

EXPLANATORY STATEMENT

Select Legislative Instrument No. 224, 2015

(Issued by the Authority of the Minister for Agriculture and Water Resources)

Water Act 2007

Water Amendment (Interactions with State Laws) Regulation 2015 (No. 3)

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 (NSW), 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purposes of paragraph 51(xxxvii) of the Constitution, the power to enact Parts 1A, 2A, 4, 4A 10A and 11A of the Act as originally enacted, and to make express amendments to these provisions.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), a referred provision under Part 11A of the Act, provides that regulations may be made which 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').

Sections 34 and 35 are the principal provisions in the Act that give legal effect to 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: 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 (NSW, Victoria, Queensland, South Australia and the Australian Capital Territory (ACT)), an operating authority, an infrastructure operator or the holder of a water access right.

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.

Details

The *Water Amendment (Interactions with State Laws) Regulation 2015 (No.3)* ('the Regulation') amends the *Water Regulations 2008* ('Principal Regulations') to:

extend the exemption of the following ACT interim water resource plans from inconsistencies with the Basin Plan until 31 December 2016 (section 38 of the Act refers):

- 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); and

recognise the following water sharing plans made under NSW law to replace existing transitional water resource plans until 30 June 2019 (section 250E of the Act refers):

- the *Water Sharing Plan for the Lachlan Regulated River Water Source 2015* (item 2, table item 4)
- the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2015* (item 3, table item 8)
- the *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2015* (item 4, table item 10).

The Regulation has the effect of exempting certain provisions in the plans from inconsistencies with the Basin Plan, with the exception of the Basin Plan water trading rules.

Background

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 for a transitional period of recognition of existing State water resource planning arrangements. The Act provides for recognition of:

- Transitional water resource plans – State 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 interim plans expires on the later of 31 December 2014 or five years after the plan is made.

Provisions of transitional and interim water resource plans which are inconsistent with the Basin Plan prevail over the Basin Plan to the extent of the inconsistency.

During negotiations to finalise the Basin Plan, the Commonwealth agreed to make regulations under the Act to provide extended recognition of State plans to a later expiry date (generally 30 June 2019). This commitment is reflected in the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*. As part of this commitment, it was agreed that the Basin Plan water trading rules would apply from 1 July 2014, or from the original expiry date for the transitional or interim water resource plans.

In 2013, Basin State Premiers agreed that these regulations would be made in tranches and agreed to future regulations being approved by relevant State water ministers.

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. The fifth regulation, the *Water Amendment (Interactions with State Laws) Regulation 2015 (No. 2)* was made in June 2015.

This Regulation is the sixth to be made to extend transitional water resource planning arrangements.

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.

The ACT Government requested the Commonwealth make a Regulation to ensure that existing ACT interim water resource plans are protected from inconsistencies with the Basin Plan for an extended period of 12 months. This Regulation provides the further time requested by the ACT to finalise their water resource plan, undertake public consultation and arrange for the water resource plan to be accredited by the Minister before the end of 2016.

Regulation Impact Statement

The Office of Best Practice Regulation was consulted on the transitional pathway. A Regulation Impact Statement was not prepared, as the Regulation will not have any regulatory impact on business, individuals or community organisations.

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 following dates:

- Sections 1 to 4 commence the day after the instrument is registered
- Schedule 1, item 1, which relates to ACT interim water resource plans, commences on 15 December 2015
- Schedule 1, items 2 to 4, which relates to NSW transitional water resource plans, commence on the date the relevant plan commences under NSW legislation.

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

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. 3)

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 recognise three water sharing plans made under NSW law to replace existing transitional water

resource plans until 30 June 2019. It also extends the exemption of three ACT interim water resource plans from inconsistencies with the Basin Plan until 31 December 2016.

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 that NSW and ACT plans in are protected from inconsistency with the Basin Plan, with the exception of the Basin Plan trading rules. This provides for time for the 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 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.

The Hon. Barnaby Joyce MP
Minister for Agriculture and Water Resources

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 2015 (No.3)*

Section 1 - Name

This section provides that the title of the Regulation is the *Water Amendment (Interactions with State Laws) Regulation 2015 (No. 3)* ('the Regulation').

Section 2 - Commencement

This section provides that the Regulation commences on the following dates:

- Sections 1 to 4 commence the day after the instrument is registered
- Schedule 1, item 1, which relates to ACT plans, commences on 15 December 2015
- Schedule 1, items 2 to 4, which relates to NSW plans, commences on the date the relevant plan commences under NSW legislation. A plan that does not commence under NSW legislation will not be recognised under this Regulation.

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* ('Principal Regulations')**

Item [1] – Subregulation 2.02(3)

This item amends paragraph 2.02(3)(c) of the Principal Regulations to change the repeal day of regulation 2.02 from 31 December 2015 to 31 December 2016. The three ACT interim water resource plans listed at subregulation 2.02(2) continue to be protected from inconsistency with the Basin Plan until 31 December 2016 to the extent set out in regulation 2.02(1).

The ACT interim water resource plans are defined by subregulation 2.02(2) of the Principal Regulations to mean any of the following:

- 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).

This item ceases to have effect earlier if the ACT interim water resource plans cease to be in force under ACT law, because 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.

Items [2] to [4] – Clause 1AA of Part 1 of Schedule 5 (table items 4, 8 and 10)

The table, 'New South Wales – State plans that prevail over Basin Plan', lists NSW plans that are recognised as transitional water resource plans for the purposes of regulation 11A.02. The

table specifies for each plan: the water resource plan area, the start date, end date and accreditation date*.

Items 2 to 4 replace table items 4, 8 and 10 to recognise three transitional water resource plans made under NSW law (to replace existing transitional water resource plans) until 30 June 2019. The replacement plans are:

- the *Water Sharing Plan for the Lachlan Regulated River Water Source 2015* (item 2, table item 4);
- the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2015* (item 3, table item 8); and
- the *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2015* (item 4, table item 10).

*The accreditation date is the date the plan commences under NSW legislation. It is the original date that the plan is taken to have been accredited under the Act.