

EXPLANATORY STATEMENT

Select Legislative Instrument No. 59, 2015

(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 2015 (No.1)

Section 256 of the *Water Act 2007* (the ‘Act’) allows the Governor-General to make regulations prescribing matters that are required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The relevant 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of the Constitution, the power to enact the referred provisions, Parts 1A, 2A, 4, 4A 10A and 11A of the Act as originally enacted, and to make express amendments to these provisions.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.

The Act defines ‘Commonwealth water legislation’ to mean the Act, the regulations and other instruments made under the Act, including the *Basin Plan 2012* (‘Basin Plan’).

The *Water Amendment (Interactions with State Laws) Regulation 2015 (No.1)* (‘Regulation’) amends the *Water Regulations 2008* (‘Principal Regulations’) to extend transitional recognition of the *Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources 2010* (the ‘Peel Valley WSP’) until 30 June 2019.

The Regulation is a referred regulation, and is the fourth 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*, was made in November 2013. The second regulation, the *Water Amendment (Interactions with State Laws) Regulation 2014 (No 1)* was made in June 2014. The third regulation, the *Water Amendment (Interactions with Australian Capital Territory Water Resource Plans) Regulation 2014* was made in November 2014.

Consistent with the requirements of the *2008 Intergovernmental Agreement on Murray-Darling Basin Reform – Referral*, the NSW Government was consulted and agreed to the Regulation being made.

Transitional measures under the Act

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 sustainable average diversion limits (SDLs) in the Basin Plan take effect on 1 July 2019.

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 water resource plans – State plans that were made before 25 January 2007. Recognition of transitional plans expires on the date specified in the Act or the Principal Regulations, and
- Interim water resource plans - State plans that were made on or after 25 January 2007, but prior to the commencement of the Basin Plan. Recognition of these plans expires on the later of 31 December 2014 or five years after the plan was 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.

Modified operation - provisions relating to transitional water resource plans

In November 2013, the first regulation amended the Principal Regulations to provide for extended transitional recognition for a number of State 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 Principal Regulations until after the day specified.

The Regulation is the fourth 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 water trading rules, which will apply from 1 July 2014 or from the original expiry date for the transitional or interim water resource plans.

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.

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*, and 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 (Interactions with State Laws) Regulation 2015 (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 the Peel Valley WSP (other than the provisions relating to water trading rules) as a transitional water resource plan.

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 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.

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.

Details of the *Water Amendment (Interactions with State Laws) Regulation 2015 (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 2015 (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] – Clause 1AA of Part 1 of Schedule 5 (after table item 15)

This item inserts a new item in the table at clause 1AA of Part 1 of Schedule 5 of the Principal Regulations recognising the *Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources 2010* ('Peel Valley WSP') as a transitional water resource plan for the purposes of regulation 11A.02. The table in this item specifies the following for the Peel Valley WSP:

- the start date for extended transitional recognition is the date the regulation commences,
- the end date for extended transitional recognition is 30 June 2019, and
- the accreditation date is 26 September 2014.

The accreditation day 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 as being 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.