

## **EXPLANATORY STATEMENT**

Issued by Authority of the Deputy Prime Minister and Minister for Agriculture and Water Resources

*Water Act 2007*

*Water Amendment (Review Measures) Regulation 2016*

The *Water Act 2007* (the Water Act) provides the legislative framework for managing Australia's largest water resource, the Murray-Darling Basin, in the national interest, as well as providing information on Australia's water resources.

Section 256 of the Water Act provides that the Governor-General 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.

The purpose of the *Water Amendment (Review Measures) Regulation 2016* (the Regulation) is to amend the *Water Regulations 2008* (the Water Regulations) to implement recommendations three and nineteen of the government's response to the *Report of the Independent Review of the Water Act 2007* (the Water Act Review).

Enforceable undertakings are voluntary arrangements between the appropriate enforcement agency (the Murray-Darling Basin Authority, the Australian Competition and the Consumer Commission or the Bureau of Meteorology) and a person considered to have committed a contravention of the Water Act under the parts of the law prescribed in section 137 of the Act. They are an effective, less burdensome alternative to taking a matter to court and allow both parties to agree on the steps required to achieve a means of compliance. Water Act enforcement agencies may accept written undertakings, given by a person, under any of Section 163(2) subparagraphs (a), (b) and (c) and of a kind specified in the regulations made for the purposes of subsection 163(2)(d) of the Water Act. The Regulation amends the Water Regulations to provide additional clarity by prescribing five kinds of undertakings that are available under the Water Act. These regulations do not limit the kinds of enforceable undertakings that may be accepted currently under the Act (Section 163 (2)(a)-(c)).

As specified in section 49 of the Water Act, the Water Regulations may provide the process for the Murray-Darling Basin Authority to make a specified kind of minor, non-substantive amendment of the Basin Plan 2012 (the Basin Plan). The Regulation amends the Water Regulations to set out the process to be followed by the Murray-Darling Basin Authority when making minor or non-substantive amendments to the Basin Plan. The Regulation provides for procedural improvements, such as editorial changes, updates, removal of redundant provisions and correction of errors, *inter alia*. The Regulation requires that the Murray-Darling Basin Ministerial Council certify in writing that a proposed amendment does not alter the rights or obligations provided for in, or the substance of, the Basin Plan.

The Office of Best Practice Regulation (OBPR) was consulted regarding the amendments made by the Regulation. The OBPR considered that the changes in the Regulation will not have a significant regulatory impact on individuals, business, or community organisations and no further analysis (in the form of a Regulation Impact Statement) is required.

Details of the Legislative Instrument are set out in Attachment A.

The Legislative Instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Consultation was undertaken with persons likely to be affected by this Regulation and with persons having expertise in fields relevant to this Regulation, in accordance with section 17 of the *Legislation Act 2003*. Those consulted included the Murray-Darling Basin Authority, the Bureau of Meteorology, the Australian Competition and Consumer Commission, Basin States and external stakeholders, including agricultural and irrigation industry, environmental and indigenous stakeholders. Comments were invited on the proposed Regulation, and the consultation period closed on 19 August 2016. Basin States supported the draft regulation. Industry and non-industry stakeholders were generally supportive, and comments sought to clarify the purpose of the regulations, the circumstances in which they would be used and, in the case of enforceable undertakings, who would be subject to enforceable undertakings. No changes were made to the proposed Regulation.

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

**Details of the *Water Amendment (Review Measures) Regulation 2016***

**Section 1 – Name**

This section provides that the name of the Regulation is the *Water Amendment (Review Measures) Regulation 2016* ('the Regulation').

**Section 2 – Commencement**

This section provides for the Regulation to commence on the day after it is registered.

**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 the Regulation is amended or repealed as set out in the applicable items in the Schedule and any other item in a Schedule has effect according to its terms.

**Schedule 1 – Amendments**

***Water Regulations 2008***

**Item [1] – After Part 7**

This item inserts Part 8 Division 8.6, providing for enforceable undertakings. Enforceable undertakings are voluntary arrangements between the appropriate enforcement agency (the Murray-Darling Basin Authority, the Australian Competition and the Consumer Commission or the Bureau of Meteorology) and a person considered to have committed a contravention of the Water Act. Water Act enforcement agencies may accept a written undertaking, given by a person, of a kind specified in the regulations made for the purposes of subsection 163(2)(d) of the Water Act. The Regulation amends the Water Regulations to expand the range of enforceable undertakings that are available under the Water Act.

The introductory paragraph at clause 8.01 provides that Division 8.6 specifies the kind of written undertakings that the appropriate enforcement agency may accept from a person if that agency considers that an action, or omission, of the person is a contravention to which Part 8 of the Act applies. Note 1 to the clause notes that appropriate enforcement agencies are defined at section 137 of the Act. Note 2 to the clause notes that the contraventions to which Part 8 of the Act applies are set out at section 136 of the Act. Note 3 to the clause notes that an undertaking must be expressed to be an undertaking under section 163 of the Act.

Clause 8.02 provides that a person may enter into an enforceable undertaking by a written undertaking to pay refunds, compensation or other forms of restitution to a person who has suffered loss, injury or damage as a result of another person's contravention of the Act. Other restitution may encompass community service obligations that might be appropriate, for example, in cases of environmental damage.

Clause 8.03 provides that, where a person has accepted or is now accepting a specified undertaking under section 163 of the Act, they can also enter into an enforceable undertaking to provide specified information for the purpose of monitoring compliance with the first undertaking. This specified information must be provided to the appropriate enforcement agency. An undertaking under clause 8.03 must be in writing and is defined as a monitoring undertaking.

Clause 8.04 provides that, where a person has accepted or is now accepting a specified undertaking under section 163 of the Act, they can also enter into an enforceable undertaking to publish specified information about the first undertaking. Examples of the ways this information can be published include in a newsletter, in the print media, by radio or television broadcasting or on a website. An undertaking under clause 8.04 must be in writing and is defined as a publication undertaking.

Clause 8.05 provides that, where a person has accepted or is now accepting a specified undertaking under section 163 of the Act, they can also enter into an enforceable undertaking to notify a specified person, or persons in a specified class, about the first undertaking. This can be done, for example, either by a newsletter delivered by mail, or by email or letter. An undertaking under clause 8.05 must be in writing and is defined as a notification undertaking.

Clause 8.06 provides that, where a person has accepted or is now accepting a specified undertaking under section 163 of the Act, they can also enter into an enforceable undertaking to appoint, in writing, a specified person (defined as the reviewer) to review the first person's compliance with that other specified undertaking. The appointment will require the reviewer to prepare a draft report that sets out the findings and recommendations of the review, give the person an opportunity to provide written comments on the draft report to the review, consider those comments and then prepare a written final report and give that report, with comments attached, to both the person and the appropriate enforcement agency. The first person will, after considering that report, inform the appropriate enforcement agency, in writing, of the action (if any) they have taken or intend to take in response to the report. An undertaking under clause 8.06 must be in writing and is defined as a review undertaking.

### **Item [2] – Before regulation 11.01**

This item inserts the heading “Division 11.1 – Transitional water resource plans – Victoria”, prior to regulation 11.01. This identifies that it is now the first Division of Part 11.

### **Item [3] – In the appropriate position in Part 11**

This item inserts “Division 11.2 – Amendments made by the Water Amendment (Review Measures) Regulation 2016” at the end of Part 11. This identifies that this is now Division 2 of Part 11 and provides its title.

It also inserts Clause 11.02 which provides that Division 8.6 of Part 8, as inserted by this Regulation, applies in relation to actions or omissions that occur on or after the day that Schedule commences, which is the day after it is registered, and does not apply retrospectively.

## Schedule 2 – Amendments

### ***Water Regulations 2008***

#### **Item [1] – At the end of Division 2.1**

This item inserts clause 2.03 into the Water Regulations which provides for a process for the Murray-Darling Basin Authority to make a specified kind of minor, non-substantive amendment of the Basin Plan, as specified in section 49 of the Water Act. The Regulation sets out that the process only applies to amendments of a minor nature, such as correcting spelling, punctuation or grammar, updating names or references or removing redundant provisions. The Regulation sets out the process that needs to be undertaken to make those minor amendments.

Subregulation 2.03(1) provides that the regulation is made as specified in paragraph 49(1)(a) of the Act.

Subregulation 2.03(2) provides a listing of the type of amendments that are minor or non-substantive in nature. These include the Murray-Darling Basin Authority correcting spelling, punctuation, grammar or syntax, updating references to laws, re-numbering or re-ordering of provision or the removal of redundant provisions. A minor amendment may be updating the name of a river to reflect new spelling or updating a reference to the *Legislative Instruments Act 2003* to reflect the name change to the *Legislation Act 2003*.

Subregulation 2.03(3) provides that a reference in subregulation (2) to any law includes those of the Commonwealth, a State or a Territory. This allows references to State and Territory law to be updated, as well as references to Commonwealth legislation.

Subregulation 2.03(4) provides that the process only applies to amendments that do not alter the rights or obligations provided for in the Basin Plan, or alter the substance of the Basin Plan.

Subregulation 2.03(5) sets out the process for making minor or non-substantive amendments to the Basin Plan. The process provides that the Murray-Darling Basin Ministerial Council (Ministerial Council) must consider the proposed amendment and must certify in writing that it does not alter the rights, obligation or substance of the Basin Plan (as set out in 2.03(4)). After this is certified, the Authority makes the amendment to the Basin Plan.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Water Amendment (Review Measures) Regulation 2016**

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 (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

This Legislative Instrument amends the *Water Regulations 2008* (the Water Regulations) to implement recommendations three and nineteen of the government's response to the *Report of the Independent Review of the Water Act 2007* (the Water Act Review) to expand the range of enforceable undertakings that are available under the *Water Act 2007* (the Water Act) that can be accepted for contraventions to the parts of the law prescribed in section 137 of the Water Act and set out the process to be followed by the Murray-Darling Basin Authority when making minor or non-substantive amendments to the Basin Plan 2012.

**Human rights implications**

The amendments in this Schedule have been considered against each of the seven core international human rights treaties. 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 and to the continuous improvement of living conditions is protected in Article 11 of the ICESCR. The right to the highest attainable standard of 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' (CESCR General Comment No.15: The Right to Water E/C 12/2002/11).

The purpose of the Water Regulations are to ensure water use in Australia is equitable, efficient and sustainable, which support the human right to water through the management of water resources and the collection of water information. The amendments made to the Water Regulations will respect and protect the human right to water by improving the operation and effectiveness of the management of water resources.

**Conclusion**

The Legislative Instrument is compatible with human rights.

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