

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the Environment and Water

Water Act 2007

*Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework)
Regulations 2025*

Legislative Authority

Subsection 256(1) of the *Water Act 2007* (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.

Subsection 100G(1) of the Water Act provides that the regulations may prescribe a code, to be known as the Water Markets Intermediaries Code (the Code), for the purposes of regulating the conduct of eligible water markets intermediaries towards participants and potential participants in the water market.

Part 5, Division 5 of the Water Act creates a statutory trust accounting (STA) framework for eligible water markets intermediaries (intermediaries). Section 100Q of the Water Act provides that the regulations may prescribe exceptions to the application of Division 5 where an intermediary maintains a trust account in accordance with a State or Territory law providing for a statutory trust accounting scheme. Sections 100R and 100V provide that certain requirements relating to the maintenance of trust accounts and the preparation of trust account statements and audit reports are to be specified in the Code.

Purpose

The purpose of the *Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework) Regulations 2025* (the Regulations) is to amend the *Water Regulations 2008* by prescribing the Code and prescribing requirements in relation to the STA framework, in addition to prescribing exceptions to the application of the STA obligations for intermediaries. The purpose of the amendment is to:

- improve the integrity of, and trust in, intermediaries;
- give users of those services greater protection and confidence;
- help increase participation in water markets; and
- subject intermediaries to broadly comparable regulatory safeguards that apply to non-water market intermediaries in other markets – such as stock and station agents, real estate agents and stockbrokers.

Background

The Water Act makes provision for the management of the water resources of the Murray-Darling Basin, and for other matters of national interest in relation to water and water information, and for related purposes.

In October 2022, the Australian Government announced its commitment to implementing the

Water Market Reform Roadmap (Roadmap) to restore transparency, integrity and confidence in Murray–Darling Basin water markets. This formed the Australian Government’s response to the 2021 Australian Competition and Consumer Commission (ACCC) Murray–Darling Basin water markets inquiry – final report (the ACCC Inquiry Report). The Roadmap recommended an enforceable mandatory code for intermediaries be implemented, at least across the Basin, applying to all tradeable water rights as part of a broader conduct and integrity legislation package.

The *Water Amendment (Restoring Our Rivers) Act 2023* (RoR Act) amended the Water Act to, among other things, establish a framework for the Code to be prescribed in regulations, as well as creating a STA framework for intermediaries.

The Code, as prescribed, provides a set of rules or standards of conduct for intermediaries, including the relationship between eligible water markets intermediaries and their clients. The ACCC is responsible for regulating the Code, including monitoring compliance and taking enforcement action when necessary or appropriate.

The STA framework places obligations on intermediaries to use a trust account when they receive money on behalf of another person in the course of providing water markets intermediary services. The Regulations prescribe certain requirements relating to the maintenance of trust accounts and the preparation of trust account statements and audit reports, as well as providing exceptions to the STA obligations with respect to persons maintaining trust accounts in accordance with certain state and territory laws to enable its effective operation in each state and territory.

Regulatory Impact

The department consulted with the Office of Impact Analysis (OIA) on the making of the Regulations. The OIA advised that the regulations are largely in scope of the original Impact Analysis Equivalent (IAE) process conducted in respect of the Roadmap, and additional analysis through an Addendum would not be required at this stage (OBPR22-01397).

Consultation

Extensive stakeholder consultations have been conducted since February 2024, both with key stakeholders and with the public.

Key stakeholders include the Australian Water Brokers Association (AWBA), the National Irrigators’ Council, Basin state authorities (New South Wales, Queensland, Victoria, South Australia and the Australian Capital Territory), Commonwealth agencies, water brokers, water exchanges, irrigation infrastructure operators, peak industry bodies for legal professionals, conveyancers and real estate agents in Basin states and the ACCC as the enforcement agency.

Targeted consultation seeking feedback from key stakeholders included:

- an Introductory Paper in February 2024;
- a Discussion Paper in May 2024, accompanied by online workshops for providing feedback; and
- a Policy Proposal Paper in July 2024, accompanied by an online information session about the proposals.

27 submissions were received in August 2024 in response to the Policy Proposal Paper.

The department has also met individually with key stakeholders.

The public consultation process involved:

- a Policy Position Paper in November 2024;
- an Exposure Draft of the Code in March 2025; and
- a Consultation Paper on STA exceptions and Code exemptions in March 2025.

For each public consultation, the department invited written feedback and held online information and Q&A sessions during the consultation period to assist stakeholders in providing feedback. 16 submissions were received in December 2024 in response to the Policy Position Paper. 17 submissions were received in April 2025 in response to the Exposure Draft and Consultation Paper.

Stakeholders actively engaged in consultation by participating in workshops and providing written submissions in response to policy proposals and the draft Regulations. Most of the feedback was supportive of the Code and the STA exceptions, however some individuals were concerned with the imposition of further regulatory burden. To address these comments, the Code obligations were amended to balance accommodation of practical business operations with maintenance of integrity in the intermediary services used by water market participants. Further, stakeholders raised concern about being unable to effectively prepare between the making of the Regulations and commencement on 1 July. For this reason, some Code obligations commence on 1 October 2025.

Incorporation by Reference

The Australian Auditing Standards are a set of standards issued or adopted by the Auditing and Assurance Standards Board. The set of standards is incorporated by reference as it is in force from time to time.

Subsection 100H(1) of the Water Act provides for the incorporation of material as in force or existing from time to time.

The set of Australian Auditing Standards is freely and readily available to persons interested or affected by the Regulations online at < <https://auasb.gov.au/standards-guidance/auasb-standards> >.

Privacy

Where an intermediary or their client is a natural person, the Regulations may require the collection, use or disclosure of personal information.

The Regulations impose a list of record keeping requirements on intermediaries in regulations 5.15 – 5.19. Some of these may require the collection of personal information, for example: paragraph 5.16(2)(a) requires an intermediary to keep certain client records for a specified time period, including the client's name, address, phone number and email address; and paragraph 5.23(2)(f) requires an intermediary to collect, as part of a trust account statement, a list of names of each person for whom the intermediary has prepared a client ledger. Any

personal information collected by intermediaries is subject to the confidentiality obligation in subregulation 5.03(6) to prevent any unauthorised use or disclosure.

Under section 100W of the Water Act the ACCC can request an intermediary to provide a trust account statement, trust account audit report or other related information under paragraph 100V(3)(b). Additionally, under section 100ZD of the Water Act the ACCC can request an intermediary to provide information or produce documents that the intermediary is required to keep, generate or publish under the Code. Information or documents that are compelled by the ACCC may contain personal information. The *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles contained in Schedule 1 of the Privacy Act would apply to any personal information collected by the ACCC.

Details/ Operation

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

Details of the Regulations are set out in Attachment A.

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.

ATTACHMENT A

Details of the *Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework) Regulations 2025*

Section 1 – Name

This section provides that the name of the instrument is the *Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework) Regulations 2025* (Amendment Regulations).

Section 2 – Commencement

This section provides for the Amendment Regulations to commence on 1 July 2025. This aligns with the commencement of Schedule 3, Part 1 of the *Water Amendment (Restoring Our Rivers) Act 2023*, which inserts Part 5 (Water Markets Intermediaries Code and trust accounting framework) into the *Water Act 2007* (the Water Act).

Section 3 – Authority

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

Section 4 – Schedule

This section provides that the *Water Regulations 2008* (Water Regulations) are amended as set out in Schedule 1. Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

SCHEDULE 1 – AMENDMENTS

Part 1 – Main Amendments

Water Regulations 2008

Item 1 – Subregulation 1.03 (note)

This item repeals the note and substitutes a new note including additional definitions relevant to the Amendment Regulations.

Item 2 – Subregulation 1.03(1)

This item inserts definitions of key terms used in the Amendment Regulations into subregulation 1.03(1) of the Water Regulations.

A new term “***Australian ADP***” is used in both the Water Markets Intermediaries Code (the Code) and the statutory trust accounting framework. The meaning of Australian ADI has the same meaning as in section 9 of the *Corporations Act 2001*, which provides:

Australian ADI means:

- (a) an ADI (authorised deposit taking institution) within the meaning of the *Banking Act 1959*; and
- (b) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

The “**financial year**” of an eligible water markets intermediary has the same meaning as in subsection 100V(6) of the Water Act, which provides:

(6) A **financial year** of an eligible water markets intermediary means:

- (a) if the eligible water markets intermediary is a body corporate to which section 323D of the *Corporations Act 2001* applies—a financial year of the body corporate (within the meaning of that section); and
- (b) in any other case—a year ending on 30 June.

The meaning of “**financial year**” is relevant to: statements about broking water accounts under regulation 5.13; the requirement for an intermediary to hold professional indemnity insurance under regulation 5.14; the requirement to maintain client ledger accounts for statutory trust accounts and broking water accounts under regulations 5.18 and 5.19; and the information and matters that must be contained in a trust account statements and trust account audit reports under regulations 5.23 and 5.24.

The term “**related party**” is relevant to the requirement to place the interests of the client before the interests of the intermediary or a related party to the intermediary in regulation 5.03; where there is a conflicting interest in eligible tradeable water rights between the intermediary or a related party and the client in regulation 5.05; where the intermediary or related party have a material personal interest in the eligible tradeable water right in regulation 5.06; and the eligibility requirements for auditors under regulation 5.25.

Item 3 – After Part 4

This item inserts a new heading: “**Part 5 – Water Markets Intermediaries Code and trust accounting framework**” into the Water Regulations after Part 4.

The new Part 5 has two divisions:

- “**Division 1 – Water Markets Intermediaries Code**”, which prescribes the Water Markets Intermediaries Code
- “**Division 2 – Exceptions to the application of the statutory trust accounting framework**”, which makes provision for and in relation to exceptions to the application of the statutory trust framework for eligible water markets intermediaries.

Division 1 - Water Markets Intermediaries Code

Division 1 has three subdivisions:

- “**Subdivision A – Preliminary**”, which provides the purpose of Division 1

- **“Subdivision B – Regulation of the conduct of eligible water markets intermediaries towards participants and potential participants in the water market”**, which contains obligations eligible water markets intermediaries must comply with where the intermediary is providing, or proposing to provide, a water markets intermediary service
- **“Subdivision C – Statutory trust accounting framework for eligible water markets intermediaries”**, which specifies certain requirements relating to the statutory trust accounting framework

Subdivision A – Preliminary

5.01 Purpose of this Division

This regulation provides that, for the purposes of subsection 100G(1) of the Act, this Division prescribes the Water Markets Intermediaries Code.

This regulation also provides that, for the purposes of subsections 100R(3) and 100V(2) and (3) of the Act, this Division prescribes matters relating to the statutory trust accounting framework for eligible water markets intermediaries established by Division 5 of Part 5 of the Act.

Subdivision B - Regulation of the conduct of eligible water markets intermediaries towards participants and potential participants in the water market

5.02 Application of this Subdivision

This regulation applies this Subdivision B to all eligible water markets intermediaries that provide, or propose to provide, a water markets intermediary service to a participant or potential participant in the water market, subject to the exceptions in subregulations (2) to (5).

Subregulation 5.02(2) provides an exception for a water markets intermediary service provided by a water market authority to approve, allow or register the trade or transfer of an eligible tradeable water right in exchange for a commission or fee. Water market authorities, including irrigation infrastructure operators (IIOs) who are water market authorities, usually charge a fee or commission to approve, allow or register a trade or transfer of eligible tradeable water rights. Subregulation 5.02(2) is necessary so that the Code does not apply to this service.

Subregulation 5.02(3) provides an exception for a water markets intermediary service provided by an IIO for the purpose of processing, on behalf of a member of the operator, the trade or transfer of an eligible tradeable water right between the member and a person who is not a member of the operator, in exchange for a commission or fee. The Water Market Reform Roadmap (Roadmap) recommended that the Code should not cover customer assistance services that an IIO provides in its capacity as the statutory holder of the bulk entitlement. As the statutory holder of the bulk entitlement, an IIO is required to trade on or off the IIO’s water access entitlement when a member wishes to trade outside the network. An IIO may charge a commission or fee for this process. Subregulation 5.02(3) is necessary so that the Code does not apply to this service.

Subregulation 5.02(4) provides that this Subdivision 2 only applies in relation to a water markets intermediary service that involves the provision of a trading platform – mentioned in paragraph (d) of the definition of eligible water markets intermediary in subsection 4(1) of the Act – where the trading platform is an online-enabled application, website or system and operates in accordance with the requirements in paragraphs 5.02(4)(b) and (c). While providing a trading platform is a water markets intermediary service, the term ‘trading platform’ is not defined in the Act, and this type of intermediary service is not limited to where the service is being provided for a fee or commission. The exception is necessary so that the Code does not apply to platforms that merely enable another person to advertise eligible tradeable water rights, without any matching or facilitation of trade for a fee or commission by the platform operator. This is intended to exclude such platforms as Gumtree or Facebook marketplace.

Subregulation 5.02(5) provides that this Subdivision 2 does not apply in relation to a water markets intermediary service provided in respect of eligible tradeable water rights that automatically transfer with land. Certain eligible tradeable water rights are tied to a particular parcel of land or land holding and automatically transfer with the land. Subregulation 5.02(5) is necessary so that Subdivision 2 does not apply in a situation where there is no market for these rights independent of the market for the real property.

5.03 General obligations

Requirements in relation to client interests and instructions

This regulation provides the general obligations which eligible water markets intermediaries must oblige by under the Code and prescribes the maximum civil penalty for failure to comply with the obligations. Subregulation 5.03(1) provides that an eligible water markets intermediary contravenes the subregulation if they, in the course of providing a water markets intermediary service to a person (the client), fail to comply with a requirement in subregulation (2), (3), or (4).

Subregulations 5.03(2) to 5.03(4) detail the general obligations of the intermediary in the course of providing the service, including placing the interests of the client before their own (or the interests of a related party), representing the interests of the client diligently and with due care and skill, and acting in accordance with the lawful instructions provided by the client.

Requirements in relation to confidential information

Subregulation 5.03(5) provides that an eligible water markets intermediary contravenes this subregulation if the intermediary provides a water markets intermediary service to a client or is engaged or instructed by a proposed client to provide a water markets intermediary service and fails to comply with the confidentiality requirements set out in subregulation 5.03(6).

Feedback was received that a clear obligation on intermediaries not to misuse or disclose confidential information provided by a client would be consistent with good commercial practice and would enhance industry trust in intermediaries.

Subregulation 5.03(6) provides that the intermediary can only use or disclose confidential information in certain circumstances. The confidential information must be obtained from a

client or proposed client, or otherwise obtained in the course of its dealings with the client or proposed client in respect of the service. Once obtained, the circumstances in which an intermediary can use or disclose such information are where there is authority from the client or proposed client, where the intermediary reasonably believes that the information is relevant to a possible contravention of a provision of the Water Act or a legislative instrument made under the Water Act and the use or disclosure is for the purpose of providing the information to an enforcement agency whose functions include the enforcement of the provision, or where the use or disclosure is otherwise required or authorised by law. This allows an intermediary to voluntarily disclose information of potential suspicious market activity, as well as disclosure compelled by the ACCC or other enforcement agency.

General requirements subject to contrary requirements in this Code

Subregulation 5.03(7) provides that a requirement in regulation 5.03 is subject to any contrary requirement in the Code. The exception is intended to recognise that an intermediary may at times, due to law or the client's freedom to act and instruct, need to comply with other Code requirements in a manner not in accordance with professional conduct or contrary to the client's interests or instructions.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.03 as compliance with the provision is an important part of the Code to ensure standards of conduct of intermediaries towards clients are met. The high penalty is proposed to reflect that potential for harm arising from a breach is serious, in terms of detriment to the client. There are also strong incentives to contravene if the intermediary is acting in their own interests.

5.04 Intermediary must deal in good faith

This regulation provides that an eligible water market intermediary must deal in good faith and prescribes the maximum civil penalty for a contravention of the regulation. An eligible water market intermediary is considered to have contravened subregulation 5.04(1) if the intermediary provides a water markets intermediary service to a client or is engaged or instructed by a proposed client to provide a water markets intermediary service and the intermediary fails to deal with the client or proposed client in good faith, within the meaning of the unwritten law from time to time.

Subregulation 5.04(2) provides matters to which the court may have regard when determining whether an intermediary has dealt with the client or proposed client in good faith. The list includes that a court may have regard to any other relevant matter that is not listed.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.04 as compliance with the provision is an important part of the Code to ensure standards of conduct of intermediaries towards clients are met. The high penalty is proposed to reflect that potential for harm arising from a breach is serious, in terms of detriment to the client.

5.05 How intermediary must deal with interests that conflict with the interests of clients

This regulation provides requirements relating to how an eligible water markets intermediary discloses conflicting interests in the provision of services. Where an eligible water markets intermediary provides a service to a client or is engaged or instructed by a proposed client to provide a water markets intermediary service, and the intermediary, or a related party of the intermediary, has an interest that conflicts with the interest of the client or proposed client in the provision of the service, or will have such an interest as a consequence of the provision of the service, and fails to disclose the conflicting interest in accordance with the requirements of subregulation 5.05(3) the intermediary may be liable to a civil penalty.

Subregulation 5.05(2) provides that the intermediary or related party has an interest that conflicts with an interest of the client or proposed client where the intermediary or related party receives, or expects to receive, a commission, fee or other benefit from a person other than the client or proposed client in relation to the provision of the service.

The result of this provision is that where an intermediary or related party has an interest that conflicts, the intermediary must disclose to the client or proposed client in writing, the nature of the interest and circumstances that give rise to the conflict, prior to providing the service or otherwise as soon as practicable after the intermediary first becomes aware. The intermediary must also request the client or proposed client to confirm, in writing, that the disclosure has been received. The regulation is focused on enabling client choice through appropriate disclosure and the professionalism of intermediaries to exercise care and skill to represent the interests of every client.

Subregulation 5.05(3) provides that a conflict of interest disclosure must be provided in writing, specify the nature of the interest giving rise to the conflict, be made before a service is provided or as soon as practicable after the intermediary becomes aware of the conflict, and request that the client confirm in writing that they have received the disclosure.

Subregulation 5.05(4) provides an exception for paragraph (1)(c), meaning the intermediary does not contravene the subregulation despite failing to disclose the conflicting interest. This exception applies in relation to a conflicting interest that a related party has, or will have, in the provision of service if the intermediary does not or cannot be reasonably expected to know, that the related party has, or will have, the conflicting interest.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.05 as compliance with the provision is an important part of the Code to ensure clients are aware of intermediary conflicts and able to choose another intermediary to avoid the conflict. If there was a failure to disclose a conflict, harm may arise because a client was operating under the assumption the intermediary was not conflicted and potentially incentivised to act in their own interests.

5.06 How intermediary must deal with material personal interests in eligible tradeable water rights

This regulation provides requirements relating to how an eligible water markets intermediary who provides a water markets intermediary service to a client or a proposed client must act where a material personal interest of the intermediary or of a related party of the intermediary exists or arises with respect to an eligible tradeable water right.

Where an intermediary, or a related party of an intermediary, has a material personal interest in an eligible tradeable water right or will have such an interest as a consequence of the provision of the service to a client or proposed service to a proposed client, a failure by an intermediary that is an IIO to comply with subregulation 5.06(2), or a failure by an intermediary, other than an IIO, to comply with subregulations 5.06(3) or (5) may result in a civil penalty.

The result of this provision is that where an intermediary or a related party of the intermediary has a material personal interest in an eligible tradeable water right, or will have such an interest as a result of providing an intermediary service, the intermediary must not provide the service to the client or proposed client in respect of those eligible tradeable water rights and must notify the client or proposed client as soon as practicable, in writing, that the intermediary is prohibited from providing the service. If the intermediary is not aware of the interest at the time the intermediary is engaged or instructed, the intermediary must make the notification after the intermediary first becomes aware of the interest (which may be after the intermediary begins to provide the service).

Where the intermediary is an IIO this prohibition does not apply. This exception from the prohibition recognises that some IIOs provide intermediary services in the absence of other intermediaries operating in that market (e.g. the market for internal trade between members). It also ensures that IIOs can attract board members and employees and reflects that usually IIOs provide intermediary services not as their core function, but as a low-cost service to their members rather than as a commercial operation. However, as provided in subregulation 5.06(2), an IIO must not, in providing the service, improperly use its status, power or authority to gain, or seek to gain, an advantage for itself or a related party. IIOs must also ensure that a related party does not improperly use its status, power or authority to gain, or seek to gain, an advantage for itself or for the intermediary in respect of the provision of the service – although, subregulation 5.06(7) provides that this only applies where the intermediary knows, or can reasonably be expected to know, that the related party is acting improperly.

Paragraph 5.06(4)(a) provides that the prohibition will also not apply where the client or proposed client is a related party of the intermediary and the intermediary is not providing, or proposing to provide, water markets intermediary services in relation to the relevant eligible tradeable water right to any person other than the client or proposed client.

Paragraph 5.06(4)(b) provides that the prohibition will also not apply where the service involves the live-matched trade or transfer of the relevant eligible tradeable water right, the client or proposed client is a related party of the intermediary, a related party of the intermediary has, or will have, a material personal interest in the relevant eligible tradeable water right, and the intermediary does not, or will not, have a material personal interest in the relevant eligible tradeable water right. Subregulation 5.06(5) provides that the intermediary must also ensure that the related party does not improperly use its status, power or authority to gain, or seek to gain, an advantage for itself or for the intermediary in respect of the provision of the service – although subregulation 5.06(7) provides that this only applies where the intermediary knows, or can reasonably be expected to know, that the related party is acting improperly.

Live-matching occurs where buy and sell offers for the trade of eligible tradeable water rights are listed on a trading platform and are accepted or matched on that trading platform without

further negotiation. Trading platforms providing live-matching services are sometimes referred to as ‘water exchanges’. This term is used in paragraph (d) of the definition of ‘eligible water markets intermediary’ in subsection 4(1) of the Water Act.

Subregulation 5.06(6) provides that the regulation will not apply in relation to a material personal interest that a related party has, or will have, in the relevant eligible tradeable water right, if the intermediary does not know, or cannot be reasonably expected to know, that the related party has, or will have, the material personal interest in the relevant eligible tradeable water right.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.06 as compliance with the provision is an important part of the Code to ensure that where interests are conflicting, the services are not provided. Alternatively, where this is not practicable, the services are subject to protections against the improper use of position to obtain advantage, so clients are protected. Breach of this regulation could cause serious harm to a client and the incentive for an intermediary to commit a breach is strong due to the fact that an intermediary has direct material interests that can be benefited by their unique knowledge of their clients – therefore, deterrence must outweigh that incentive.

5.07 Intermediary must provide general information about services and obligations

This regulation provides that within a reasonable period before an eligible water markets intermediary provides a water markets intermediary service to a person, a failure to provide to that person, in writing, the information listed in subregulation 5.07(2) may result in a civil penalty. Subregulation 5.07(4) provides that this penalty will not apply where the intermediary has provided the same information in writing to the person within the previous 12 months. Where there is no material change to the information that has previously been provided in writing in the past 12 months, this should be regarded as ‘the same information’.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.07 as compliance with the provision is an important part of the Code to ensure clients have information to inform their choice about which intermediary to engage. While the obligation is largely administrative, this penalty amount is necessary to deter an intermediary from not disclosing enforcement outcomes. An enforcement outcome against an intermediary may be determinative of whether to engage that intermediary.

5.08 Intermediary must provide additional information about particular services

This regulation provides that where an eligible water markets intermediary provides a water markets intermediary service to a person in exchange for a commission or fee, a failure to provide to that person, in writing, the information listed in subregulation (2) within the time limit specified for the information listed in subregulation (4), the intermediary may be liable to a civil penalty.

Other than trade or transfer outcomes, the information is to be provided before the intermediary begins to provide the service to the client, , or as soon as practicable after the intermediary becomes aware of new or changed information.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.08 as compliance with the provision is an important part of the Code to ensure that an intermediary and clients have sufficient information to enable the intermediary to act on correct client instructions and that both the client and intermediary have a record of these.

5.09 Intermediary must deal with complaints

This regulation provides requirements that an eligible water markets intermediary must comply with where the intermediary provides a water markets intermediary service to a person (a client), or is engaged or instructed by a person to provide a water markets intermediary service (a proposed client) and receives a complaint from the client or proposed client in the course of its dealings with the client or proposed client in respect of the service. The requirements for dealing with such a complaint are specified in subregulation 5.09(2).

Subregulation 5.09(3) provides that the intermediary must have a documented process for dealing with complaints that enables the intermediary to meet the requirements of subregulation (2). A failure by the intermediary to comply with subregulation (3) or a failure to comply with a requirement listed in subregulation (2) when dealing with a complaint will mean the intermediary may be liable to a civil penalty.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 100 penalty units. This is necessary and proportionate to the contravention of regulation 5.09 as compliance with the provision is an important part of the Code to ensure that intermediaries follow a transparent, fair and timely process when complaints are received.

5.10 Intermediary must have authority to trade or transfer eligible tradeable water rights

This regulation provides that where an eligible water markets intermediary makes an application to a water market authority to approve, allow or register the trade or transfer of an eligible tradeable water right in the course of providing water markets intermediary services, a failure to hold a written authority (to make the application) that meets the requirements listed in subregulation (2) from each person who holds a legal or equitable interest in the water right proposed to be traded or transferred by the application may result in a civil penalty. This obligation does not apply to irrigation infrastructure operators.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.10 as compliance with the provision is an important part of the Code to ensure trades are not unauthorised. There is serious potential for harm if an authority from all relevant parties is not held when submitting trades, and this has been noted by the industry association. Water market authorities have the ultimate ability to verify and control authorities as the handler of trade applications. However, the efficiency and integrity of trade application processes will increase if there is confidence that intermediaries are appropriately authorised.

5.11 Intermediary must have authority to act as an agent

This regulation provides that where an eligible water markets intermediary acts as an agent on behalf of a person who the intermediary is providing water markets intermediary services to, a

failure by the intermediary to hold a written authority from that person to act as their agent and that meets the requirements listed in subregulation 5.11(2) will mean the intermediary may be liable to a civil penalty.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.11 as compliance with the provision is an important part of the Code to ensure clients have certainty about their relationship with their intermediary and the actions the intermediary may take on their behalf.

5.12 Intermediary must maintain broking water accounts

This regulation provides that a failure by an eligible water markets intermediary to maintain or deal with one or more broking water accounts, in accordance with the regulation, when holding eligible tradeable water rights on behalf of a client (the *client* is the person the intermediary is providing water markets intermediary services to) may result in a civil penalty. This obligation does not apply to irrigation infrastructure operators.

A broking water account must be maintained with an agency of a State or an irrigation infrastructure operator and an intermediary must transfer eligible tradeable water rights into the account as soon as practicable after they are received from a client. The intermediary must also notify the ACCC in writing that the intermediary is maintaining the account within 3 months from the date the obligation on the intermediary arose to maintain the broking water account.

Subregulations 5.12(5) and (6) provide requirements for transferring eligible tradeable water rights in and out of broking water accounts. The requirements operate to avoid the comingling of the intermediary's personal water rights with those of clients and, with regulation 5.13, enhance transparency for clients and the ACCC of water broking accounts.

As a result of minimum tradeable volumes and rounding it is not always possible to transfer the exact amount out of a broking water account. Subregulations 5.12(5)(c) and 5.12(6) permit an intermediary to deal with remaining accumulated amounts. Disclosure is required as part of the broking water account statement under subregulation 5.13(3)(f), including if it was in accordance with information provided to the client under 5.07(2)(f).

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.12 as compliance with the provision is an important part of the Code to ensure that client water rights held by an intermediary are held separately to any personal water rights held by the intermediary, and that any transfers out of broking water accounts are appropriate.

5.13 Intermediary must prepare statements about broking water accounts

This regulation provides that, where an eligible water markets intermediary is required by regulation 5.12 to maintain a broking water account, a failure by an intermediary to prepare a statement for that account that complies with the requirements in subregulation 5.13(2) for each financial year of the intermediary may result in a civil penalty.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.13 as compliance with the provision is an important part of the Code to ensure that client water rights held by an intermediary are adequately accounted for and certain dealings occurred in the manner the client expected.

5.14 Intermediary must hold professional indemnity insurance

This regulation provides that a failure by an eligible water markets intermediary to, while providing a water markets intermediary service, hold professional indemnity insurance that covers the provision of the water markets intermediary service and that complies with the requirements in this regulation may result in a civil penalty.

Subregulation 5.14(2) provides that the insurance must be a minimum of \$5 million for any one claim and \$10 million in the annual aggregate, or, both of at least \$5 million for any one claim and in the annual aggregate in addition to including an automatic right of reinstatement of the annual aggregate. The subregulation provides intermediaries with options for insurance policy structure that ensure the policy is able to cover at least two claims at the maximum amount in any one policy year.

Subregulation 5.14(3) read together with subregulation (5) provides that where an irrigation infrastructure operator (IIO) has provided water markets intermediary services for eligible tradeable water rights with a total value of trades and transfers (excluding commissions and fees for these services) less than an average yearly sum of \$5 million (averaged over the previous 3 financial years), then the IIO must obtain an adequate and appropriate insurance amount to cover the liabilities that may arise in the course of the IIO providing its water markets intermediary services.

Subregulation 5.14(4) lists factors that are relevant to determining whether or not an insured amount is *adequate and appropriate*. What is an ‘adequate and appropriate’ amount of cover may differ from one intermediary to the next depending on the intermediary’s business and circumstances. The intermediary must make a reasonable and rational assessment of what amount of coverage is adequate and appropriate to cover potential claims, while matching the coverage to the specific risks and exposures of the intermediary. The factors in subregulation 5.14(4) are included to assist an intermediary with this assessment, and to guide consideration of adequacy and appropriateness for compliance and enforcement.

In accordance with section 100J of the Act, the penalty amount for contravening this regulation is 400 penalty units. This is necessary and proportionate to the contravention of regulation 5.14 as compliance with the provision is an important part of the Code to ensure that intermediaries obtain appropriate insurance to cover potential liability for client loss or damage arising from the intermediary’s services and to deter an intermediary from avoiding the cost of the insurance.

5.15 Intermediary must comply with record-keeping requirements

This regulation provides that a failure by an eligible water markets intermediary to keep a record specified in subregulation 5.15(2) for a 6-year period from the day the record was given to, or prepared by, the intermediary, may result in a civil penalty. The 6-year period aligns with the periods relevant to the enforcement provisions in the Water Act.

In accordance with section 100J of the Act, the penalty amount is 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.15 as compliance with the provision is an important part of the Code to ensure the ACCC is able to undertake compliance monitoring for other Code and statutory trust accounting obligations. The penalty is necessary to ensure intermediaries are appropriately deterred from non-compliance with record-keeping requirements.

5.16 Intermediary must comply with requirements for holding client and proposed client records

This regulation imposes record keeping obligations on eligible water markets intermediaries where the intermediary provides a water markets intermediary service to a person (the *client* for the purposes of the provision). This subregulation also imposes record keeping obligations on eligible water markets intermediaries where they are instructed or engaged to provide a water markets intermediary service to a person (the *proposed client* for the purposes of this provision).

Subregulation 5.16(1) provides that a failure by an eligible water markets intermediary to keep the records for clients or proposed clients listed in subregulation 5.16(2) or 5.16(4) for a period of 6 years (beginning on the day the record was given to, or created by, the intermediary) may result in a civil penalty.

Subregulation 5.16(3) provides that paragraph 5.16(2)(1) does not apply to a record that the intermediary is required to give to the Bureau of Meteorology under Part 7A of the Act.

In accordance with section 100J of the Act, the penalty amount is 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.16 as compliance with the provision is an important part of the Code to ensure the ACCC is able to undertake compliance monitoring for other Code obligations. The penalty is necessary to ensure intermediaries are appropriately deterred from non-compliance with record-keeping requirements.

5.17 Intermediary must comply with requirements for holding trust account records

This regulation imposes obligations on an eligible water markets intermediary required to maintain a trust account in accordance with Division 5 of Part 5 of the Act to keep records mentioned in subregulation (2) for the period of time mentioned in subregulation (3). This period is for 6 years (beginning the day the record was given to, or created by, the intermediary).

A failure to keep the records mentioned in subregulation (2) may result in the intermediary being liable to a civil penalty. The civil penalty amount is 200 penalty units. As is the case with other record keeping requirements in regulations 5.15 and 5.16, this penalty is necessary and proportionate to the contravention of regulation 5.17 as compliance with the provision is an important part of the Code to ensure the ACCC is able to undertake compliance monitoring for Code and statutory trust accounting obligations. The penalty is necessary to ensure intermediaries are appropriately deterred from non-compliance with record-keeping requirements.

5.18 Intermediary must maintain client ledgers for statutory trust accounts

This regulation provides that where an eligible water markets intermediary is required to maintain a trust account in accordance with section 100R of the Act in respect of money received on behalf of a person (the *client* for the purposes of the provision) in the course of providing water markets intermediary services during a financial year for the intermediary, a failure by the intermediary to maintain and keep a ledger (in respect of the money held in the account on behalf of the client during the financial year) in accordance with subregulation 5.18(2) will mean the intermediary may be liable to a civil penalty (subparagraph 5.18(1)(b)(i)). Subregulation 5.18(2) contains a list of information and records that must be included in the ledger.

A failure by the intermediary to give the client a statement from the ledger within 5 business days of receiving a request by the client for the statement will also mean the intermediary may be liable to a civil penalty (subparagraph 5.18(1)(b)(ii)).

In accordance with section 100J of the Act, the penalty amount is the same for each provision – 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.18 as compliance with the provision is an important part of the Code to ensure clients' money is appropriately accounted for and its handling can be made transparent for clients.

This provision, when read together with section 100R of the Water Act, operates to ensure that intermediaries maintain (as required) an appropriate trust account or accounts with an Australian ADI, and maintain and keep an appropriate ledger for each client that has had money held in a statutory trust account. The provision also ensures the client is able to access a statement from the ledger in a timely manner.

5.19 Intermediary must maintain client ledgers for broking water accounts

This regulation provides that where an eligible water markets intermediary is required to maintain a broking water account in accordance with regulation 5.12 for the purpose of holding eligible tradeable water rights on behalf of a client, a failure by the intermediary to maintain and keep a ledger (in respect of the water rights held in the account on behalf of the client during the financial year for the intermediary) in accordance with the requirements in subregulation 5.19(2) will mean the intermediary may be liable to a civil penalty (subparagraph 5.19(1)(b)(i)). Subregulation 5.19(2) contains a list of information that must be included in the ledger.

A failure by the intermediary to give the client a statement from the ledger within 5 business days of receiving a request by the client for the statement will also mean the intermediary may be liable to a civil penalty (subparagraph 5.19(1)(b)(ii)).

In accordance with section 100J of the Act, the penalty amount is the same for each provision – 200 penalty units. This is necessary and proportionate to the contravention of regulation 5.19 as compliance with the provision is an important part of the Code to ensure clients' water rights are appropriately accounted for and their handling can be made transparent for clients.

This provision, when read together with regulation 5.12, operates to ensure that intermediaries maintain (as required) an appropriate broking water account or accounts for holding clients' eligible tradeable water rights, and maintain and keep an appropriate ledger for each client

that has had water rights held in a broking water account. The provision also ensures the client is able to access a statement from the ledger in a timely manner.

5.20 Exemption by Minister

This regulation provides that the Minister may exempt an eligible water markets intermediary from the Code or from specified provisions of the Code.

Such an exemption needs to be made by legislative instrument, and in determining whether to make an exemption the Minister must consider the matters in subregulation 5.20(2).

The list in subregulation 5.20(2) does not limit the matters the Minister may consider.

5.21 Review of operation of this Code

This regulation provides that the Secretary must cause a review to be conducted in relation to the Code. The review must assess the Code's operation and the activities under, or in relation to, the Code during the 3-year period commencing on 1 July 2025. The Minister must receive a written report in relation to the review on or before 31 December 2028 and the Minister must cause a copy of the report to be tabled in each House of Parliament. The copy of the report must be tabled within 15 sitting days of that House after the Minister receives the report.

Before causing a copy of the report to be tabled, the Minister may redact information from the report if the Minister is satisfied of paragraph 5.21(5)(a) or (b) – that is, that the information is personal information, or that the release of the information would, or could reasonably be expected to: divulge confidential or commercially sensitive information; cause damage to the security, defence, or international relations of the Commonwealth; or cause damage to relations between the Commonwealth and a State or Territory.

Subdivision C - Statutory trust accounting framework for eligible water markets intermediaries

5.22 Designation of trust accounts

This regulation provides that, for trust accounts which are required to be maintained by an eligible water markets intermediary under subsection 100R of the Water Act, the name of the trust account must include the words “water market trust account” or “water markets trust account” and either the legal name of the intermediary or, subject to subregulation (3), a registered business name of the intermediary.

Subregulation 5.22(3) provides that a registered business name of the intermediary cannot be used if the registered business name is not used in connection with the provision by the intermediary of water markets intermediary services or if the registered business name is not permitted to be included in the name of the account by the Australian ADI that maintains the trust account.

5.23 Trust account statements – information and matters

This regulation provides that, for the purposes of paragraph 100V(2)(b) of the Water Act, the information and matters listed in subregulation 5.23(2) must be contained in a trust account statement prepared in relation to a trust account that is maintained by an eligible water markets intermediary under section 100R of the Water Act.

Subregulation 5.23(3) provides that if the trust account is maintained by the Australian ADI in separate branches, different trust account statements may be prepared in relation to the trust account maintained in the separate branches.

The provision, when read together with section 100V of the Water Act, operates to ensure the intermediary prepares a trust account statement it declares is true and correct that summarises the account details, balances, and transactions for a statutory trust account and all related client ledgers, and provides a reconciliation between all these.

5.24 Trust account audit reports – information and matters

This regulation provides that, for the purposes of paragraph 100V(2)(b) of the Water Act, the information and matters listed in subregulation 5.24(2) must be contained in a trust account audit report that is prepared by an auditor for a financial year in relation to the trust accounts maintained by an eligible water markets intermediary.

An auditor is expected to conduct an audit in accordance with Australian Auditing Standards. The intermediary as the responsible party to the assurance engagement is the preparer of the trust account statements and supporting evidence. The auditor's objectives are to obtain reasonable assurance about whether the trust account statements and relevant other historical financial information as a whole are free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes their opinion. The auditor may express an opinion on a range of matters related to Code and Act requirements such as internal controls, and related party relationships and transactions. The auditor is not responsible for preventing non-compliance and cannot be expected to detect non-compliance with all laws and regulations.

The reasonable assurance expected from an audit is a high level of assurance, but is not a guarantee that an audit conducted in accordance with the Australian Auditing Standards will always detect a material misstatement when it exists. In considering the materiality of misstatements an auditor would be expected to have regard to subsection 100G(1) of the Act that expresses the Code as being for the purposes of regulating the conduct of eligible water markets intermediaries towards participants and potential participants in the water market.

Auditors need to be aware that due to application provisions in Division 12.1 certain requirements of the Code will commence from 1 July 2025 and others from 1 October 2025.

5.25 Trust account audit reports – eligibility requirements for auditors

This regulation provides that, for the purposes of paragraph 100V(3)(a) of the Act, a trust account audit report prepared for an eligible water markets intermediary must be prepared by a person who satisfies the eligibility requirements in subregulation 5.25(2). A person need only meet one of the criteria listed in subregulation 5.25(2) – however, if a person meets one of the criteria listed in subregulation 5.25(3) then they are not eligible to prepare a trust account audit report for that intermediary.

Subregulation 5.25(3) provides that a person cannot prepare a trust account audit report for an eligible water markets intermediary where the person is a related party of the intermediary or an employee, director or partner of an entity that has, or has had in the previous three years, a contractual relationship with the intermediary, other than in relation to the provision of auditing services.

Division 2 - Exceptions to the application of the statutory trust accounting framework

5.26 Purpose of this Division

This regulation provides that, for the purposes of section 100Q of the Act, this Division 2 makes provision for and in relation to exceptions to the application of the statutory trust accounting framework for eligible water markets intermediaries that is found in Division 5 of Part 5 of the Act.

5.27 Exception to the application of the statutory trust framework

This regulation provides that, for the purposes of paragraph 100Q(1)(c) of the Act, Division 5 of Part 5 of the Act (Statutory trust accounting framework for eligible water markets intermediaries) does not apply in relation to specified classes of eligible water markets intermediaries when those intermediaries maintain a trust account in accordance with specified State or Territory laws.

The specified classes of eligible water markets intermediaries that may be excepted from Division 5 of Part 5 of the Act are provided for in regulation 5.28, and the State or Territory laws that such intermediaries may maintain a trust account in accordance with are provided for in regulation 5.29.

5.28 Specified class of eligible water market intermediaries

For the purposes of paragraph 100Q(1)(c) of the Act, this regulation provides two criteria that must be met in order for an eligible water markets intermediary to qualify for the specified class.

The first, as subregulation 5.28(2) provides, is that the intermediary must be enrolled as a legal practitioner of a federal court of the Supreme Court of a State or Territory, or, the intermediary must be licensed or registered under a State or Territory law as a real estate agent or conveyancer.

The second, as subregulation 5.28(3) provides, is that the intermediary, during the period when the intermediary maintains a trust account in accordance with a State or Territory law listed in regulation 5.29, is required by a law of the State or Territory to pay to the credit of the trust account any money received on behalf of another person in the course of providing water markets intermediary services. Subregulation 5.28(3) operates to ensure that an intermediary who receives money on behalf of another person in the course of providing water markets intermediary services is excepted from Division 5 of Part 5 of the Act where they are already required to pay such money into a trust account by a law of a State or Territory.

5.29 Prescribed State and Territory laws

This regulation prescribes a list of State and Territory laws for the purposes of 100Q(1)(b) of the Act. The prescribed State and Territory laws make provision for a statutory trust accounting scheme. Where the specified class of eligible water markets intermediaries maintains a statutory trust accounting scheme in accordance with a prescribed law, Division 5 of Part 5 of the Act does not apply.

5.30 Matters Minister must have regard to before State or Territory laws are prescribed

Section 100Q(2) of the Act provides that, before a law can be prescribed for the purposes of 100Q(1)(b) (in regulation 5.29), the Minister must be satisfied that the statutory trust accounting scheme for which the law makes provision is equivalent in substance to the statutory trust accounting framework established under Division 5 of Part 5 of the Act.

Section 100Q(3) of the Act provides that, when the Minister is determining whether or not he or she is satisfied of this, the Minister must have regard to prescribed matters, which are provided in this regulation 5.30.

This provision operates to ensure clients of excepted water market intermediaries are being provided with similar levels of protection of money. The matters listed ensure that when considering the equivalency of a statutory trust accounting framework the Minister has regard to requirements for audit and other external examination; accounting record keeping; protection, deposit and withdrawal of funds; and the consequences for contravention.

Part 2 – Application provisions

Water Regulations 2008

Item 4 – After Part 11A

This item inserts a new heading: “Part 12—Application, transitional and savings provisions” into the Water Regulations after Part 11A.

Division 12.1 – Amendments made by the Water Amendment (Water Markets Intermediaries and Trust Accounting Framework) Regulations 2025

The transitional provisions for the Amendment Regulations are included in Division 12.1.

12.01 Definitions for this Division

This regulation provides that the term “*amending instrument*” that is used in this Division 12.1 means the Amendment Regulations.

12.02 Application of Code obligations

This regulation provides that some provisions in the Amendment Regulations apply from 1 July 2025, and others apply from 1 October 2025. Regulation 12.02 also provides clarification on the application of references to financial years in those provisions.

Subregulation 12.02(1) provides that, where an engagement is entered into or instructions are received on or after 1 July 2025 in respect of an eligible water markets intermediary service, or where an eligible water markets intermediary service is provided to a person on or after 1 July 2025, regulations 5.03 – 5.06 (inclusive) and regulation 5.17 will apply.

Subregulation 12.02(2) provides that, where an engagement is entered into or instructions are received on or after 1 October 2025 in respect of an eligible water markets intermediary service, or where an eligible water markets intermediary service is provided to a person on or after 1 October 2025, regulations 5.07 – 5.16 (inclusive) and regulations 5.18 and 5.19 will apply. These provisions apply in addition to the provisions that commenced on 1 July 2025.

Subregulation 12.02(3) provides that for regulations 5.13, 5.14, 5.18 and 5.19, a reference to the term ‘financial year’ is taken to be a reference to a financial year beginning on or after 1 July 2025. This ensures that these provisions do not apply to a partial financial year that was in progress as at 1 July 2025 when the Code commenced.

Subregulation 12.02(4) provides that if a financial year for the intermediary begins on a day during the 3-month period beginning on 1 July 2025, then a requirement in paragraph 5.13(1)(b), 5.18(1)(b), or 5.19(1)(b) to prepare a statement or ledger that contains information in respect of the financial year does not apply to that part of the financial year that occurs during that 3-month period. In addition, a reference in paragraph 5.13(3)(d) to the opening balance of an account during the financial year is taken to be a reference to the opening balance of the account on 1 October 2025. This provides for the keeping of a client ledger in relation to a statutory trust account to commence at 1 October 2025, with no requirement to include client transactions on the statutory trust account from the preceding 3 months. It also ensures that the requirements to prepare broking water account statements and associated client ledgers are aligned with the commencement of the requirement to maintain and use broking water accounts in regulation 5.12.

The purpose of delaying commencement of some provisions until 1 October 2025 was due to feedback received from industry stakeholders which expressed concern around the intended commencement date of 1 July 2025 following closely after the final regulations were proposed to be made. Stakeholders requested that commencement be delayed to allow intermediaries time to:

- Uplift their systems to be compliant with the Code and statutory trust accounting (STA) framework;
- Obtain legal advice and engage auditors, noting that these professionals need a final copy of the regulations before they can provide such advice or services;
- Adjust their processes, procedures and forms to be compliant with the Code and STA framework; and
- Train staff in any new systems, processes and procedures.

In response to feedback, the Australian Government decided to delay commencement until 1 October 2025 for those detailed provisions which require time to prepare for implementation, such as record-keeping and client ledgers, and that the principled Code obligations, such as acting in good faith and dealing with conflicts of interest, and provisions supporting the STA framework, would remain with a commencement date of 1 July 2025.

Phasing commencement ensures water market participants have protections in place from 1 July 2025, while giving intermediaries the time they need to prepare to be compliant with the more detailed obligations.

Statement of Compatibility with Human Rights

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

Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework) Regulations 2025

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 purpose of the *Water Amendment (Water Markets Intermediaries Code and Trust Accounting Framework) Regulations 2025* (Amendment Regulations) is to amend the *Water Regulations 2008* by prescribing the Code and prescribing requirements for exceptions to the application of the STA obligations for water markets intermediaries. The purpose of the Amendment Regulations is to:

- improve the integrity of, and trust in, water markets intermediaries;
- give users of those services greater protection and confidence;
- help increase participation in water markets; and
- subject water markets intermediaries to broadly comparable regulatory safeguards that apply to non-water markets intermediaries in other markets – such as stock and station agents, real estate agents and stockbrokers.

Human rights implications

The Amendment Regulations engage the following rights:

- the right to a fair trial and equality before the courts under Article 14(1) of the International Covenant on Civil and Political Rights (the ICCPR);
- the right to privacy and reputation under Article 17 of the ICCPR;

Right to a fair trial and equality before the courts

Article 14(1) of the ICCPR provides the right to a fair hearing and equality before the courts. The right applies to criminal and civil proceedings and in cases before both courts and tribunals and provides that, in the determination of any criminal charge against a person, or of their rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14(5)).

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of the ICCPR, so that an assessment can be made as to

whether the provision is consistent with the requirements of the ICCPR. Determining whether penalties could be considered criminal under international human rights law requires consideration of the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties, and the severity of the penalties

The Amendment Regulations expressly classify each penalty under the Water Market Intermediaries Code (the Code) as a civil penalty. The provisions of the Code create solely pecuniary penalties in the form of a debt payable to the Commonwealth. The purpose of these penalties is to ensure compliance and enforcement with the Code and promote the integrity of, and trust in, water markets intermediaries. The civil penalty provisions do not impose criminal liability, and a finding by a court that they have been contravened would not lead to the creation of a criminal record. The civil penalties would only apply to eligible water markets intermediaries (within the definition of *eligible water markets intermediary* in subsection 4(1) of the Water Act) that provide a water markets intermediary service to a person in accordance with regulation 5.02 of the Amendment Regulations – the civil penalties do not apply to the general public. These factors all suggest that the civil penalties imposed by the Amendment Regulations are civil rather than criminal in nature. As such, they would not engage criminal process rights provided for by Articles 14 and 15 of the ICCPR.

The Amendment Regulations incorporate sixteen new civil penalty provisions into the Water Regulations where a person has contravened certain requirements. The new civil penalty provisions are contained within the Code (the new Part 5, Division 1).

Considering the matters discussed above, the civil penalties in the Amendment Regulations are necessary and reasonable as they balance the integrity of the Code and the need for compliance and enforcement with right under the ICCPR. The Amendment Regulations are compatible with the right to a fair hearing provided for by Article 14 of the ICCPR because, to the extent that it engages those rights, it does not unduly limit them.

Right to privacy and reputation

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home, or correspondence, as well as attacks on their honour or reputation. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR, and be reasonable in the circumstances. The UNHRC has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The UNHRC has not defined 'privacy', but it is generally understood to comprise of a freedom from unwanted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The collection and sharing of information (public or otherwise) may be considered to engage and offend the right to privacy.

Personal information may be required to be collected, used or disclosed where an eligible water markets intermediary, or their client, is a natural person. For example, the new regulation 5.16 requires an eligible water markets intermediary to keep certain client records for a specified time period, including the client's name, address, phone number and email address. Any personal information collected by eligible water markets intermediaries is

subject to the confidentiality obligation in subregulation 5.03(6) to prevent any unauthorised use or disclosure.

Section 100W of the Water Act provides that the ACCC may request a trust account statement or trust account audit report (or any information or documents required to accompany the audit report under paragraph 100V(3)(b)). Additionally, under section 100ZD of the Water Act the ACCC can request an eligible water markets intermediary to provide information or produce documents that the intermediary is required to keep, generate or publish under the Code. Information or documents that are compelled by the ACCC may contain personal information.

To the extent the ACCC obtains personal information in its role as regulator of the Code, it would be done so in accordance with the conditions set out in the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles contained in Schedule 1 of the Privacy Act, and for the reasonable and legitimate objectives of regulating the Code and the statutory trust accounting framework. Participation in water markets is voluntary and therefore, any disclosure of personal information will be in relation to persons who have agreed to interact with water markets. Accordingly, the Regulations are compatible with the right to privacy and reputation provided for by Article 17 of the ICCPR

Conclusion

The Amendment Regulations are compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary, and proportionate to the legitimate goals of the Amendment Regulations.

**Senator the Hon. Murray Watt
Minister for the Environment and Water**