

EXPLANATORY STATEMENT

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

Water Act 2007

Water Amendment (Interaction with New South Wales Water Resource Plans)

Regulations 2018

Legislative Authority

The *Water Act 2007* (the Act) enables the Commonwealth, in conjunction with the Basin States, to manage the water resources within, or beneath, the Murray-Darling Basin in the national interest.

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 matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

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.

Purpose

The purpose of the Basin Plan as a whole is to give effect to relevant international agreements through the integrated management of Basin water resources; to establish a sustainable and long-term adaptive management framework for the Basin water resources; to optimise social, economic and environmental outcomes arising from the use of Basin water resources in the national interest; and to improve water security for all uses of Basin water resources.

Section 54 of the Act provides that there must be a Basin Plan compliant water resource plan (WRP) for each water resource plan area to be accredited by the Minister. Prior to formal accreditation, Part 11 of the Act provides for a transitional pathway for State water resource planning. The Basin States (which include New South Wales (NSW), Victoria, Queensland, South Australia and the Australian Capital Territory (ACT)) and the Commonwealth agreed to extend the recognition of current transitional and interim water resource plans (TWRPs) until 30 June 2019 (or earlier dates as agreed by the relevant parties). This commitment is reflected in the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*.

The purpose of the *Water Amendment (Interaction with New South Wales Water Resource Plans) Regulations 2018* (the Regulations) is to amend the *Water Regulations 2008* (the Principal Regulations) to extend transitional recognition to nine NSW water sharing plans. The provisions of these nine NSW water sharing plans that are inconsistent with the Basin Plan prevail over the Basin Plan to the extent of the inconsistency, with the exception of any water trading rules, as provided for by section 11A.02 of the Principal Regulations.

The Regulations extend recognition to nine NSW water sharing plans that have had their transitional status expire since they were last recognised under the Water Act. The water sharing plans recognised by the Regulations have been assessed by the MDBA as ‘no less

consistent' with the Basin Plan and include the water sharing plans for the: Belubula Regulated River Water Source 2012, Lower Macquarie Groundwater Sources 2003, Lower Murray Groundwater Source, Lower Murray Shallow Groundwater Source 2012, Lower Murrumbidgee Groundwater Sources 2003, Macquarie Bogan Unregulated and Alluvial Water Sources 2012, Upper and Lower Namoi Groundwater Sources 2003, Lower Lachlan Groundwater Source 2003 and Lower Gwydir Groundwater Source 2003.

Background

Under the Act and the Basin Plan the SDLs are to be implemented through water resource plans, which are prepared under state legislation. The SDLs are a 'cap' on water use in the Murray-Darling Basin. They regulate the amount of water that can be used for consumptive purposes in the Basin. The SDLs in the Basin Plan also apply to groundwater and mean that, for the first time, there are comprehensive limits on groundwater take across the Basin.

Subsection 35(1) of the Act prohibits both 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, an operating authority, an infrastructure operator and a holder of a water access right.

Part 11A of the Act, which deals with interactions with State laws, provides for a transitional period of recognition for existing State water resource planning arrangements. Recognition of transitional plans expires on the date specified in the Act or the Principal Regulations.

To provide certainty to water users and Basin States during the transition period to 1 July 2019 (when SDLs are due to commence), the Commonwealth and Basin States agreed that State and Territory water resource plans that were already in place under State legislation at the time when the Basin Plan was adopted in 2012, would be recognised by the Commonwealth as TWRPs until 30 June 2019. The extension of recognition to these State plans means that State plans prevail over the Basin Plan to the extent of any inconsistency. This commitment is reflected in the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin* (the Agreement). Under the Agreement, Basin States have committed to ensure that any State plans they put forward for accreditation by the Commonwealth as a TWRP would be 'no less consistent' with the version of the Basin Plan that was in place when the Basin Plan was adopted in 2012. The 'no less consistent test', which is also set out in section 246 of the Act, ensures that no additional inconsistencies between State plans and the Basin Plan are introduced in the lead up to commencement of the SDLs on 1 July 2019. As part of this commitment, it was also agreed that the Basin Plan water trading rules would apply from 1 July 2014, or from the original expiry dates for the TWRPs.

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.

Impact and Effect

As the Act does not provide for the extension of interim water resource plans, all State plans added as a result of the Regulations are recognised as transitional water resource plans under section 11A.02 of the Principal Regulations.

Consultation

The Commonwealth and States solidified their agreement to extend recognition of State plans in the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*.

During negotiations with Basin States 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).

In 2013, Basin State Ministers agreed that these regulations would be made in tranches and they agreed that the relevant State water Ministers would be consulted and their approval sought at the time future regulations were made by the Commonwealth.

NSW officials were consulted during the drafting of the Regulations and the NSW Minister for Regional Water has agreed to the Regulations being made.

A preliminary Regulation Impact Statement (RIS) was prepared for the Office of Best Practice Regulation (OBPR) for the first two regulations recognising transitional water resource plans. Since then, the Regulatory Reform Units of the Department of the Environment and Energy and the Department of Agriculture and Water Resources have advised that no preliminary RIS or further contact with OBPR is required for subsequent tranches, as additional tranches were specifically contemplated in the original preliminary assessment. The Department of Agriculture and Water Resources Regulatory Reform Unit was consulted on this amendment and confirmed that no further regulatory assessment was required.

Details/Operation

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

The Regulations are the tenth tranche of regulations to extend transitional coverage for Basin State water resource planning arrangements until the SDLs commence on 1 July 2019.

Other

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 (Interaction with New South Wales Water Resource Plans) Regulations 2018*

Section 1 – Name

This section provides that the title of the Regulations is the *Water Amendment (Interaction with New South Wales Water Resource Plans) Regulations 2018*.

Section 2 – Commencement

This section provides for the *Water Amendment (Interaction with New South Wales Water Resource Plans)* (the Regulations) to commence the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

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

Section 4 – Schedules

This section provides that the *Water Regulations 2008* (the Principal Regulations) are 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

The Regulations insert additional items into the table in clause 1AA of Part 1 of Schedule 5 to the Principal Regulations, ‘*New South Wales—State plans that prevail over Basin Plan*’, which lists New South Wales (NSW) water sharing plans which are recognised as transitional water resource plans (TWRPs) under section 11A.02 of the Principal Regulations. The amended table items specify for each plan: the name of the State plan, the name of the water resource plan area, the start day, the end day and the accreditation day. The effect of the amended table is to extend recognition for nine NSW water sharing plans as transitional water resource plans.

The accreditation day is the day that the version of the water sharing plan, being recognised as a TWRP under the Act, commenced under NSW legislation.

The NSW plans listed in the table in clause 1AA of Part 1 of Schedule 5 to the Principal Regulations override the *Basin Plan 2012* (the Basin Plan) to the extent of any inconsistency for the period of their recognition by virtue of section 245 of the Act, as modified by section 11A.02 of the Principal Regulations, that is, with the exception of the Basin Plan water trading rules.

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

This item inserts a new item 1A to add the interim *Water Sharing Plan for the Belubula Regulated River Water Source 2012* (NSW) to the table, which has the effect of providing recognition for it as a transitional water resource plan, for the period starting on the day after the Regulations commenced and ending on 30 June 2019.

Item [2] – 1 Clause 1AA of Part 1 of Schedule 5 (after table item 3)

This item inserts a new item 3A to add the *Water Sharing Plan for the Lower Gwydir Groundwater Source 2003* (NSW) to the table, which has the effect of providing recognition for it as a transitional water resource plan for the period starting the day after the Regulations commenced and ending on 30 June 2019.

Item [3] – 1 Clause 1AA of Part 1 of Schedule 5 (cell at table item 4, column headed “End day”)

This item repeals the date in the column headed “End day” and substitutes it with the date “30 June 2019”. This has the effect of providing recognition for the *Water Sharing Plan for the Lower Lachlan Groundwater Source 2003* (NSW) as a transitional water resource plan for the period starting the day after the Regulations commenced and ending on 30 June 2019.

Item [4] – 1 Clause 1AA of Part 1 of Schedule 5 (after table item 4)

This item inserts a new item 4A to add the *Water Sharing Plan for the Lower Macquarie Groundwater Sources 2003* (NSW) to the table, which has the effect of providing recognition for it as a transitional water resource plan for the period starting the day after the Regulations commenced and ending on (30 June 2019).

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

This item inserts two new items, 5A and 5C, to add the *Water Sharing Plan for the Lower Murray Groundwater Source* (NSW) and the *Water Sharing Plan for the Lower Murrumbidgee Groundwater Sources 2003* (NSW) to the table, which has the effect of providing recognition for them as transitional water resource plans for the period starting the day after the Regulations commenced and ending on 30 June 2019.

The item would also insert a new item 5B to add an interim water resource plan—the *Water Sharing Plan for the Lower Murray Shallow Groundwater Source 2012* (NSW) to the table, which has the effect of providing recognitions for it as a transitional water resource plan for the period starting on the day after the Regulations commenced and ending on 30 June 2019.

Item [6] – 1 Clause 1AA of Part 1 of Schedule 5 (after table item 6)

This item inserts a new item 7A to add the interim *Water Sharing Plan for the Macquarie Bogan Unregulated and Alluvial Water Sources 2012* (NSW) to the table, which has the effect of providing recognition for it as a transitional water resource plan, for the period starting the day after the Regulations commenced and ending on 30 June 2019.

Item [7] – 1 Clause 1AA of Part 1 of Schedule 5 (after table item 14)

This item inserts a new item 7A to add the transitional *Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003* (NSW) to the table, which has the effect of providing recognition for it as a transitional water resource plan, for the period starting the day after the Regulations commenced and ending on 30 June 2019.

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 (Interaction with New South Wales Water Resource Plans) Regulations
2018*

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 extend recognition for nine water sharing plans made under NSW law as transitional water resource plans.

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 (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.

This legislative instrument ensures that NSW water resource planning arrangements are protected from inconsistency with the Basin Plan, with the exception of the Basin Plan water trading rules. The extended recognition of State plans as transitional water resource plans provides time for Basin States to undertake the comprehensive water management and planning required in the lead up to the commencement of the Sustainable Diversion Limits (SDLs) on 1 July 2019.

The Principal Regulations, incorporating these amendments, will continue to support access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses.

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

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 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. David Littleproud
Minister for Agriculture and Water Resources