

## **EXPLANATORY STATEMENT**

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

*Water Act 2007*

*Water Amendment (Murray-Darling Basin Agreement) Regulations 2017*

### **Legislative Authority**

The *Water Act 2007* (the Act) provides the legislative framework for managing Australia's largest water resource — the Murray-Darling Basin — in the national interest, as well as for providing information on Australia's water resources. Section 256 of the 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 Murray-Darling Basin Agreement (the Agreement), including its eight Schedules, is an intergovernmental agreement between the Commonwealth, New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory (together referred to in the Agreement as the Contracting Governments). The text of the Agreement is set out in Schedule 1 to the Act. The purpose of the Agreement is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin.

The Agreement establishes the Murray-Darling Basin Ministerial Council (the Council), consisting of a Minister of each of the Contracting Governments. The Council is the policy-setting and decision-making body through which the Agreement is implemented. Section 18C(1) of the Act provides that regulations may be made to amend Schedule 1 to the Act to incorporate amendments to the Agreement agreed by the Council. An amendment to the Agreement takes effect upon registration of a legislative instrument in accordance with the *Legislation Act 2003* (clause 5 of the Agreement). The Council agreed to the amendments incorporated in the *Water Amendment (Murray-Darling Basin Agreement) Regulations 2017* (the Regulations) on 18 November 2016.

### **Purpose**

Under section 16E of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) — which commenced on 25 April 2015 — the Authority is required to publish a Corporate Plan by 31 August each year. The current format of the Authority's corporate plan is a detailed operational document not suitable for publication. The Regulations are a response to these requirements.

The Regulations amend the Agreement to allow the Authority to prepare a high-level corporate plan to fulfil the requirements of the *Public Governance Performance and Accountability Act 2013* (PGPA Act), the PGPA Rule and the Act, while maintaining a detailed work plan under the Agreement for operational purposes. Additionally, the Regulations substitute references to the *Legislative Instruments Act 2003*, in the Agreement, with the *Legislation Act 2003*. The Regulations amend the text of Schedule 1 to the Act to reflect these amendments.

### **Background**

The Authority is a corporate Commonwealth entity as defined by section 176 of the Act and section 11 of the PGPA Act. The purpose of clauses 34 and 35 of the Agreement is to outline the process for producing the Authority's annual corporate plan. The requirement to prepare a corporate plan is mandated by section 35 of the PGPA Act and section 213A of the Act.

Subsection 35(2) of the PGPA Act requires a Commonwealth entity's corporate plan to comply with and be published in accordance with any requirements prescribed by the PGPA Rule.

The *Public Governance, Performance and Accountability Amendment (Corporate Plans and Annual Performance Statements) Rule 2015*, amended the PGPA Rule to give effect to a new requirement for Commonwealth entities to publish their corporate plans on their websites (subsection 16E (3)) and cover a period of at least four reporting periods (subsection 16E (1)). These changes also outline matters that must be included in a Commonwealth entity's corporate plan (subsection 16E (2)). The Authority complied with the requirements of the amended PGPA Rule in 2015 and 2016 by publishing their corporate plan on their website. However, the existing format of the corporate plan, as set out in the Agreement, is prepared for operational purposes. As a response to this, the Regulations allow the Authority to produce:

- Under clause 34 of the Agreement: a high-level corporate plan for publication, to comply with its statutory obligations under the Act, PGPA Act and PGPA Rule. This document will contain information about the Authority's: purposes; operating environment; performance expectations and measures; key strategies and plans; and information on risk management; and
- Under clause 34A of the Agreement: a detailed work plan for internal operational purposes. The work plan will be a more detailed document that will provide additional information on the Authority's: activities (including capital works and operational and maintenance programmes to be undertaken); budget information for the activities; works and programmes; and any other matters relevant to the Authority's functions as the Authority sees fit. Due to its operational nature, the work plan will not be published.

Under the Agreement on Murray-Darling Basin Reform-Referral of July 2008 (the Referral Agreement) the Basin States agreed to refer legislative power to the Commonwealth for the purposes of paragraph (xxxvii) of the Commonwealth Constitution. The referral of power by the Basin States supports parts of the Act including the provisions dealing with the Agreement (Part 1A). Under the Referral Agreement, the Basin States must agree to any amendments to the referred regulations. The Water Amendment (Murray-Darling Basin Agreement) Regulations 2017 are referred regulations.

### **Impact and Effect**

The amendments will not diminish public access to information. Appropriate and relevant elements of the Authority's work plan will be included in the publicly available corporate plan, as agreed by the Council, which will be published on the Authority's website.

### **Consultation**

Contracting Governments were consulted on the draft instrument prior to obtaining agreement from the Basin Officials Committee and the Council and raised no concerns regarding the Regulations.

A Regulatory Impact Statement (RIS) Preliminary Assessment was prepared for consideration by the Office of Best Practice Regulation (OBPR). OBPR advised that no RIS was required as the Regulations will not have any regulatory impact on business, individuals or community organisations (OBPR ID: 20874).

The Authority was consulted during all phases of the regulations making process.

### **Details of the Regulations**

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

The Regulations are 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.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

**Details of the *Water Amendment (Murray-Darling Basin Agreement) Regulations 2017***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Water Amendment (Murray-Darling Basin Agreement) Regulations 2017* (the Regulations).

**Section 2 – Commencement**

This section provides that the Regulations commence on the day after the instrument is registered.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Water Act 2007* (the Act).

**Section 4 – Repeal of this instrument**

This section provides for the Regulations to be repealed on the day after commencement. When the Regulations commence, they will amend the text of the Murray-Darling Basin Agreement (the Agreement) in Schedule 1 to the Act. After the text of the Agreement is amended, the Regulations will have no continuing legal effect and can therefore be repealed.

**Section 5 – 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 – Amendment of the Murray-Darling Basin Agreement**

**Part 1 – Corporate Plans**

**Murray-Darling Basin Agreement, Schedule 1 to the *Water Act 2007***

**Item 1 – Clause 2 of Schedule 1**

This item inserts a new definition — ‘work plan’ — into clause 2 of the Agreement. A work plan is defined as a work plan approved under clause 34A of the Agreement, and includes any amendments to that plan approved under clause 35 of the Agreement.

A work plan is distinct from a ‘corporate plan’ (also defined under clause 2) in several ways.

A corporate plan is prepared specifically to comply with section 35 of the *Public Governance Performance and Accountability Act 2013* (PGPA Act), section 16E of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule), and section 213A of the Act. The corporate plan is required to be published on the Murray-Darling Basin Authority’s (the Authority’s) website and must contain information about the Authority’s: purposes, operating environment, performance expectations and measures, key strategies and plans, and information on risk management. A corporate plan must also be published on the Authority’s website by the last day of the second month of the reporting period for which the plan is prepared. Further detail on the specific requirements for a corporate plan are at section 16E of the PGPA Rule.

A work plan is a more detailed document that provides additional information on the Authority’s activities, including capital works and operational and maintenance programmes to be undertaken, and budget information for the activities, works and programmes. The work

plan may also include any other matters relevant to the Authority's functions as the Authority sees fit. Due to its operational nature, the work plan will not be published.

#### **Item 2 – Paragraph 9(c) of Schedule 1**

This item deletes the words 'and budget, and' and substitutes them with ', the annual work plan, and the'.

The effect of this item is to clarify that one of the functions of the Murray-Darling Basin Ministerial Council (the Council) is to approve both the annual corporate plan and the annual work plan.

#### **Item 3 – Paragraph 9(ca) of Schedule 1**

This item inserts the words 'or the annual work plan' after 'annual corporate plan'.

The effect of this item is to make clear that one of the functions of the Council is to approve any amendments to both the annual corporate plan and the annual work plan.

#### **Item 4 – After paragraph 29(2)(b) of Schedule 1**

This item inserts the words 'the work plan' after subclause 29(2)(b).

The effect of this item is to clarify that the Authority, in carrying out its functions, must act in accordance with, among other things, both the corporate plan and the work plan.

#### **Item 5 – Subclauses 34(1) and (2) of Schedule 1**

This item repeals subclauses 34(1) and (2) and replaces them with new subclauses to give effect to the new requirements for a corporate plan.

The effect of these amendments is to remove some of the requirements that are currently included in the corporate plan, such as the requirement to provide detail on the capital works and operational and maintenance programmes, and budget information.

Subclause 34(1) provides that the Authority must prepare a draft corporate plan by a date determined by the Council and in compliance with the PGPA Act.

Subclause 34(2) provides for the information that must be in the draft corporate plan, including: a statement that the draft corporate plan is prepared for the purposes of the Agreement, and the same matters in relation to the Authority's functions under the Agreement as are required under section 35 of the PGPA Act for the relevant reporting period.

The note to this item clarifies that the draft corporate plan prepared under clause 34 of the Agreement is not the same document as the corporate plan prepared for the purposes of the Act, PGPA Act and PGPA Rule. This is because the draft corporate plan prepared under clause 34 of the Agreement is only required to cover matters that are relevant to the Agreement. However, it is intended that the draft corporate plan approved by the Council under subclause 34(6) — which only covers matters relevant to the agreement — will be incorporated into the final corporate plan required under section 213A of the Act, section 35 of the PGPA Act and section 16E of the PGPA Rule.

### **Item 6 – After clause 34 of Schedule 1**

This item inserts a new clause describing the function and requirements of an annual work plan.

Subclause 34A(1) sets out that the Authority must prepare a draft work plan, by a date determined by the Council, in line with the reporting timeframes required under the PGPA Act and — by extension — the PGPA Rule.

Subclause 34A(2) sets out what must be included in the draft work plan.

Subclause 34A(2)(a) requires that the draft work plan must set out the Authority's activities under the Agreement for the next four years, including how the Authority intends to achieve the outcomes and objectives set by the Council and, in respect of river operations, those set by the Basin Officials Committee (BOC).

Subclause 34A(2)(b) requires that the draft work plan must set out new capital works and operational and maintenance programmes to be undertaken or required under Part VIII of the Agreement, including those activities that may be required to implement the asset management plan.

Subclause 34A(2)(c) requires that the draft work plan must include the budget for the activities, works and programmes set out in subclauses 34A(2)(a)-(b).

Subclause 34A(3) provides that the draft work plan may include any other matters relevant to the Authority's functions under the Agreement as the Authority sees fit.

Subclauses 34A(4)-(6) sets out the process to be followed for the submission of the draft work plan to BOC and the Council, as well as the Council's options for approving the work plan.

### **Item 7 – Clause 35 of Schedule 1 (heading)**

This item amends the heading of clause 35 so that it covers the process for amending both a corporate plan and a work plan.

### **Item 8 – Subclause 35(1) of Schedule 1**

This item inserts new words into subclause 35(1) to allow for the Authority to consider changes to both a corporate plan and a work plan.

### **Item 9 – Subclause 35(1) of Schedule 1**

This item deletes and substitutes new words into subclause 35(1) to allow for the Authority to prepare draft amendments to both a corporate plan and a work plan.

### **Item 10 – Subclause 35(1A) of Schedule 1**

This item inserts new words into subclause 35(1A) to allow for the Authority to prepare a draft amendment to both a corporate plan and a work plan.

### **Item 11 – Paragraph 35(3)(a) of Schedule 1**

This item deletes and substitutes new words into subclause 35(3)(a) to allow the Council to approve draft amendments to both a corporate plan and a work plan.

### **Item 12 – Paragraph 35A(a) of Schedule 1**

This item deletes the reference to corporate plan under the Authority-Council service level agreement and substitutes it with a reference to a work plan.

The service level agreement between the Authority and the Council sets out the key elements of how the Authority will undertake its responsibilities for the joint programmes and other activities and functions under the Agreement.

The intent of amendments in the Regulations will shift the requirements for reporting on the joint programmes — including capital works, operational and maintenance programmes, and budget matters — from the corporate plan to the work plan. Accordingly, this amendment allows the service level agreement to set out the key elements of how the Authority will undertake its joint programmes' responsibilities with respect to the work plan (rather than the less detailed corporate plan).

#### **Items 13-14 – Subparagraph 52(1)(a)(ii) of Schedule 1**

These items amend subparagraph 52(1)(a)(ii) so that works or measures under the Agreement must be constructed, operated, maintained or implemented in accordance with the relevant corporate plan or work plan.

#### **Item 15 – Subclause 52(2) of Schedule 1**

This item amends subclause 52(2) by deleting the words 'corporate plan' and substituting them with 'work plan'.

The effect of this amendment is to clarify that a Contracting Government is deemed to have been nominated under subclause 52(2)(1)(b) to construct, operate, maintain and renew a particular work until the relevant work plan nominates another Contracting Government for one or more of those purposes with respect to that work.

#### **Item 16 – Subclause 56(2) of Schedule 1**

This item clarifies the wording of subclause 56(2) and deletes the words 'corporate plan' and substitutes them with 'work plan'. This amendment also makes minor changes to the words of the subclause to improve clarity.

The subclause provides that — except in an emergency when only the Council approval is required — works or measures are considered authorised by the Council if the work or measure is contained in a work plan.

#### **Item 17 – Subclause 56(5) of Schedule 1**

This item deletes the words 'corporate plan' and substitutes them with 'work plan'.

The effect of this item is to allow for the Council, the Authority or the relevant work plan to nominate a Contracting Government (or Governments) to be responsible for the construction, operation and maintenance of an authorised work, or implementation of an authorised measure.

#### **Items 18 - 26 – Schedule 1**

These items delete the words 'corporate plan' and substitute them with 'work plan'.

The effect of these items is to clarify that the references to a corporate plan are now references to a work plan, as defined at clause 34A.

#### **Item 27 – Clause 138 of Schedule 1**

This item deletes the words 'approved corporate plan' and substitutes them with 'work plan'.

The effect of this amendment is to clarify that the amounts to be paid to New South Wales each year may be specified in the work plan (rather than the corporate plan). The word 'approved' has been removed as it is redundant — a work plan is necessarily already approved by the Council.

### **Item 28 – Part XVII of Schedule 1 (heading)**

This item amends the heading of Part XVII of the Agreement by removing references to reviews, schedules, resolutions and activities.

This item also inserts an additional sub-heading — ‘DIVISION 1–TRANSITION TO THIS AGREEMENT’ — which has the effect of providing for two sets of transitional provisions: those that are relevant to the coming into effect of the Agreement, and those relating to the coming into effect of the amendments made by the Regulations.

### **Item 29 – Clause 149 of Schedule 1**

This item is consequential to Item 28 and changes the word ‘Part’ to ‘Division’.

### **Item 30 – Clause 149 of Schedule 1 (definition of *transitional provisions*)**

This item repeals the definition of ‘transitional provisions’.

This amendment is necessary as the definition of transitional provisions is no longer accurate because the Regulations introduce two sets of transitional provisions — those relating to the coming into effect of the Agreement, and those relating to the coming into effect of the amendments made by the Regulations.

Clause 150 deals with transitional provisions relevant to the coming into effect of the Agreement, and the amended clause 152 deals with transitional provisions relating to amendments made by the Regulations.

### **Item 31 – Clause 150 of Schedule 1 (heading)**

This item amends the heading of clause 150 to clarify that the clause only deals with the transitional provisions relating to the coming into effect of the Agreement (rather than the coming into effect of the Regulations).

### **Item 32 – Clauses 151 and 152 of Schedule 1**

This item deletes the headings and content of clauses 151 and 152, as those provisions are now redundant, having effect only for the period up until the Basin Plan first took effect on 24 November 2012. This item also inserts a new Division heading. The amended clauses deal with transitional provisions relating to the coming into effect of the Regulations.

Clause 151 is amended to provide for a new heading ‘Definitions’, and two new definitions for the purposes of clarifying the transitional provisions for the coming into effect of the Regulations. The ‘amending regulations’ refers to the Regulations. The ‘transition period’ is the period that starts at the commencement of the Regulations, and ends when the first work plan is approved by the Council under new clause 34A. The first work plan is likely to be approved by the Council before 31 August 2017.

Clause 152 is amended to provide for transitional provisions relating to the coming into effect of the Regulations. Subclause 152(1) clarifies that clauses 34, 34A and 35 — which deal with the corporate plan, work plan, and amendments to corporate plans and work plans, respectively — apply in relation to the next reporting period, which commences each year on 1 July. So, for example, if the Regulations commence on 1 March 2017, clauses 34, 34A and 35 would apply in relation to the next reporting period, commencing on 1 July 2017.

Subclause 152(2) clarifies that, during the transition period (from commencement of the Regulations until approval of the first work plan by the Council), a reference in the Agreement to a work plan also includes a reference to the most recently approved corporate plan, including amendments to the corporate plan. The effect of this subclause is to ensure that, following



commencement of the Regulations, the provisions of the corporate plan most recently approved by the Council under clause 34 remain in force. The exception to this is clause 34A and subclauses 52(2) and 56(2).

Clause 34A is a new clause that deals with the requirements for the annual work plan. The provisions of this clause are not subject to the transitional provisions because clause 34A merely sets out the requirements for work plans drafted and approved with effect for the next reporting period following commencement of the Regulations.

Subclauses 52(2) and 56(2) both deal with acts and decisions that could have been made under previous corporate plans (including corporate plans from some years ago). The effect of exempting subclauses 52(2) and 56(2) from the provisions of the amended 152(2) is to ensure that those acts and decisions made under earlier corporate plans remain in effect once the Regulations commence.

Subclause 152(3) clarifies that references to a work plan in subclauses 52(2) and 56(2) can include references to corporate plans previously approved for any reporting period.

Subclause 52(2) deals with the nomination of Contracting Governments to undertake works in the Murray-Darling Basin. A Contracting Government is taken to have been ‘nominated’ to undertake that work until a corporate plan nominates another Contracting Government to undertake that work. The nomination of a Contracting Government by a corporate plan (or a work plan, following commencement of the Regulations) is an act that has enduring effect even after the relevant corporate plan (or work plan) is superseded. The effect of Subclause 152(3) is to ensure that the nomination of a Contracting Government made by a previous corporate plan or work plan under subclause 52(2) remains in effect following the approval of a new work plan, assuming that the new corporate plan or work plan does not specifically change the nomination.

Subclause 56(2) concerns the approval of works and measures by the Council. Once amended, it clarifies that — except in cases of emergency — works and measures are to be included in the relevant work plan. The effect of subclause 152(3) in the Regulations on subclause 56(2) in the Agreement is to ensure that works previously authorised by a corporate plan, work plan or the Council remain authorised even when a new work plan is in place, assuming that the new corporate plan or work plan does not specifically alter the authorisation.

## **Part 2 – Technical amendments**

### *Water Act 2007*

#### **Item 33 – Subclause 5(2) of Schedule 1**

This item is a consequential change following the re-titling of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*.

## **ATTACHMENT B**

### **Statement of Compatibility with Human Rights**

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

#### *Water Amendment (Murray-Darling Basin Agreement) Regulations 2017*

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 Murray-Darling Basin Agreement (‘the Agreement’), which is set out in Schedule 1 to the *Water Act 2007* (the Act) to:

- allow the Murray-Darling Basin Authority (the Authority) to prepare a high-level corporate plan for publication, to comply with its statutory obligations under the Act, *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule), while maintaining a detailed work plan under the Agreement for operational purposes; and
- substitute references to the *Legislative Instruments Act 2003*, in the Agreement, with the *Legislation Act 2003*.

## 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’.<sup>1</sup>

The human rights implications of the legislative instrument must be considered in the context of 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 Agreement deal with the corporate plan reporting requirements for the Authority, which is required to comply with the new requirement, under subsection 16E(3) of the PGPA Rule, for Commonwealth entities to publish a corporate plan by 31 August each year. The amendments will improve transparency for stakeholders by ensuring that the Authority’s corporate plan is publicly available and in a format that is appropriate for the audience.

## Conclusion

The legislative instrument is compatible with human rights because it supports the human right to water.

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

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