

EXPLANATORY STATEMENT

Water Act 2007

Water Market Amendment Rules 2012

The *Water Market Rules 2009* (the water market rules), made under the *Water Act 2007* (the Water Act) and applicable in the Murray-Darling Basin, were made in June 2009.

The water market rules apply to irrigation infrastructure operators that hold ‘group’ water access entitlements under which the member irrigators have a right to a share of water (an irrigation right) against the operator. The water market rules ensure that an operator cannot prevent or unreasonably delay the transformation of entitlements to water under irrigation rights into separately held water access entitlements.

Some technical issues have arisen since the rules were made which have required amendments to the rules.

Purpose of the Amendment Rules

The water market rules must contribute to achieving the Murray-Darling Basin water market and trading objectives and principles set out in Schedule 3 of the Water Act. Broadly, these objectives and principles seek to:

- (a) facilitate the operation of efficient water markets and the opportunities for trading, within and between Murray-Darling Basin States, where water resources are physically shared or hydrologic connections and water supply considerations will permit water trading; and
- (b) minimise transaction cost on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions; and
- (c) enable the appropriate mix of water products to develop based on water access entitlements which can be traded either in whole or in part, and either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time; and
- (d) recognise and protect the needs of the environment; and
- (e) provide appropriate protection of third party interests.

The amendments to the rules will address technical issues that have arisen during implementation and clarify how the rules operate. In particular, the amendments will contribute to objectives (a), (b) and (e) by clarifying that the rules apply to irrigation rights (not annual allocations), ensuring information is provided to irrigators about calculations for irrigation rights, and extending provisions allowing irrigation infrastructure operators to require security from customers in situations where the operator elects to define water rights on a non-volumetric basis.

Authority

Subsection 97(1) of the Water Act provides that the Minister for Sustainability, Environment, Water, Population and Communities may make *water market rules*.

Process and consultation

The process for making rule amendments is set out in section 98 of the Water Act. In particular, the Minister must ask the Australian Competition and Consumer Commission (the ACCC) for advice about rule amendments the Minister proposes to make and have

regard to that advice. The *Water Regulations 2008* (the Regulations) set out the detailed process the Minister must follow in making rule amendments.

The former Minister for Climate Change, Energy Efficiency and Water, Senator the Hon Penny Wong, requested the ACCC's advice, including draft amendments, in September 2009. The ACCC provided its advice to the former Minister in March 2010. The rule amendments are, in the Minister's opinion, substantially the same as the draft amendments which the ACCC provided to the former Minister.

The ACCC received seven written submissions in response to a web notice announcing the Minister's request for advice and seeking information from stakeholders in October 2009.

The ACCC wrote to Murray-Darling Basin State Ministers on 10 December 2009 seeking comments on the ACCC draft advice and draft amendment rules. The ACCC also issued a public notice inviting written submissions, and published its draft advice and the draft rule amendments on the ACCC website. The ACCC received ten written submissions in response.

The Department of Sustainability, Environment, Water, Population and Communities also conducted targeted consultation to discuss specific issues with stakeholders.

The ACCC's consultation outlined above satisfies the requirements set out in regulation 4.18 of the Regulations. There was therefore no requirement for the Minister to undertake further consultation.

The Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, published a notice on the Department of Sustainability, Environment, Water, Population and Communities internet site on 12 July 2012 which included a statement that the Minister proposes to amend the water market rules, a copy of the proposed amendments, a summary of the proposed amendments, and a copy of the advice provided by the ACCC. Notices were also published in *The Australian* and a newspaper with an agri-business focus circulating in each Murray-Darling Basin State between 7 July 2012 and 12 July 2012.

Regulation Impact Statement

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not necessary for these amendments.

Statement of Compatibility with Human Rights

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

Water Market Amendment Rules 2012

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

The *Water Act 2007* provides for the making of water market and charge rules, to ensure that the water market in the Murray-Darling Basin works efficiently and that there are no inappropriate barriers to trade.

The *Water Market Rules 2009* ensure that an irrigation infrastructure operator cannot prevent or unreasonably delay transformation of an irrigator's right to water into a statutory title and trade of that right.

The *Water Market Amendment Rules 2012* address technical issues that have arisen during implementation of the *Water Market Rules 2009*. The rule amendments:

- require that operators provide details of the calculations for irrigation rights to irrigators on request;
- clarify that the rules apply to irrigation rights (not to annual allocations); and
- allow operators to require security from customers if the operator elects to define water rights on a non-volumetric basis.

Human rights implications

The right to an adequate standard of living and the right to physical and mental health is protected the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Articles 11 and 12). 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 Market Rules 2009*. These rules specify administrative requirements that irrigation infrastructure operators must follow to transform irrigation rights into water access entitlements. These rules only apply to irrigation infrastructure operators who hold water access entitlements and make arrangements with irrigators to access this water under irrigation rights. The rules deal with administrative processes and do not impact on human rights to water as discussed above.

The legislative instrument makes amendments to the rules which are of a technical nature and clarify these administrative process requirements. The legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights as it does not raise any human rights issues.

Details of the *Water Market Amendment Rules 2012*

The process and consultation conditions specified in the Water Act and the Regulations that need to be satisfied before the power to make the Amendment Rules may be exercised have been satisfied, as described above.

The Amendment Rules are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Amendment Rules commence on the day after registration on the Federal Register of Legislative Instruments.

Details of the Amendment Rules are set out below.

Further explanatory material is available in the ACCC’s final advice on proposed amendments to the *Water Market Rules 2009* and *Water Charge (Termination Fees) Rules 2009*, March 2010 which is available at www.environment.gov.au/water.

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

Part 1 Preliminary

1. Name of Rules

Rule 1 provides that the title of the Rules is the *Water Market Amendment Rules 2012*.

2. Commencement

Rule 2 provides that the Rules commence on the day after registration.

3. Amendment of the Water Market Rules 2009

Rule 3 sets out the schedule to amend the Water Market Rules 2009.

Schedule Amendments

Item 1 and 2 – Part 3, Paragraphs 7(1)(b) and 7(1)(c)

These items provide that when an operator provides, on the request of an irrigator, details of his or her irrigation right, this must include in addition to the number of units or volume of water to which the irrigator is entitled, the details necessary to confirm the accuracy of the operator's calculation.

Item 3 – Part 3, Paragraph 7(2)(a)

This item deletes the reference in subrule 7(2)(a) to the current financial year in the formula to calculate the number of units or volume of water by which the irrigator's entitlement may be reduced under rule 7. The reference to the current financial year has been removed because it might have suggested that operators were required to give details of the volume of water an irrigator is entitled to receive in annual allocations, rather than, as the rule requires, the volume of water that an irrigator is entitled to receive under an irrigation right against the operator.

Item 4 – Part 4, Subrule 10

This item inserts new subrules 10(1A), 10(1B) and 10(1C). Subrule 10(1A) permits operators that have converted their volumetric delivery rights to delivery rights on the basis of flow rate or other basis to require security against payment of future access fees in certain circumstances if a person who holds an irrigation right applies for transformation and continues to hold a water delivery right. Subrule 10(1A) also provides that the operator will calculate the security threshold by using the appropriate conversion formula, adjusted for any changes to delivery rights that take place after the date of conversion of those delivery rights.

Subrule 10(1B) applies where operators define delivery rights on a non-volumetric basis and initially issued a number of units under a water delivery right either equal to the number of units under an irrigation right, or that reasonably represents the person's delivery right as agreed in writing. Subrule 10(1B) permits an operator to require security against payment of future access fees if a person who holds an irrigation right:

1. applies for transformation; and
2. continues to hold a water delivery right; and
3. either
 - a) transforms the whole of their irrigation right; or
 - b) subject to subrule 10(1C), the number of units under the delivery right is more than 5 times the number of units the person is entitled to under the irrigation right retained after transformation.

Subrule 10(1C) provides that subrule 10(1B)(ii) does not apply if delivery rights have been restructured after being first issued in a way that has altered the number of units under the delivery right, other than as a result of the holder acquiring, transferring or terminating the delivery units.