

EXPLANATORY STATEMENT

Select Legislative Instrument No. 98, 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. 2)

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of the Constitution, the power to enact the referred provisions, Parts 1A, 2A, 4, 4A 10A and 11A of the Act as originally enacted, and to make express amendments to these provisions.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* (the ‘Basin Plan’).

The *Water Amendment (Interactions with State Laws) Regulation 2015 (No.2)* (the ‘Regulation’) amends the *Water Regulations 2008* (‘Principal Regulations’) to:

- extend transitional recognition for 14 New South Wales water resource plans (‘NSW plans’); and
- recognise the *Water Sharing Plan for the Lower Lachlan Groundwater Source 2003* (‘Lower Lachlan WSP’) as a transitional plan; and
- make minor editorial changes such as reordering the list of plans in alphabetical order and aligning the names of the plans as recognised under NSW legislation.

The Regulation also brings forward the requirement to have a Basin Plan compliant water resource plan for the Lachlan Alluvium water resource plan area to 30 June 2017 and delays this requirement for the Lachlan water resource plan area to 30 June 2019. This means that the water resource plan for the Lachlan Alluvium water resource area will be NSW’s pilot plan for Basin Plan accreditation purposes.

The Regulation is a referred regulation and is the fifth 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. The fourth regulation, the *Water Amendment (Interactions with State Laws) Regulation 2015 (No. 1)* was made in April 2015.

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 average sustainable 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 water resource plans ('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 Basin State plans that are inconsistent with the Basin Plan override the Basin Plan to the extent of any inconsistency. 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.

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 first 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 fifth 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 14 NSW 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 NSW 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 is 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 1 July 2015.

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. 2)

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 14 NSW water resource plans (other than provisions of those plans relating to water trading rules) as transitional water resource plans. It also brings forward the requirement to have a Basin Plan compliant water resource plan for the Lachlan Alluvium water resource plan area to 30 June 2017 and delays this requirement for Lachlan water resource plan area to 30 June 2019.

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 Basin State plans as transitional water resource plans provides for time Basin States to undertake the comprehensive water management and planning required to prepare Basin Plan compliant 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

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

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.

Details of the *Water Amendment (Interactions with State Laws) Regulation 2015 (No.2)*

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. 2)* ('the Regulation').

Section 2 - Commencement

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

Section 3 - Authority

This section provides that the Regulation is made under the *Water Act 2007* (the '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 relating to interactions with State laws

Water Regulations 2008 ('Principal Regulations')

Item [1] – Clause 1AA of Part 1 of Schedule 5 (table)

This item repeals the table at Clause 1AA of Part 1 of Schedule 5 and substitutes it with a new table.

The table, '*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 (ie the version of the plan that has transitional status). The effect of the new table is to:

- extend transitional recognition for 14 New South Wales water resource plans;
- recognise the *Water Sharing Plan for the Lower Lachlan Groundwater Source 2003* as a transitional water resource plan;
- make minor editorial changes such as reordering the list of plans in alphabetical order and aligning the names of the plans as recognised under NSW legislation.

Item [2] – Clause 1 of Part 2 of Schedule 5 (cell at table item 7, column headed "End day")

This item repeals the end date for extended transitional recognition for the Lachlan water resource area and substitutes it with 30 June 2019. This delays the requirement to have a water resource plan for the Lachlan water resource area to 30 June 2019.

Item [3] – Clause 1 of Part 2 of Schedule 5 (cell at table item 8, column headed "End day")

This item repeals the end date in for extended transitional recognition for the Lachlan Alluvium water resource area and substitutes it with 30 June 2017. This brings forward the requirement to have a water resource plan for the Lachlan Alluvium water resource area by 30 June 2017.