

EXPLANATORY STATEMENT

Select Legislative Instrument No. 180, 2014

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

Subject: *Water Act 2007*
Water Amendment (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014

The Governor-General, under subsection 256(1) of the *Water Act 2007* (the ‘Act’), may 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.

Sections 34 and 35 are the principal provisions in the Act that give legal effect to the *Basin Plan 2012* (the ‘Basin Plan’). Subsection 34(1) of the Act requires the Murray-Darling Basin Authority (the ‘Authority’) and other Commonwealth agencies to perform their functions and exercise their powers in a manner that is consistent with and gives effect to the Basin Plan.

Subsection 35(1) of the Act prohibits both: the doing of an act where that act is inconsistent with the Basin Plan, and the failure to do an act where that failure is inconsistent with the Basin Plan. Subsection 35(1) applies to the Basin Officials Committee, an agency of a Basin State, an operating authority, an infrastructure operator or the holder of a water access right. A Basin State is defined in section 4 of the Act to mean New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory (the ‘ACT’).

Section 38 of the Act allows regulations to be made which provide that subsections 34(1) and 35(1) of the Act do not apply to specified activities. The regulations may provide for an exemption in relation to a particular activity if specified conditions are satisfied, or for a specified period of time.

The *Water Amendment (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014* (the ‘Regulation’) amends the *Water Regulations 2008* (the ‘Principal Regulations’) to ensure the existing ACT interim water resource plans are protected from inconsistency with the Basin Plan for an extended twelve month period ending on 31 December 2015, at the latest. The Regulation will cease to apply before 31 December 2015 if the ACT interim water resource plans cease to have effect before that day, because the Regulation will only apply to activities undertaken in accordance with a plan that is in effect at the time the activity is undertaken.

The Regulation is the third regulation to extend transitional coverage for Basin State water resource planning arrangements until accredited water resource plans are in place by 1 July 2019, at the latest. The first regulation, the *Water Amendment (Interactions with State Laws and Water Information) Regulation 2013*, was made in November 2013. The second regulation, the *Water Amendment (Interactions with State Laws) Regulation 2014 (No 1)* was made in June 2014.

Transitional and interim water resource plans

The Basin Plan, other than the water trading rules in Chapter 12, commenced on 24 November 2012. The water trading rules commenced on 1 July 2014. The long-term average sustainable diversion limits (SDLs) in the Basin Plan take effect on 1 July 2019. All Basin States are required to have accredited water resource plans in place by 1 July 2019.

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

- Transitional water resource plans – Basin State water resource plans made before 25 January 2007. Transitional plans cease to be recognised under the Act on the date specified in the Act or the Principal Regulations, if the transitional plan has not ceased to have effect under State law before that date; or
- Interim water resource plans – Basin State water resource plans that are made on or after 25 January 2007, but prior to the commencement of the Basin Plan on 24 November 2012. The period of recognition for interim plans is the later of 31 December 2014 or five years after the plan is made.

The existing ACT plans detailed in the Regulation are recognised as interim water resource plans under section 242 of the Act. Under subsection 242(3) of the Act, the recognition of the ACT plans is currently due to expire on 31 December 2014.

Provisions of transitional or interim water resource plans that are inconsistent with the Basin Plan override the Basin Plan to the extent of the inconsistency. 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 through accredited water resource plans.

Modified operation – provisions relating to interim water resource plans

The Regulation provides that the Basin Plan will not apply to any matters that are dealt with by provisions of the existing ACT interim water resource plans that are inconsistent with the Basin Plan, with the exception of the water trading rules which applied from 1 July 2014. The Regulation will be repealed on 31 December 2015 but will cease to have effect earlier if the existing ACT interim water resource plans cease to be in force as ACT laws. The ACT is currently preparing a Basin Plan compliant water resource plan to replace the existing ACT interim water resource plans, for accreditation by the Commonwealth Minister under the Water Act.

Regulation Impact Statement

The Deregulation Unit of the Department of the Environment has advised that a Regulation Impact Statement was not required, as the Regulation is likely to be of minor impact.

Consultation

The ACT Government requested the Commonwealth to ensure that the existing ACT interim water resource plans will be protected from inconsistency with the Basin Plan for an extended twelve month period. The approach for making the Regulation has been discussed with the ACT Government.

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 1 January 2015.

Details of the regulation are set out in the Attachment.

Authority: Subsection 256(1) 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 (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014 (the 'Regulation')

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* (the 'Principal Regulations') to provide that the existing Australian Capital Territory ('ACT') water resource plans (other than provisions of those plans relating to water trading rules) are protected from inconsistency with the Basin Plan. The Regulation will be repealed on 31 December 2015 but will cease to have effect earlier if the existing ACT interim water resource plans cease to be in force as ACT laws.

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 (the '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* (the '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* (the '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 Regulation ensures the existing ACT water resource plans are protected from inconsistency with the Basin Plan for an additional twelve months and provides the ACT with the time required to undertake comprehensive water management and planning, in order 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.

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

Conclusion

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

ATTACHMENT

Details of the Water Amendment (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014

Section 1 – Name of the Regulation

This section provides that the title of the Regulation is the *Water Amendment (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014* (the ‘Regulation’).

Section 2 – Commencement

This section provides that the Regulation commences on 1 January 2015.

Section 3 – Authority

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

Section 4 – Schedules

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 (the ‘Principal Regulations’)

Item 1 – After regulation 2.01

This item inserts a new regulation 2.02 after regulation 2.01 of the Principal Regulations.

This new subregulation 2.02(1) provides that subsections 34(1) and 35(1) of the Act do not apply to an activity if certain conditions are satisfied, namely:

- The activity is undertaken in accordance with a relevant provision of an Australian Capital Territory (‘ACT’) interim water resource plan that is in force under ACT law at the time the activity is undertaken;
- The relevant provision of the ACT interim water resource plan relates to surface water or ground water in a water resource plan area; and it is a matter that must be included in the content of the *Basin Plan 2012* (the ‘Basin Plan’), other than the water trading rules of the Basin Plan; and
- There is an inconsistency between the relevant provision of the ACT interim water resource plan and a provision of the Basin Plan.

This new subregulation 2.02(2) defines the ACT interim water resource plans as the three existing ACT water resource plans, as in force on 1 January 2015, namely:

- The *Water Resources (Amounts of water reasonable for uses guidelines) Determination 2007 (No 1)* (ACT);
- The *Water Resources (Water available from areas) Determination 2007 (No 1)* (ACT);

- The *Water Resources (Water management areas) Determination 2007 (No 1)* (ACT).

The plans defined as ACT interim water resource plans are recognised as interim water resource plans under section 242 of the Act. The period of recognition provided under section 242 ceases on 31 December 2014. The Regulation has the effect of ensuring the three existing ACT water resource plans continue to be protected from inconsistency with the Basin Plan until 31 December 2015, as if their recognition as interim plans had continued under the Act.

This new subregulation 2.02(3) provides that this Regulation is repealed on 31 December 2015. The Regulation will cease to have effect earlier if the existing ACT interim water resource plans cease to be in force as ACT laws, because new paragraph 2.02(1)(a) only applies to activities undertaken in accordance with a plan that is in effect at the time the activity is undertaken.