authority. The accreditation day identifies the version of the plan that is recognised, while the start day is the date that extended transitional recognition commences.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement was not required, as the Regulation is likely to be of minor impact.

Details of the Regulation

The Act does not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Instruments.

Details of the regulation are set out in the Attachment.

Authority: Section 256 of the *Water Act 2007*

Statement of Compatibility with Human Rights

This Statement of Compatibility has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* ('Human Rights Act').

Water Amendment (Interaction with State Laws) Regulation 2014 (No. 1)

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 Act.

Overview of the Legislative Instrument

This legislative instrument amends the *Water Regulations 2008* ('Principal Regulations') to provide for an extended period of recognition for some State water resource plans (other than provisions of those plans relating to water trading rules) as transitional water resource plans.

Human rights implications

This legislative instrument engages the right to an adequate standard of living and the right to health in the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). The right to an adequate standard of living is protected in Article 11 of the ICESCR and the right to physical and mental health is protected in article 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights, established to oversee the implementation of the ICESCR, has interpreted these articles as including a human right to water which encompasses an entitlement to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.¹

The human rights implications of the legislative instrument must be considered in the context of the *Water Act 2007* ('Act'). The overall framework of the Act supports access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses. This is reflected in the Act by section 20 which sets out the purpose of the *Basin Plan 2012* ('Basin Plan') and is supported by subsection 22(1) which sets out the specific content required to be included in the Basin Plan, such as a water quality and salinity management plan (Item 10). These sections, together with subsection 86A(1)(a) which requires regard to be given to critical human water needs and water quality, support the human right to water.

These amendments to the Principal Regulations deal with minor administrative and machinery matters which are provided for in the Act and required to support implementation of the Basin Plan.

The extended recognition of the State plans as transitional water resource plans provides the Basin State with the time required to undertake comprehensive water management and planning, required to prepare water resource plans for accreditation under the Act.

The Principal Regulations, incorporating these amendments, will continue to support access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses. The amendments do not change the Basin Plan, which in accordance with the Act, was prepared having regard to the fact that the Commonwealth and the Basin States have agreed that critical human water needs are the highest priority water use for communities who are dependent on Basin water resources (subsection 86A(1)(a) of the Act). The amendments also do not affect the water quality and salinity management plan set out in Chapter 9 of the Basin Plan.

Conclusion

The legislative instrument is compatible with human rights because it supports the human right to water.

¹ CESCR General Comment No. 15: The Right to Water E/C 12/2002/11.

Details of the *Water Amendment (Interactions with State Laws) Regulation 2014 (No. 1)*

Section 1 - Name of Regulation

This section provides that the title of the Regulation is the *Water Amendment (Interactions with State Laws) Regulation 2014 (No. 1)* ('Regulation').

Section 2 - Commencement

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

Section 3 - Authority

This section provides that the Regulation is made under the *Water Act 2007* ('Act').

Section 4 - Schedule(s)

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

Schedule 1 – Amendments

Water Regulations 2008 ('Principal Regulations')

Item [1] – Part 2 of Schedule 4 (table items 121 and 123 to 125)

This item repeals four Victorian plans currently listed in Schedule 4 of the Principal Regulations which are no longer in effect under Victorian law.

Item [2] - Before clause 1 of Part 1 of Schedule 5

This item inserts a new clause 1AA to Part 1 of Schedule 5 of the Principal Regulations. New clause 1AA, '*New South Wales – State plans that prevail over Basin Plan*', lists New South Wales plans which are recognised as transitional water resource plans for the purposes of regulation 11A.02. The table in this item specifies for each plan: the water resource plan area, the start date, end date and accreditation date.

Item [3] – Paragraph 1(c) of Part 1 of Schedule 5

This item repeals paragraph 1(c) of Schedule 5 of the Principal Regulations, and substitutes the words 'period, starting on the start day and ending on the end day, during which a State plan prevails over the Basin Plan'. The substitution has the effect of clarifying paragraph 1(c).

Items [4] - [11] – Clause 1 of part 1 of Schedule 5

These eight items amend the table in Part 1 of Schedule 5 of the Principal Regulations, '*Victoria – State plans that prevail over Basin Plan*' to include additional Victorian plans which are recognised as transitional water resource plans under regulation 11A.02.

Item [12] – After clause 1 of Part 1 of Schedule 5

This item inserts a new clause 1A to Part 1 of Schedule 5 of the Principal Regulations to include a new clause 1A. New clause 1A '*Queensland – State plans that prevail over Basin Plan*', lists Queensland plans which are recognised as transitional water resource plans under regulation 11A.02

Item [13] – Paragraph 2(c) of Part 1 of Schedule 5

This item repeals paragraph 2(c) of Schedule 5 of the Principal Regulations, and substitutes the words ‘period, starting on the start day and ending on the end day, during which a State plan prevails over the Basin Plan’. The substitution has the effect of clarifying paragraph 1(c).

Items [14] and [15] – Clause 2 of Part 1 of Schedule 5

These items amend Part 1 of Schedule 5 of the Principal Regulations, ‘*South Australia – State plans that prevail over Basin Plan*’, to include additional South Australian plans which are recognised as transitional water resource plans under regulation 11A.02.

Item 15 also repeals one South Australian plan currently listed in Schedule 5 of the Principal Regulations which is no longer in effect under South Australian law.