**Senator the Hon Marise Payne**
Minister for Foreign Affairs
Minister for Women

MC19-003559

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the correspondence of 25 June 2019 from the Secretary of the Senate Standing Committee on Regulations and Ordinances, requesting additional information as referred to in the Committee's Delegated Legislation Monitor 2 of 2019 about the *Charter of the United Nations (Sanctions – South Sudan) Amendment (2019 Measures No. 1) Regulations 2019* (the Regulations).

The Regulations introduce an arms embargo in relation to South Sudan in accordance with United Nations Security Council (UNSC) Resolution 2428. The arms embargo was adopted by the UNSC in the context of continued hostilities and violations of the peace agreements with respect to South Sudan. It requires all Member States to implement an arms embargo in relation to South Sudan.

I trust the attached information will assist the Committee in finalising its consideration of the Regulations.

Yours sincerely

**MARISE PAYNE**

Encl.

22 JUL 2019

**Response to the Senate Standing Committee on Regulations and Ordinances**

**(Delegated Legislation Monitor 2 of 2019)**

The Committee has requested advice as to the justification for:

1. including offence provisions, which are punishable by up to ten years imprisonment, in delegated legislation, rather than primary legislation; and

2. applying strict liability to whether a person holds a permit granted under sections 4C or 4E for the purposes of the offences in sections 4B and 4D (respectively) of the instrument, with reference to the relevant principles in the Attorney-General's Department's 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (the Guide).

## 1. Inclusion of offence provisions in delegated legislation

The UN sanctions environment is dynamic, with the UN Security Council imposing sanctions to respond to threats to international peace and security. Australia's UN sanctions framework operates in a manner that ensures Australia is able to give legal effect to its international law obligations and respond to such threats in a timely fashion.

The *Charter of the United Nations Act 1945* (CoTUNA) enables Australia to apply sanctions giving effect to certain decisions of the United Nations Security Council (UNSC), through the making of specific regulations. There are currently 16 UNSC sanctions regimes. As Australia is obliged to give effect to UNSC resolutions as a matter of international law, and is not able to unilaterally determine how they will apply to Australia, it is both appropriate and practical that they be implemented through Regulations made by the Governor-General sitting in Council.

As the Guide set outs, the content of an offence set out in an Act or Regulation should be clear from the offence provision itself, although the offence may rely on the Act or Regulation, or another instrument to define terms used to give context to the offence. As noted in the Guide, while it is desirable for the content of an offence to be clear on the face of legislation, there are circumstances where it appropriate for the content of an offence to be set out by Regulation [see 2.3.4].

One of the examples given in the Guide as to when the content of an offence may be appropriately delegated to Regulations is where elements of the offence are to be determined by an international instrument in order to comply with Australia's obligations under international law. Here, the Regulations give effect to Australia's obligations to implement UNSC resolutions as they relate to sanctions.

The legal framework for the domestic implementation of UNSC resolutions was carefully designed to ensure that only provisions giving effect to UNSC sanction obligations can be a UN sanction enforcement law and subject to the offence provisions set out in section 27 of CoTUNA. Specifically, subsection 2B(3) provides:

> *The Minister may only specify a provision [to be a UN sanction enforcement law] to the extent that it gives effect to a decision that:*

*(a) the Security Council has made under Chapter VII of the Charter of the United Nations; and*

*(b) Article 25 of the Charter requires Australia to carry out;*

*in so far as that decision requires Australia to apply measures not involving the use of armed force.*

UNSC sanctions-related resolutions, even though they have different country focuses, address conduct of significant global seriousness. As such, it is appropriate for the penalty to be set out in primary legislation and for the offence content to be detailed in Regulations that reflect the terms of the relevant UNSC resolutions. Parliament , in passing CoTUNA, has determined that contravening a UN sanction law is a serious offence that ought to carry the significant penalties set out in CoTUNA.

Importantly, regulations made under the CoTUNA are registered on the Federal Register of Legislation and made available on the Department of Foreign Affairs and Trade sanctions website page.

## 2. Strict liability

The Committee has requested advice as to the justification for applying strict liability to the elements of the offences in subsections 4B(1)(b) and 4D(1)(b) in the instrument with reference to the relevant principles in the Guide. The Committee has specifically asked how requiring proof of fault in relation to subsections 4B(1)(b) and 4D(1)(b) of the Regulations would undermine deterrence and what the legitimate grounds are for penalising persons lacking fault in respect of these elements.

The Regulations contain two new offence provisions: a prohibition relating to a sanctioned supply and a prohibition relating to a sanctioned service. Both provisions contain multiple physical elements to the offence. The application of strict liability does not apply to all elements of these offences. It only applies to *one* factual element - whether or not the relevant conduct was authorised by a permit. Significantly, to prove the offence, it is still necessary to show that a person intended to engage in the conduct constituting the offence. As a strict liability element, a defendant can still rely on the 'mistake of fact' defence available under section 9.2 of the Criminal Code. Accordingly, where a person can show they were under a mistaken but reasonable belief about certain facts, which if true would render the conduct non-criminal, they will not be convicted of the offence even if it can be proved that they intended to deal with a designated person or entity or with a controlled asset.

As set out in the Guide [2.2.6], applying strict liability to a *particular* physical element of an offence (as opposed to *all* physical elements) can be justified where:

1. requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in repsect of that element; or

2. the element is a jurisdictional element rather than one going to the essence of the offence.

In the case of these Regulations, we consider that the first exception applies. Specifically, the application of strict liability to a single physical element of the offences relating to the existance of a permit is necessary to ensure the integrity of Australia's South Sudan sanctions regime.

In the absence of the strict liability element of the offences in subsections 4B(1)(b) and 4D(1)(b) of the South Sudan Regulations, the corresponding fault element that would apply would be recklessness (the automatic default element set out in section 5.6 of the Criminal Code). This would require the prosecution to establish beyond reasonable doubt that a person who has breached UN sanctions was aware of the substantial risk that the dealing was not authorised by a permit and that it was unjustifiable to take the risk. As the courts have interpreted substantial risk as requiring conscious awareness (as opposed to the risk being obvious or well-known), this would require proof of the alleged offender's subjective appreciation of the circumstances. Given the difficulty in obtaining this form of evidence to satisfy the evidentiary threshold 'beyond reasonable doubt', and the consequent improbability of a successful prosecution, the sanctions regime would not have its intended deterrent effect.

Sanctions operate to prohibit particular activities, with very limited exceptions. Conduct which would be otherwise prohibited is *only* authorised where a permit has been issued. Permits can only be issued in a limited range of cirucmstances, as determinded by the UNSC and as set out in the relevent UNSC resolution/s.

Applying strict liability to whether the conduct in question is authorised by a permit, rendering it a factual question, maintains the integrity of the permit system and its strict adherence to the narrow range of exceptions allowed by the UNSC in relation to a particular sanctions regime. It is also consistent with the Government's position that Australians and Australian companies should be encouraged to adopt the highest ethical standards in adhering to Australia's sanctions regimes.

The absence of the element of fault (strict liability) in subsections 4B(1)(b) and 4D(1)(b)of the Regulations, is justified as it allows Australia to uphold a robust sanctions system in line with its international sanctions obligations and that otherwise prohibited conduct is permited *only* in circumstances specifically contemplated by the UNSC in establishing a particular sanctions regime.

**Reversal of evidential burden of proof**

The Committee has drawn attention to the inclusion in the instruments of provisions (that is subsections 4B(7) and 4C(7)) which reverse the evidential burden of proof, in circumstances where, in its view, relevant matters may not be peculiarly within the knowledge of the defendant. This relates to the circumstance of a supply or service being authorised by a permit granted by a foreign country.

The Minister takes note of the observation but remains of the view that the defendant should bear the evidential burden of proof, that such matters are peculiarly within the knowledge of the defendant, and that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MS19-000364

25 JUL 2019

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
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Dear Chair

Thank you for your letter of 4 April 2019, concerning the Child Care Subsidy Minister's Amendment Rules (No 1) 2019 ('the Amendment Rules').

I appreciate the opportunity to provide the Committee with further clarification. The explanatory notes for the Amendment Rules have been revised to include additional detail under the consultation heading. A copy of the revised explanatory notes is attached.

Thank you for raising this matter with me.

DAN TEHAN

# Explanatory Statement

**Circulated by the Minister for Education**

***Child Care Subsidy Minister's Amendment Rules (No. 1) 2019***

## Summary

The *Child Care Subsidy Minister's Amendment Rules (No. 1) 2019* (Amendment Rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) and subitem 12(1) of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Jobs for Families Child Care Package Act).

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules). Part 7 of the Principal Rules sets out transitional rules relating to the implementation of the Jobs for Families Child Care Package Act. The amendments to the Principal Rules are made under subsection 85GB(1) of the Family Assistance Act and subitem 12(1) of Schedule 4 to that Act construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subitem 12(3) of Schedule 4 to the Jobs for Families Child Care Package Act provides that, without limitation, rules made under subitem 12(1) that are made on or before 2 July 2020 may provide that (amongst other things) the Family Assistance Act has effect with any modifications prescribed by the rules. In allowing, for a time, the rules to modify the operation of the Family Assistance Act, item 12 of Schedule 4 to the Jobs for Families Child Care Package Act operates as a so-called "Henry VIII clause". The purpose of item 12 of Schedule 4 is set out in the Explanatory Memorandum to the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016.

The Amendment Rules modify the operation of section 85CE of the Family Assistance Act. In particular, the modification to section 85CE will enable the Secretary to make a determination that a child was at risk of serious abuse or neglect on a day before 1 July 2019, without the approved child care provider that provided care to the child on that day having to apply for such a determination. The effect of a determination under section 85CE of the Family Assistance Act is that the parent or guardian of the child, or the child care provider providing care to the child, is entitled to ACCS (child wellbeing) for the period of the determination.

The Amendment Rules also make minor amendments to update references in the Principal Rules to a new version of the *In Home Care National Guidelines*, which provide information and guidance on the operation of the in home care program.

## Background

Under the Family Assistance Act, a person whose child receives care from an approved child care service is entitled to an amount of child care subsidy (CCS) to offset the cost of that care. Usually, the maximum amount of CCS that a person is entitled to is 85% of the cost of the care (subject to a maximum hourly rate cap). However, under Division 3 of Part 4A of the Family Assistance Act, in specified circumstances a person may be eligible for additional child care subsidy (ACCS), which covers the full cost of the care of the child (subject to a maximum hourly rate cap).

Under Subdivision A of Division 3 of Part 4A, a person is eligible for ACCS (child wellbeing) for a child for a period for which:

- an approved child care provider has issued a certificate under section 85CB; or
- the Secretary has made a determination under section 85CE.

The provider's certificate under section 85CB and the Secretary's determination under section 85CE must start on the Monday of a week that includes a day in which the child was at risk of serious abuse or neglect.

An approved child care provider can only backdate the start of a certificate under section 85CB up to 28 days, and the certificate can only last a maximum of 6 weeks. If the child continues to be at risk of serious abuse or neglect thereafter, the provider can apply to the Secretary for a determination under section 85CE.

The Secretary can only make a determination under section 85CE on application by an approved child care provider, and the determination can only be backdated up to 28 days before the application was made.

Unfortunately, due to transition and Child Care Subsidy System (CCSS) information technology issues, a number of approved child care providers have been unable to issue certificates under section 85CB, or apply for determinations under section 85CE, that cover periods for which children in their care have been at risk of serious abuse or neglect.

This has meant that there have been periods since 2 July 2018 during which there have been children at risk of serious abuse or neglect and in relation to which provider certificates under section 85CB and Secretary determinations under section 85CE are not able to be made. While CCS has been paid for those periods, the higher rate ACCS has not been able to be paid.

The Amendment Rules address this by empowering the Secretary to make a determination under section 85CE on his or her own initiative – that is, without requiring an application by an approved child care service – and allowing such a determination to be backdated to cover any period during which the child was at risk of serious abuse or neglect.

The modifications to section 85CE made by the Amendment Rules only operate in relation to at risk days occurring before 1 July 2019, by which time processes and systems supporting the issue of certificates and the making of determinations for ACCS (child wellbeing), and any gaps identified in coverage of those instruments, will have been addressed.

## Consultation

The Amendment Rules have been drafted to take into account feedback from providers and families since the implementation of the new child care package. Significant stakeholder feedback from approved providers, and indirectly from affected families, pointed to transitional and information technology related issues that were having an unintended impact on the issuing of certificates and determinations with respect to the Child Wellbeing element of the Additional Child Care Subsidy. To maintain the intent of the primary legislation, enable a timely response, and to minimise the impact on vulnerable families and providers, further consultation on the Amendment Rules was not considered necessary and so was not undertaken.

## Regulatory Impact Statement

The amendment to enable the Secretary to make a determination that a child was at risk of serious abuse or neglect on a day before 1 July 2019, without the approved child care provider that provided care to the child on that day having to apply for such a determination, has no regulatory impact (OBPR reference 24776).

## Explanation of the provisions

**Preliminary**

Sections 1 to 4 of the Amendment Rules are formal provisions providing for the name, commencement, authority etc. for the instrument.

**Section 1** states the name of the instrument as the *Child Care Subsidy Minister's Amendment Rules (No. 1) 2019*.

**Section 2** states that all provisions of the Amendment Rules commence on the day after they are registered on the Federal Register of Legislation.

**Section 3** states that authorities to make the Amendment Rules are the Family Assistance Act and the Jobs for Families Child Care Package Act.

**Section 4** provides that the Principal Rules are amended as set out in the Schedule to the instrument.

**Schedule – Amendments to *Child Care Subsidy Minister's Rules***

In December 2018, a new version of the *In Home Care National Guidelines* was published by the Department of Education and Training. Those guidelines provide information and guidance on the operation of the in home care program. **Items 1 and 2** repeal and replace subsection 48A(8) and paragraph 48A(10)(c) of the Principal Rules, to update the references in those provisions to the *In Home Care National Guidelines* published in December 2018.

**Item 3** inserts a new Division 4A into Part 7 of the Principal Rules. The new Division 4A consists of a new section 69A, which modifies the operation of section 85CE of the Family Assistance Act.

New subsection 69A(2) inserts a new subsection (4A) into section 85CE, which empowers the Secretary to make a determination under section 85CE (that a child was at risk of serious abuse or neglect on a day before 1 July 2019 (***at risk day***)) on his or her own initiative – that is, without needing an application from an approved child care provider under sub-section 85CE(1)).

New subsection 69A(3) repeals and replaces paragraph 85CE(5)(a), which relates to when a determination under the section takes effect. The replacement paragraph continues to provide that a determination must commence on the Monday of a week that includes an at risk day, and continues to limit the backdating of a determination made in response to an application from a provider to 28 days. However, the paragraph does not limit the backdating of a determination made on the Secretary's own initiative under new subsection (4A).

In summary, the modifications to section 85CE of the Family Assistance Act made by new section 69A of the Principal Rules allow the Secretary to make a determination that covers any period that a child was at risk of serious abuse or neglect up until 1 July 2019, thereby entitling the parent or guardian of the child, or the approved child care provider that provided care to the child during that period, to ACCS for the period.

## Statement of Compatibility with Human Rights

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

***Child Care Subsidy Minister's Amendment Rules (No. 1) 2019***

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 *Child Care Subsidy Minister's Amendment Rules (No. 1) 2019* (Amendment Rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) and subitem 12(1) of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Jobs for Families Child Care Package Act).

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules). Part 7 of the Principal Rules sets out transitional rules relating to the implementation of the Jobs for Families Child Care Package Act. The Amendment Rules insert a new transitional provision into Part 7 of the Principal Rules. The new provision modifies the operation of section 85CE of the Family Assistance Act.

Under the Family Assistance Act, a person whose child receives care from an approved child care service is entitled to an amount of child care subsidy (CCS) to offset the cost of that care. Usually, the maximum amount of CCS that a person is entitled to is 85% of the cost of the care (subject to a maximum hourly rate cap). However, under Division 3 of Part 4A of the Family Assistance Act, in specified circumstances a person may be eligible for additional child care subsidy (ACCS), which covers the full cost of the care of the child (subject to a maximum hourly rate cap).

Under Subdivision A of Division 3 of Part 4A, a person is eligible for ACCS (child wellbeing) for a child for a period for which:

- an approved child care provider has issued a certificate under section 85CB; or
- the Secretary has made a determination under section 85CE.

The provider's certificate under section 85CB and the Secretary's determination under section 85CE must start on the Monday of a week that includes a day in which the child was at risk of serious abuse or neglect.

An approved child care provider can only backdate the start of a certificate under section 85CB up to 28 days, and the certificate can only last a maximum of 6 weeks. If the child continues to be at risk of serious abuse or neglect thereafter, the provider can apply to the Secretary for a determination under section 85CE.

The Secretary can only make a determination under section 85CE on application by an approved child care provider, and the determination can only be backdated up to 28 days before the application was made.

The modification to section 85CE made by the Amendment Rules with enable the Secretary to make a determination that a child was at risk of serious abuse or neglect on any day before 1 July 2019, without the approved child care provider that provided care to the child on that day having to apply for such a determination.

## Human rights implications

The Amendment Rules engage the following rights:

- the rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 3, 18, 23 and 27;
- the right to work and the right to social security under Articles 6 and 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to equality and non-discrimination under Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the CRC.

***Rights of the child***

Article 3(1) of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(3) requires institutions and services responsible for the care of children to conform to standards established by competent authorities, particularly in the areas of safety and health.

Article 18(2) also requires States Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.

Article 18(3) requires States Parties to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.

Article 23 recognises the right of the disabled child to special care and ensure the extension of assistance, subject to available resources, to the child and those responsible for his or her care, for which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

ACCS (child wellbeing) provides assistance to support access to child care for children who are at risk of serious abuse or neglect as a result of current or past circumstances or events. The definition of 'at risk' also includes situations where the child is likely to experience those circumstances in the future.

By enabling the Secretary to issue a determination under section 85CE of the Family Assistance Act without requiring an application from an approved child care service, and enabling that determination to cover any period from 2 July 2018 to 29 December 2019, the Amendment Rules will expand access to ACCS (child wellbeing). This promotes the rights of the child referred to above.

***Right to work and social security***

Article 6 of the ICESCR requires that States Parties recognise the right to work, including through developing policies and techniques to achieve steady economic, social and cultural development and full and productive employment. Article 9 recognises the right of everyone to social security.

The Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The right to work goes to the core objective of the CCS and ACCS payments, to help parents who want to work, or who want to work more. The Amendment Rules reinforce this commitment by ensuring child care fee assistance can be paid in a broader range of circumstances that will further the capacity of individuals to engage in work, study, training and other activities that promote workplace participation and engagement.

***Right to equality and non-discrimination***

The Amendment Rules support the purpose and ethos of Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the CRC, which is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons.

In particular, Article 2 of the CRC provides that every child has the right to equal treatment, without discrimination of any kind, irrespective of the social origin, property, disability, birth or other status of the child or the child's parents or guardian.

Article 2 of the ICCPR provides that States Parties must undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR, without distinction of any kind, such as social origin, birth or other status.

Article 16 of the ICCPR requires that everybody shall have the right to recognition everywhere as a person before the law.

Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, States Parties are required to ensure that the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as social origin, birth or other status.

The provision of increased access to quality education and care to vulnerable children who may not otherwise have opportunity through approved child care service, enables children and families facing unique and challenging circumstances to have equal opportunity to access quality education and care arrangements.

## Conclusion

The Amendment Rules are compatible with human rights. By enabling the Secretary to issue a determination under section 85CE of the Family Assistance Act without requiring an application from an approved child care service, and enabling that determination to cover any period from 2 July 2018 to 29 December 2019, the measures in the Amendment Rules advance human rights under the CRC, ICESCR and ICCPR .

**Dan Tehan**
**Minister for Education**

# SENATOR THE HON MATHIAS CORMANN

**Minister for Finance**
**Leader of the Government in the Senate**

REF: MS19-000662

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I refer to the Committee's request of 15 February 2019 for further information on the Emerging Markets Impact Investment Fund that is in the following instrument:

- The *Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2018*.

The Minister for Foreign Affairs, Senator the Hon Marise Payne, who is responsible for the item in the instrument, has provided the attached response to the Committee's request.

I trust the advice will assist the Committee with its consideration of the item. I have copied this letter to the Minister for Foreign Affairs.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
**Minister for Finance**

25 July 2019

**Response to request for more detailed information from the Senate Standing Committee of Regulations and Ordinances**

*Financial Framework (Supplementary Powers) Amendment) Foreign Affairs and Trade Measures No. 2) Regulations 2018* **[F2018L01723]**

*Response provided by the Minister for Foreign Affairs, Senator the Hon Marise Payne*

**The Committee requests more detailed advice as to the characteristics of funding and investment decision made by the Emerging Markets Impact Investment Fund that would justify excluding independent review, by reference to the established grounds for excluding review set out in the Administrative Review Council's guidance document, What decisions should be subject to merit review?**

As noted in the explanatory statement, the Investment Committee, the Investment Manager and the Trustee of the Emerging Markets Impact Investment Fund (EMIIF) will all be independent of the Commonwealth. The Commonwealth will not have direct influence over the decisions of the Investment Committee. Once the funds are settled in the trust account, they will no longer be considered Commonwealth funds. This means that the investment/funding decisions will not be government decisions subject to administrative law and a merits review process, consistent with the Australian Administrative Law Policy Guide. The exclusion of independent review is justified because the Commonwealth will not be the decision-maker in relation to investment/funding decisions.

# THE HON DAVID COLEMAN MP
## MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS19-002190

Senator the Hon Concetta Fierravanti-Wells (Chair)
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
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Dear Chair

**Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]**

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 4 April 2019, in which the Committee requested further information about the *Immigration (Guardianship of Children) Regulations 2018* (the Regulations).

In response to my previous letter of 13 March 2019, the Committee has sought further advice as to whether consideration has been given to amending the *Immigration (Guardianship of Children) Act 1946* (the Act) to ensure that specific criteria setting out the basis on which a non-citizen child may become the ward of the Minister are included on the face of the Act, rather than left to delegated legislation.

The Committee has noted its *'longstanding view … that significant policy matters, and matters that may affect fundamental rights and liberties, should be set out in the primary legislation'*.

As the Committee would be aware, it is not unusual for primary legislation to give Ministers and other persons broad discretionary powers particularly in situations where the circumstances under which the powers are to be exercised may vary considerably and flexibility is required to deal appropriately with specific cases. Policy guidelines are usually given for the exercise of broad discretionary powers, but while decision makers are required to consider such guidelines, they are not binding.

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The legislative scheme for orders for guardianship was inserted in the Act by the *Statute Law (Miscellaneous Provisions) Act (No 1)1985*. The effect of this scheme is that while section 4AA gives the Minister a broad discretionary power to direct that certain children shall become the Minister's ward, the exercise of that power is subject to the preconditions in section 4AA and also subject to any principles that may be prescribed under paragraph 12(aa). All of the requirements in the legislation, both in the Act and in the regulations, are binding on the Minister, unlike policy guidelines not made by legislative instrument.

The use of a legislative instrument (regulations) for prescribing the principles for exercise of the power in section 4AA therefore allows for closer regulation of the power but also allows flexibility for the principles to be updated if changing circumstances make it necessary to do so.

Under the Act, such a direction can only be given in relation to a child where, among other things:

- the child enters Australia as a non-citizen in the charge of, or for the purpose of living in Australia under the care of, a relative;
- the Minister is satisfied it is necessary to make the direction in the child's best interests; and
- the relative consents to the Minister giving the direction.

Only a small proportion of children become wards of the Minister as a result of a direction made under section 4AA of the Act. Most children who come under the Act are covered automatically without any direction needed. Currently the Minister is the guardian of 96 individuals under the Act, only two of whom became wards as a result of a direction given under section 4AA. The principles prescribed in the Regulations therefore apply to only a small cohort of children.

In addition, a direction under section 4AA of the Act would generally only be given if:

- the Minister or delegate holds serious concerns about actual harm or the risk of harm arising from the minor's existing care arrangements;
- to the extent possible, these concerns have been brought to the attention of the relevant State/Territory child welfare/protection agency;
- in addition to any services and support available from the State/Territory child protection authorities or the minor's relatives, the minor would benefit from the Minister's guardianship and the Minister would be able to effectively carry out the ministerial guardianship responsibilities; and
- the relationship between the relative and the minor appears to have irretrievably broken down to the extent that the minor and relative should not live together for the foreseeable future.

The Committee has observed that a legislative instrument *'is unamendable and made by the executive'* and *'is not subject to the full extent of parliamentary scrutiny inherent in bringing about proposed changes in the form of an amending bill'*. I acknowledge this concern, but note that any changes to the principles prescribed in the regulations would be tabled in both houses of the Parliament and would be subject to disallowance by either House. This allows an additional element of parliamentary scrutiny of the legislative scheme which would not be available if the power in section 4AA were exercisable subject only to policy guidelines.

Having turned my mind to the concerns raised by the Committee, I consider that the current legislative scheme is effective and appropriate. Consideration has not been given to amending the Act in the way the Committee describes.

I thank the Committee again for bringing this matter to my attention.

Yours sincerely

David Coleman

13 / 7 / 2019

**Australian Government**
**Department of Agriculture and Water Resources**

Ref: MC19-003209

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 4 April 2019 to the Hon. David Littleproud MP, Minister for Agriculture and Water Resources, about the request from the Senate Standing Committee on Regulations and Ordinances (the Committee) for further information about the Basin Salinity Management (BSM) procedures in the *Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018* (the Amendment Regulations), following the Minister's earlier response dated 4 March 2019. As the government is currently in an election period, I am responding on behalf of the Minister.

The Department of Agriculture and Water Resources (the Department) thanks the Committee for their consideration of the Amendment Regulations, which improve the regulation of salinity management in the Murray-Darling Basin. The Department has also prepared a replacement explanatory statement for the Amendment Regulations (Attachment A) to clarify the source of the regulation-making power (as detailed below).

Yours sincerely

Matthew Dadswell
Assistant Secretary
Murray-Darling Basin Policy Branch

18 April 2019

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# Response to a request for information from the Senate Standing Committee on Regulations and Ordinances

***The Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018 (the Amendment Regulations)***

**Basin Salinity Management (BSM) Procedures**

**In light of the preceding discussion, the committee requests the minister's further advice as to why it is considered that the Basin Salinity Management (BSM) procedures are not incorporated by the instrument (and why section 14 of the *Legislation Act 2003* would not apply), but rather only by Schedule 1 to the *Water Act 2007*.**

The Department refers to the Minister's advice provided by letter of 4 March 2019 and provides the following additional information to assist in explaining why the Agreement can be considered to incorporate the BSM procedures, rather than the Amendment Regulations.

The legal status of the Murray-Darling Basin Agreement is relevant to this issue. The Agreement is, itself, not a Commonwealth law. Rather, it is an agreement between the parties that is given further effect by a Commonwealth law – namely the *Water Act 2007* (the Water Act). For instance, the Note to the definition of 'Agreement' in section 18A states that:

> The Murray Darling Basin Agreement operates as an agreement between the parties. The text of the Agreement is set out in Schedule 1, and as such it has further effect as provided for by this Act (for example, see sections 18E and 18F).

The Note to section 18E also states that:

> The conferral of functions, powers and duties on the Authority by this section does not otherwise give the Agreement any effect as a law of the Commonwealth.

While the text of the Agreement is set out in Schedule 1 of the Water Act, as amended by regulations made for section 18C, this does not alter the legal status of the Agreement (see, for example, Note 2 to subsection 18C(1)). Given this, the Department's view is that, while the *Legislation Act 2003* (the Legislation Act) generally applies to the Amendment Regulations, section 14 does not. This is because, it is the Agreement rather than the Amendment Regulations which 'makes provision in relation to' the matters contained in the BSM procedures (as in force from time to time).

However, if an alternate view is taken that the Amendment Regulations do, themselves, incorporate the BSM procedures and that section 14 of the Legislation Act is therefore relevant, the Department provides the further information for the Committee's assistance below.

**If the advice is that the BSM procedures *are* incorporated by the instrument, the committee also requests the minister's advice as to the power relied on to incorporate the BSM procedures as in force from time to time.**

The Department draws the Committee's attention to the advice provided by the Minister by letter 4 March 2019 which provided the following information:

> Alternatively, to the extent that section 14 of the Legislation Act does apply to the Amendment Regulations, the limitation in subsection 14(2) is subject to a contrary intention appearing in the

> Water Act. By enabling the regulations to amend Schedule 1 'by incorporating into the Agreement amendments made to, and in accordance with' the Agreement, section 18C, read in the context of Part 1A of the Water Act, provides a contrary intention. The Murray-Darling Basin Agreement is not a Commonwealth law that is subject to the limitation in subsection 14(2) of the Legislation Act. Accordingly, it is possible, under clause 5 to the Agreement, for that agreement to be amended to incorporate a matter in an instrument or other writing from time to time. In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act.

To assist the Committee, the Department also notes that further evidence of a contrary intention in the Water Act, for the purposes of subsection 14(2) of the Legislation Act, is provided by considering the text of the Agreement, as it was originally included in the Water Act by *Water Amendment Act 2008* (the 2008 Amendment Act). Section 18C was also included, relevantly in the same form as present, by the 2008 Amendment Act. The text of the Agreement in Schedule 1 of the Water Act, following the commencement of the 2008 Amendment Act, made provision for a number of matters by reference to an instrument or other writing as in force or existing from time to time. (See, for example, clause 2 of Schedule B to the Agreement which defined 'Strategy' as meaning 'the *Basin Salinity Management Strategy 2001-2005* as adopted and amended by the Ministerial Council from time to time'; see also the reference to the 'Living Murray Environmental Watering Plan 2006-2007' in subclause 20(2) of Schedule F, which could be amended from time to time by the Ministerial Council under subclause 20(2).)

Section 14 of the Legislation Act was not relevant to the inclusion of such provisions in the text of the Agreement in Schedule 1 to the Water Act, as this was done by primary legislation, ie the 2008 Amendment Act. Nonetheless, the fact that the text of the Agreement contained such provisions, at the time that section 18C was included in the Water Act, provides a further indication that section 18C was not intended to be subject to the limitation in subsection 14(2) of the Legislation Act. Otherwise, subsection 14(2) would, in effect, prevent the Ministerial Council from agreeing to amendments to the Agreement which incorporate by reference documents as in force from time to time (because subclause 5(2) of the Agreement would then prevent such amendments to the Agreement from coming into effect).

Accordingly, on the view that the BSM procedures are incorporated by the Amendment Regulations, the source of the regulation-making power to do so is in sections 18C and 256 of the Water Act.

The explanatory statement has been revised to include a paragraph specifying the source of this regulation-making power:

> ... In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act. **Accordingly, sections 18C and 256 of the Water Act provide the power for the Amendment Regulations to incorporate the BSM procedures as in force from time to time, by amending the text of the Agreement in Schedule 1 of the Water Act.**

**Attachment A – Explanatory Statement**

# EXPLANATORY STATEMENT

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

*Water Act 2007*

*Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018*

## Legislative Authority

The *Water Act 2007* (the Act) provides the national legislative framework for the sustainable management of water resources within or beneath the Murray-Darling Basin (the Basin). The Murray-Darling Basin Agreement (the Agreement) and its Schedules are contained in Schedule 1 to the Act.

Section 256 of the Act provides that the Governor-General may make regulations and section 18C of the Act permits regulations to be made under the Act to amend Schedule 1 to incorporate amendments made to, and in accordance with, the Agreement.

The *Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018* (the Amendment Regulations) amend Schedule B to the Agreement. Schedule B outlines the salinity management obligations of the Commonwealth, the states of New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory (together referred to in the Agreement as the Contracting Governments). As the policy-setting and decision-making body through which the Agreement is implemented, the Murray-Darling Ministerial Council (the Ministerial Council), which consists of a Minister of each of the Contracting Governments, agreed to the proposed amendments contained in the Amendment Regulations on 18 June 2018, which is required by clause 9 of the Agreement.

The Agreement, including its Schedules, is an intergovernmental agreement between the Contracting Governments. The purpose of the Agreement is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Basin, including by implementing arrangements agreed between Contracting Governments to give effect to the *Basin Plan 2012* (the Basin Plan), the Act and State water entitlements.

## Purpose

The purpose of the Amendment Regulations is to make changes to Schedule B to the Agreement to implement the *Basin Salinity Management 2030* strategy.

The Amendment Regulations formalise the commitments of the Contracting Governments and create new or altered powers or duties for the Murray-Darling Basin Authority (the Authority) in relation to Basin salinity management under Schedule B to the Agreement. In particular, the key changes are as follows: updating the accountability framework to provide for a new approach for actions associated with the recovery, delivery and use of environmental water; changing the accountability for salinity management in catchments and valleys; amending the frequency at which entries in the Salinity Registers and models used under Schedule B are reviewed; changing monitoring obligations and reporting requirements; increasing the scope of audits, but reducing the frequency of audits; and adding a new review process for the *Basin Salinity Management 2030* strategy, which is to commence prior to 2026.

The *Basin Salinity Management 2030* strategy promotes works, measures and other action to reduce or limit the rate at which salinity increases within the Basin; provides for the adoption of

salinity targets; provides accountability arrangements for all actions that result in significant salinity impacts, including environmental water recovery, delivery and use; provides for monitoring, and assessing, auditing and reporting on matters set out in the *Basin Salinity Management 2030* strategy.

The *Basin Salinity Management 2030* strategy, as given effect through the Amendment Regulations, complements the Basin Plan which sets high-level objectives and targets for salinity. The *Basin Salinity Management 2030* strategy is the vehicle by which the Contracting Governments agree to implement individual, collective and coordinated actions in managing salinity in the Basin.

The Amendment Regulations give effect to the new obligations in the *Basin Salinity Management 2030* strategy that are to be implemented over the coming years.

**Background**

The first strategy to manage salinity collectively in the Basin was the Salinity and Drainage Strategy. The Salinity and Drainage Strategy was replaced in 2001 by the Basin Salinity Management Strategy (BSMS), and Schedule C was replaced in 2002 to give effect to the BSMS. The BSMS was moved to the current Schedule B when the Agreement was replaced in 2008. A timeline of all Basin salinity strategies and schedules is at **Table 1.** In November 2015, the Ministerial Council adopted a new salinity strategy, the *Basin Salinity Management 2030* strategy, to guide joint salinity management from 2015–2030.

**Impact and Effect**

The effect of the Amendment Regulations is to continue and improve upon the long-running strategies in place to reduce salinity by, among other things, putting limits on salt entering the river, investing in salt interception schemes and improving land and water management practices.

Past strategies have been effective in reducing salinity by, among other things, putting limits on salt entering the river, investing in salt interception schemes and improving land and water management practices. Despite this, salinity continues to pose significant economic, environmental, cultural and social risks if not managed effectively. Controlling salinity to meet the Basin Salinity Target will require ongoing and active management. The Basin Salinity Target is to maintain the average daily salinity at Morgan, the Basin Salinity Target site in South Australia, at a simulated level of less than 800 electrical conductivity (E.C.), for at least 95% of the time, under the hydrologic conditions of the Benchmark Period (clause 7, **[Item 41]**). The Amendment Regulations give effect to the new obligations in the *Basin Salinity Management 2030* strategy that will be implemented over the coming years. The Amendment Regulations give Basin communities confidence in the Contracting Governments' capacity to ensure that salinity levels in the Basin will be appropriate to protect economic, environmental, cultural and social values, until 2030 and beyond.

**Consultation**

The Office of Best Practice Regulation (OBPR) advised that no Regulatory Impact Statement was required as the Amendment Regulations do not have any regulatory impact on business, individuals or community organisations.

The Authority was consulted during the drafting of the Amendment Regulations. The Ministerial Council agreed to the amendments on 18 June 2018.

**Details of the Amendment Regulation**

Details of the Amendment Regulations are set out in Attachment A.

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

The Amendment Regulations commence on the day they are registered on the Federal Register of Legislation.

**ATTACHMENT A**

**Details of the *Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018***

For ease of reading, the Explanatory Statement groups the explanation of amendments by their intended purposes rather than clause by clause. The explanations of provisions are grouped as follows:

1. **Introductory provisions** – outlines name, commencement, authority and repeal schedules.
2. **The role of the Authority** – details how the Murray-Darling Basin Authority (the Authority) administers Schedule B on behalf of the parties.
3. **The accountability framework** – sets out the salinity accountability arrangements for environmental water.
4. **Salinity management in valleys** – amends text regarding End-of-Valley Targets (EoVTs), monitoring and reporting.
5. **Management of the Registers** – includes making provisional entries, and managing a new Collective Account and Commonwealth Account.
6. **Review Plan** – sets out a plan for periodic review of Register entries, models and EoVTs.
7. **Reporting** – moves from annual reporting to 'status' and 'comprehensive' reporting alternatively every two years.
8. **Auditing** – reduces the frequency of audit but expand its scope.
9. **Reviews of the Schedule and *Basin Salinity Management 2030* strategy** – adds reviews.
10. **Basin Salinity Management procedures (BSM procedures)** – procedures made by the Basin Officials Committee replace current guidance documents.
11. **Other Amendments made throughout the Amendment Regulations** – amendments to parts of the Schedule which are redundant, or which require updating, modernising or correction to ensure smooth operation are grouped at the end of this Explanatory Statement, as well as transitional provisions.

**1. Introductory provisions**

Section 1 – Name

This section provides that the title of the Amendment Regulations are the *Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) Regulations 2018* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence on the day they are registered.

Section 3 – Authority

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

Section 4 – Repeal of this instrument

This section provides for the Amendment Regulations to be repealed on the day after commencement.

Section 5 – Schedules

This section provides that each instrument that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule has effect according to its terms.

**Schedule 1 – Amendment of the Murray-Darling Basin Agreement**

**2. The role of the Authority**

The Amendment Regulations incorporate in law through Schedule B to the Agreement those amendments necessary to provide for the new salinity strategy adopted by the Murray-Darling Basin Ministerial Council (the Ministerial Council) in November 2015, the *Basin Salinity Management 2030* strategy. As part of this, there are additional commitments which are placed on the Contracting Governments (consisting of the Commonwealth, the states of New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory, which together are referred to in the Agreement as the Contracting Governments), as well as new or altered powers or duties for the Authority.

Schedule B sets out that the administration provisions of the Schedule are undertaken by the Authority on behalf of the Contracting Governments. The Amendment Regulations set out a clear requirement that, in carrying out certain functions, the Authority acts on the advice or direction of the Basin Officials Committee **[Items 13, 36 – 39, 56, 119, 120, 127, 145, 149]**. Some functions are given directly to the Basin Officials Committee, or are to be carried out in accordance with BSM procedures made by the Basin Officials Committee. This includes **Items 10, 70, 74, 75, 76, 79, 90, 91, 92, 94, 96, 97, 98, 101, 103, 106, 108, 110, 111, 113, 114, 115, 116, 123, 124, 125, 128, 130, 133, 137, 161, 162, 163, 172, 181**.

**3. The accountability framework**

***Background***

The existing Schedule requires each Contracting Government to ensure that it does not undertake or permit the undertaking of an action that may have a Significant Effect (an Accountable Action) except in accordance with the Schedule.

Under the Schedule, a Significant Effect is a change in average daily salinity at Morgan, the Basin Salinity Target site in South Australia, of at least 0.1 electrical conductivity (E.C.) by the year 2100, or any salinity impact that the Authority estimates as being significant. This is because, in a variable climate, a change of at least 0.1 E.C. by the year 2100 could contribute to reduction of crop yields, affect aquatic ecosystems and vegetation and damage infrastructure. This obligation is not altered by the Amendment Regulations.

The Schedule currently provides for Accountable Actions to be designated as either 'Joint works or measures' (JWM) or 'State actions'. JWMs are undertaken by the Contracting Governments jointly and state actions are undertaken by one or more State Contracting Governments (a State Contracting Government or State Contracting Governments may include one or more than one Contracting Government, excluding the Commonwealth).

Salinity impacts of Accountable Actions are attributed, in the form of salinity debits and salinity credits, to a State Contracting Government or to the Commonwealth.

The Amendment Regulations reflect new arrangements as agreed by Contracting Governments in the *Basin Salinity Management 2030* strategy attributing salinity debits and credits amongst the parties. In particular, there is a new approach to attribution of debits and credits arising from:

a. actions associated with the recovery, delivery and use of environmental water;

b. environmental works and measures associated with an adjustment to the sustainable diversion limits (SDLs) (SDL adjustment), set by the *Basin Plan 2012* (the Basin Plan); and

c. changes to river operations to support environmental outcomes.

BSM procedures made by the Basin Officials Committee for the purposes of the Schedule, as amended by the Amendment Regulations, and administered by the Authority, set out in detail how salinity debits and credits are to be attributed amongst the Contracting Governments. BSM procedures provide operational detail and consistency to guide monitoring, review, reporting and audit functions and are regularly updated as operational requirements are updated and amended.

Schedule B retains the capacity for the Authority to make protocols under Clause 40, which may be made when considered appropriate by the Authority, in consultation with the Basin Officials Committee.

***Salinity impacts relating to environmental water***

Environmental water that is expected to have an impact for the purposes of Schedule B include 'Basin Plan Water'. Basin Plan Water is defined in the amended Schedule [**Item 12**] to comprise:

a. all Commonwealth environmental water holdings; and

b. other held environmental water that is held by a State Contracting Government to offset the reduction in the long-term average SDL.

Basin Plan Water includes water that is recovered as part of efficiency measures – this is because water saved by efficiency measures becomes registered as Commonwealth environmental water holdings.

***Credits from delivery of Basin Plan Water and use of those credits***

Under the Amendment Regulations, if the Authority were to determine that dilution effects from the delivery of Basin Plan Water has a Significant Effect, the Authority has to declare the Proposal to be an Accountable Action. However, delivery of Basin Plan Water is not a JWM or a State action, so **Items 92 – 97** of the Amendment Regulations provide further clarity as to how salinity credits are to be estimated by the Authority. **Items 92 - 93** provide that all actions the Authority may take under subclause 20(1) are subject to subclause 20(2). **Item 94** provides that the Authority may designate an action may be in whole or part a Joint work or measure or a State Action, in accordance with BSM procedures. **Item 95** inserts a note to provide that the Authority can only designate that an action is either a Joint work or measure or a State Action under subclause 20(1)(b), not authorise them. **Item 96** provides that that, if the action is delivery of Basin Plan Water, the Authority must estimate the salinity credits arising from the action and enter the action in Register A, but must not designate it as a Joint work or measure or State Action. **Item 97** provides that the Authority may make a provisional entry of salinity

impacts in Register A or Register B where it is unable to confidently estimate that impact, and that it must make the estimate and amend the relevant Register as soon as practicable.

**Item 100** provides that salinity credits arising from delivery of Basin Plan Water that is an Accountable Action are attributed to the Commonwealth Account. **Items 98-99 and 101-105** amend Clause 21 to provide that all actions undertaken by the Authority under subclause 21(1) are subject to subclause 21(2) and clause 21A and that the Authority must act in accordance with BSM Procedures **[Items 98 – 104]**. **Item 105** removes the requirement for the Authority to attribute salinity credits or debits in Register A, when the State Action is a permanent transfer of an entitlement within the meaning of Schedule D to the Agreement.

The Amendment Regulations provide that credits in the Commonwealth Account may (by a Contracting Government assigning them under subclause 23(2A)), and in cases where BSM procedures require it of the Authority, must, subsequently be transferred into the Collective Account (see clause 23(2B) **[Item 113]**). Subclause 23(2C) provides that the Authority must, at the request of a State Contracting Government, transfer that Government's share of salinity credits to that Government's account and amend Register A accordingly. All of these actions must be in accordance with BSM procedures. The Commonwealth may also agree to transfer credits to a State Contracting Government account (this possibility is already provided for in the existing clause 23(1)). The amendments reflect the Contracting Governments' intention that in certain circumstances and for certain types of Accountable Actions, salinity debits are to be 'offset' by Commonwealth credits arising from delivery of Basin Plan Water.

The Amendment Regulations include a provision that requires the Contracting Governments jointly to ensure that transfers of credits from the Commonwealth Account (that is, by way of transfer to the Collective Account or to another Contracting Government) do not exceed available credits in the Commonwealth Account (see clause 16A **[Item 77]**).

***Collective Account and collective accountability***

In some circumstances it is appropriate for credits or debits from an Accountable Action to be held by the Contracting Governments collectively in Register A, rather than being attributed amongst them. The Amendment Regulations create a new 'Collective Account' to hold those credits or debits. The Amendment Regulations also create a new 'Commonwealth Account' to hold those credits or debits attributed to the Commonwealth (including through the delivery of Basin Plan Water).

The Amendment Regulations provide for the following matters relating to the Collective Account:

***Informing Authority of proposal generating credits or debits to be held in Collective Account***

The Amendment Regulations provide that the Basin Officials Committee may inform the Authority of a proposal which is intended to generate debits or credits to be held in the Collective Account (clause 17A(2) **[Item 83]**).

***Attributing credits and debits to the Collective Account***

The Amendment Regulations provide that the Authority must attribute credits or debits arising from an Accountable Action to the Collective Account if so required by BSM procedures or a direction of the Basin Officials Committee. Provisions about attribution to the Collective Account are contained in the amendments to clause 11 **[Items 55 and 56]** and clause 21A(1) **[Item 106]**.

BSM procedures also give effect to attributions to the Collective Account that have already been approved by the Ministerial Council in the *Basin Salinity Management 2030* strategy. These include that, following attribution of salinity credits from Living Murray Initiative

actions to Register A and B consistent with the approach for attributing the 61 E.C. Joint Work and Measures Program (this program has been in place for a number of years and is intended to achieve a 61 E.C. reduction in average salinity at Morgan in South Australia), the net balance of salinity credits in Register A that are not required to offset debits from Living Murray Initiative actions are held in the Collective Account. BSM procedures about attribution of debits or credits arising from a JWM to the Collective Account may also be made to give effect to any subsequent Ministerial Council resolutions under the amendments.

***Determining responsibility for action generating credits or debits to be held in Collective Account***

The Amendment Regulations provide that, if credits or debits from an Accountable Action were to be held in the Collective Account (noting that clause 21A(2) provides that, for the purposes of attribution by the Authority under clause 21A(1), an Accountable Action does not include delivery of Basin Plan Water), then the Basin Officials Committee must also determine which Contracting Government(s) will be responsible for the following (see clause 21A(3) **[Item 106]**):

a. providing the Authority with information about the action to allow the Authority to assess its salinity impacts; and

b. monitoring and reviewing the action for the purposes of clauses 27, 28 and 33 **[Items 126 – 130 and 133]**.

**Items 107 - 111** (clause 22) amend Schedule B to require that the Authority must attribute salinity credits arising from the Accountable Action in accordance with clause 21 or 21A, and in accordance with any BSM procedures.

The costs of undertaking, monitoring and reviewing State Actions whose credits or debits are held in the Collective Account is shared between Contracting Governments in accordance with a determination of the Basin Officials Committee (see clause 47(2) and (3) [**Items 180 - 181**]. Subclause 21A(3) **[Item 106]** provides that the Basin Officials Committee determines which Contracting Government is responsible for the provision of information, monitoring and reviewing of Accountable Actions where salinity credits or salinity debits are attributed to the Collective Account, but does not provide for the allocation of costs against those requirements. Clause 47(3) provides that the allocation of the costs of those requirements will be shared by Contracting Governments in accordance with a determination of the Basin Officials Committee, which provides appropriate administrative oversight for decisions relating to these requirements relating to the Collective Account.

Clause 47(1) is amended so that it is subject to subclauses 27(2) and (3) **[Item 180].**

***Assignment of debits and credits from or to the Collective Account***

Clause 23 provides for trading or transfers between parties and between Registers. **Items 112 - 116** make amendments to clause 23 to allow Contracting Governments to assign credits or debits to the Collective Account in accordance with the BSM procedures, unless the Basin Officials Committee directs otherwise. This clause is also amended to require the Authority to transfer Commonwealth credits to the Collective Account if required to do so by BSM procedures.

**Item 112** repeals the heading of Clause 23 and substitutes it with a new heading that provides that the clause relates to trading and transfer of salinity credits and salinity debits. **Item 113** inserts a subclause 23(2A) that provides that a Contracting Government may assign salinity credits or debits assigned to that Government to the Collective account, if BSM procedures permit, and requires the Authority to then amend Register A to reflect this. It also provides that the Authority must, if required by BSM procedures, transfer any salinity credits attributed to

the Commonwealth Account to the Collective Account and, if requested by a State Contracting Government, transfer that State Contracting Government's share of salinity credits from the Collective Account to that State Contracting Government and, in both cases, amend Register A to reflect that transfer. **Items 114 - 115** provide that BSM procedures are required to be made by the Basin Officials Committee. **Item 116** provides that the Authority may, in accordance with BSM procedures, transfer salinity credits from Register A to Register B or vice versa, if so requested in writing by a Contracting Government.

***Accountability for Collective Account***

The Amendment Regulations provide that the Contracting Governments must jointly ensure that salinity credits are not transferred from the Commonwealth Account to the Collective Account or to a Contracting Government unless salinity credits are available in the Commonwealth Account; and that the Collective Account has credits equal to or greater than its debits (see clause 16A **[Item 77]**).

***Joint works or measures carried out by the Commonwealth***

The Agreement permits the Commonwealth to be nominated as the responsible party for the construction, operation or maintenance, or the implementation, of a JWM (clause 56 of the Agreement).

The Amendment Regulations repeal the heading at clause 14 and substitute the heading 'Co-ordinating authorised works or measures' to reflect the fact that if the Commonwealth is the responsible party for a JWM, the Authority is responsible for coordinating the Commonwealth's activities (clause 14 **[Item 66]**). Clause 14 is also amended by **Items 67 - 68** to reflect that the Authority must coordinate the activities of each Contracting Government (removing the word 'State') and its relevant Constructing Authority in undertaking a JWM, as well as an S&DS work or measure. S&DS works or measures mean works or measures entered on the Register maintained under the Salinity and Drainage Strategy and include the works or measures referred to in Appendix 2 as Waikerie Phase 2A SIS (**[item 21],** clause 2(1)(a)).

Additional amendments to update the accountability framework are as follows:

a. auditors are to report on the performance of all Contracting Governments (clause 34 **[Items 139 - 144]**)

b. a review report may conclude that any Contracting Government has not complied with its obligations under the Schedule (clause 35 **[Items 145 - 148]**)

c. the Authority may determine that any Contracting Government has not complied with its obligations under the Schedule (clauses 44 and 46 **[Items 173 – 174** and **178 – 179]**).

Further information on the role of auditors is contained below at **Part 8. Auditing**.

**Item 172** inserts subclause 43(1A) which provides that the Authority must not make a determination regarding default by a State Contracting Government (under subclause 43(1)) unless, before making the determination, it has in accordance with any BSM procedures, made an assessment of risk to achieving the Basin Salinity Target, and consulted Contracting Governments.

**4. Salinity management in valleys**

The Amendment Regulations modify current accountability for salinity management in catchments and valleys, reflecting the policies outlined in *Basin Salinity Management 2030* strategy.

***Meeting End-of-Valley Targets will no longer be mandatory***

The Amendment Regulations reflect that State Contracting Governments are no longer obliged to undertake a program of actions to meet the End-of-Valley Targets. End-of-Valley Target means a target set out in Appendix 1 as amended from time to time by the Ministerial Council under clause 9 and includes a reference to the relevant End-of-Valley Target site. An End-of-Valley Target site means a site specified in Appendix 1 (**[Items 15-16],** clause 2).

End-of-Valley Targets were established within the BSMS to protect key values and assets in the valleys, based on the understanding that there may be large contributions to the Basin's salinity from those valleys. As a result of the monitoring of those End-of-Valley Targets, contemporary understanding is that future increases in salt loads from most valleys are likely to be small and are unlikely to pose a significant risk to shared water resources.

The contemporary understanding of the reduced salinity risk profile of upland catchments does not require the formal programs of actions envisaged under the BSMS for upland catchments. The Amendment Regulations provide for the role of End-of-Valley Targets to transition to functions that will provide a valley scale context to the identification and management of salinity risk to the shared water resources.

References in the current Schedule to 'achieving' and 'compliance with' the End-of-Valley Targets are therefore no longer relevant, and are removed from throughout Schedule B. Clause 26 **[Item 125]** provides that a State Contracting Government must, in accordance with any BSM procedures, undertake continuous flow and salinity monitoring in respect of relevant End-Of-Valley Target sites for which it is responsible.

***Amending End-of-Valley Targets***

The End-of-Valley Targets remain in Schedule B, and in certain cases it may be appropriate to amend an End-of-Valley Target. The Amendment Regulations provide that, following a request made by the Authority or a State Contracting Government, the Ministerial Council may, on the recommendation of the Authority, amend an End-of-Valley Target (clause 9).

The changes to clause 9 **[Items 44 – 50]** reflect the altered role of End-of-Valley Targets. **Item 44** repeals the heading for clause 9, 'Reviewing and amending End-of-Valley Targets' and substitutes it with the heading 'Amending End-of-Valley Targets' as the reference to reviewing is now redundant because this is now provided for in clause 33. **Item 45** repeals subclause 9(1) which relates to the requirement for the Authority to review the End-of-Valley Targets at least every 5 years. **Items 46-48 and 50** make minor amendments to reflect the fact that reviews are now provided for in clause 33, to clarify the wording of the subclause and to update the reference to the Strategy. **Item 49** repeals paragraph 9(5)(b) which relates to the requirement for the Authority to provide an opinion on whether any further works or measures are needed to meet the Basin Salinity Target under this clause.

***Monitoring at End-of-Valley Target sites and reporting on salinity in valleys***

End-of-Valley Targets and the sites at which the End-of-Valley Targets are measured remain important to State Contracting Government modelling, monitoring and reporting obligations. The Amendment Regulations incorporate a definition for 'End-of-Valley Target site', being the site specified in Appendix 1 of the Schedule for each End-of-Valley Target (clause 2, **[Items 15 and 16]**).

The current requirement under the BSM procedures for State Contracting Governments to undertake continuous flow and salinity monitoring for End-of-Valley Target sites is now explicitly included in the Schedule (clause 26 **[Item 125]**). Ongoing monitoring is required to support reviewing the outcomes at End-of-Valley Target sites rather than monitoring the degree to which targets are being met.

As a consequence of the amendments, salinity in valleys will be regularly reviewed and reported on in the context of State Contracting Government reports on End-of-Valley Targets and Register entries (which include both State Actions and Delayed salinity impacts), as required by the Review Plan provided for in clause 32 **[Item 133]**. **Item 133** amends clause 32 to specify the nature of, and matters to be contained in, the Review Plan accordingly. These review and reporting requirements replace the former requirement for Valley reports (formerly clause 30).

**5. Management of the Registers**

Part V is amended (through **[Items 69 – 123]**) regarding management of the Registers, including providing for a new approach to salinity accountability for actions associated with the recovery, delivery and use of environmental water. The provisions also provide explicitly for the making of 'provisional entries', and for the new Collective Account (defined in **[item 14],** clause 2 to mean the information included in Register A under the heading Collective Account).

Clause 17 is amended to provide a simplified outline of the operation of the Registers **[Items 78 - 83]**. **Item 78** has the effect of setting out that the clause provides a simplified outline of the operation of the Registers and that the Basin Officials Committee may, in addition to Contracting Governments who must, inform the Authority of any Proposal that may have a Significant Effect. **Item 79** amends subclause 17(2) to remove the requirement for the Authority's decision on both registering a Proposal and its treatment to be in accordance with protocols made by the Authority under clause 40 (as these protocols have been replaced by BSM procedures). **Item 80** makes the Authority's estimates, determinations and attributions under subclause 17(3) subject to subclause 17(4). **Item 81** has the effect of removing references to clauses that are no longer relevant and setting out that the Authority must attribute salinity credits or debits in accordance with clause 21 or 21A. **Item 82** provides that the Authority must make a provisional entry in the relevant Register if it is unable to confidently estimate salinity impacts of an Accountable Action, that it must amend the relevant Register to give effect to trading or transfer of salinity credits and debits, that it must re-estimate salinity impacts in accordance with Clause 24 and it may make amendments to either Register, in accordance with clause 24. **Item 83** inserts clause 17A, which provides that a Contracting Government must inform the Authority of any Proposal which the Government considers is likely to have a Significant Effect, and also that the Basin Officials Committee may inform the Authority of a Proposal that it considers is likely to have a Significant Effect and that any salinity credits or debits arising from the Proposal will be attributable to the Collective Account.

***Assessing a proposal***

If under the amendments, the Authority were to be informed of a proposal that may have a Significant Effect (clause 17A **[Item 83]**), it must assess the proposal to decide whether it has or may have a Significant Effect (clause 18). The reference in clause 2(2) is also updated to clause 17A(1) **[Item 25]**. The amendments to clause 18 **[Items 84 – 90]** provide that at this stage of the process, the Authority's role is to make an assessment of a proposal as presented to it by a Contracting Government, on the basis of information provided by that Government. **Item 84** repeals the heading and substitutes a new heading that provides that the provision relates to determining whether a Proposal or action has a Significant Effect. **Item 85** provides that the Contracting Government will inform the Authority under the subclause 17A(1). **Item 86** provides that the Authority must assess the proposal on the basis of information provided by the Contracting Government. **Item 87** inserts subclause 18(1A), which provides that, if the Basin Officials Committee informs the Authority of a Proposal under subclause 17A(2), the Authority must assess the proposal on the basis of information provided by the Contracting Government nominated by that Committee for that purpose and decide whether the Proposal,

on its own or cumulatively with other actions, may have a Significant Effect. **Item 88** omits the reference to subclause 17(1) and substitutes a reference to clause 17A(1). **Item 89** amends the description of Significant Effect to reflect that it relates to a change in average daily salinity at Morgan by 2100, rather than within 100 years after the estimate is made. **Item 90** amends the reference from protocols made by the Authority to BSM procedures.

If the Authority were to decide that a proposal it was informed of under clause 17A has or may have a Significant Effect (as defined in subclause 18(3)), the Amendment Regulations provide that the Authority must declare it to be an Accountable Action (under clause 19), and then estimate its salinity impacts (clause 19 [**Item 91**]). The declaration of an Accountable Action will bring that action within the salinity accountability arrangements of Schedule B, requiring registration, monitoring, review, reporting and audit under that schedule. To assist the Authority to estimate salinity impacts, the Amendment Regulations provide that the relevant Contracting Government must, in accordance with any BSM procedures, give the Authority relevant information about the Accountable Action. The clause provides which government is the relevant Contracting Government for the purposes of this requirement as follows:

a. the Contracting Government or Governments nominated for the purposes of clause 56 of the Agreement are the relevant Contracting Government or Governments for a JWM;

b. the relevant State Contracting Government or Governments are the relevant Contracting Government or Governments for a State Action (which includes a shared State Action); and

c. the Contracting Government as determined by the Basin Officials Committee in accordance with clause 21A is the relevant Contracting Government for an Action for which debits and credits will be held in the Collective Account.

If the Accountable Action is the delivery of Basin Plan Water the Authority is responsible for obtaining information required to assess the salinity impacts of the Accountable Action. In the Amendment Regulations, a Contracting Government that has information that may assist the assessment must give it to the Authority on request.

Clause 20 [**Items 92 – 97**] amends the Schedule so that once the Authority has estimated the salinity impacts of an action which the Authority considers may be an Accountable Action, it must estimate the salinity credits or debits arising from the action and designate, in accordance with any BSM procedures, that action to be in whole or in part either or both a Joint work or measure or State Action. However, the Amendment Regulations provide that if the action is the delivery of Basin Plan Water, the Authority must enter the action in Register A without designation (Clause 20(2) **[Item 96]**). The delivery of Basin Plan Water does not result in a salinity debit, as provided for by clause 20(2)(a), **[Item 96]**. **Items 92** and **93** make amendments to provide that all actions the Authority takes under clause 20 are subject to sub-clause 20(2). **Item 94** provides that the Authority must designate an action (in whole or part) as either or both a Joint work or Measure or State Action, in accordance with any BSM procedures. **Item 95** inserts a note to clarify that paragraph 20(1)(b) does not empower the Authority to authorise a Joint work or measure or a State Action.

***Provisional entries***

The Amendment Regulations provide for provisional entries to be made on the Register if it is not possible to confidently estimate the salinity impacts of an Accountable Action or a delayed salinity impact (clause 20A, [**Item 97**]). Provisional entries are based on an estimate of salinity effects of the Accountable Action or delayed salinity impact ('Salinity impact' and 'salinity effect' are terms with defined meanings under Schedule B).

The purpose of provisional entries is to ensure that every Accountable Action, or a Delayed salinity impact, with potentially a Significant Effect is entered on a Register, even if salinity impacts cannot be fully or confidently determined at the time an entry is required to be put on the Register.

Provisional entries do not get entered as a salinity cost effect (debit or credit), as they can only be made in accordance with a relevant method for assessing salinity effects, as provided for in clause 20A(2) **[Item 109].** Salinity effect remains 'a change in the average salinity at Morgan resulting from any action, as estimated by the Authority' which differs from a salinity cost effect which remains 'a change in average salinity costs resulting from an action, as calculated by the Authority' and credits and debits continue to be determined based on the salinity cost effect. As provisional entries do not get entered as salinity debits or credits on the relevant register, those entries are not counted for the purposes of determining whether a Contracting Government is complying with its obligations under Schedule B.

The Amendment Regulations provide that, if a provisional entry is made, the Authority must then as soon as practicable estimate the salinity credits or debits of the Accountable Action or Delayed salinity impact and amend the Register accordingly **[Item 97]**.

The Amendment Regulations provide that the Authority may, on the advice of the Basin Officials Committee, change an existing Register entry to a provisional entry if the Authority believes, on a re-estimation of salinity impacts, that an existing estimate of salinity cost effect is not reliable. If this happens, the Authority must use its best efforts to make a reliable estimate and consequential amendment of the Register as soon as practicable (clauses 24(1) and 24(1A) [**Item 119**]). **Item 117** repeals the heading for Clause 24 and substitutes a heading to provide that clause 24 relates to re-estimating salinity impacts and amendment of Register entries. **Item 118** removes the requirement of the Authority to re-estimate salinity impacts of each Accountable Action at intervals not less than every 5 years and replaces it with a requirement to re-estimate in accordance with a Review Plan under clause 32.

Under the Amendment Regulations, BSM procedures may also be made in relation to the making and administration of provisional entries (clause 41(f)(vii), **[Item 167]**).

***Attribution of credits and debits***

Amendments to Parts IV and V reflect changes in attribution of salinity credits and salinity debits, in particular to allow for credits or debits from an Accountable Action to be attributed to the new Collective Account (clause 11 **[Item 55 and 56])**, and for the credits from the delivery of Basin Plan Water to be attributed to the Commonwealth Account (see clauses 21 **[Items 98 - 105]**, 21A **[Item 106]** and 23 **[Item 113]**. The delivery of Basin Plan Water does not result in a salinity debit, as per clause 20(2)(a), **[Item 96]**.

***Amendment of Register entries***

Clause 24 relates to the power of the Authority to make amendments to Register entries. The clause **[Items 118 - 123]** requires the Authority to re-estimate the salinity impacts of any Register entry, after each review of the relevant Register entry (Reviews of Register entries are carried out in accordance with the Review Plan, see clause 32 **[Item 133]** and discussion below). The Authority retains the ability to re-estimate the salinity impacts of a Register entry at any time.

***BSM procedures***

BSM procedures set out much of the detail relating to maintenance of the Registers, as required to reflect the *Basin Salinity Management 2030* strategy **[Item 167]**.

**6. Review Plan**

The Amendment Regulations insert a definition of Review Plan (**Item 21**). The Amendment Regulations replace current provisions about review of Register entries, models and End-of-Valley Targets with requirements for:

a. the Authority to prepare a Review Plan (clause 32 **[Item 133]**), and

b. the Authority and Contracting Governments to review items in the Review Plan at the times specified in the plan for each item (clause 33 **[Item 133]**).

The Review Plan is prepared by the Authority on the advice of the Basin Officials Committee and in accordance with relevant BSM procedures. The plan provides for the review of:

a. Register entries (including provisional entries);

b. models or assessment methods associated with Register entries;

c. End-of-Valley Targets – including associated models and baseline data for each valley; and

d. any other model used or approved by the Authority under clause 38 **[Items 155 – 159]** to estimate salinity impacts.

Responsibility for carrying out reviews is as follows:

a. for Register entries (including provisional entries):

   (i) the Authority, where entries relate to JWM and S&DS works or measures;

   (ii) the relevant State Contracting Government or Governments (if the action is shared by State Contracting Governments), where entries relate to a State Action;

   (iii) as determined by the Basin Officials Committee under paragraph 21A(3)(b) [**Item 106**], where entries relate to salinity debits or credits that are attributed to the Collective Account;

   (iv) the Authority, where entries relate to the Delivery of Basin Plan Water; and

   (v) the relevant State Contracting Government, where entries relate to Delayed salinity impacts.

b. the Authority or the Contracting Government responsible for reviewing the Register entry for reviews of model or assessment methods associated with Register entries;

c. the State Contracting Government responsible for the relevant valley for review of End-of-Valley Targets; and

d. the Authority for review of any other model used by the Authority.

The Review Plan sets out the frequency at which each item must be reviewed so that every item is to be reviewed at least once during the period 2016 – 2026, and once in any ten-year period (that is, all items will be reviewed within ten years of their last review date under the BSMS). More frequent reviews may be specified, for example, for some items, commensurate with the risk, uncertainty or new knowledge in relation to the item.

The Authority and each Contracting Government review and report on the matters for which they are responsible under the Review Plan in accordance with the Review Plan and any BSM

procedures. In the Amendment Regulations, a report arising from a review of Register entries must consider salinity impacts in each of the years 2000, 2015, 2030, 2050 and 2100. A report on a review relating to End-of-Valley Targets must include information about salinity trends, predictions and risk profile for the relevant valley.

**7. Reporting**

The Amendment Regulations establish new reporting provisions to reflect the *Basin Salinity Management 2030* strategy. Detail about the form and content of all reports, including those under clauses 29, 30 and 31 (paragraph 41(ga), the Review Plan (paragraph 41(gb), the conduct and content of a review report under clause 33 (paragraph 41(gc) and about matters to be included in a review under clause 35 or 35A (paragraph 41(gd) are set out in BSM procedures **[Item 169]**).

State Contracting Governments prepare and give to the Authority status reports and comprehensive reports every two financial years (clause 29 **[Item 133]**). A status report is required to be prepared every two financial years from 1 July 2017, and a comprehensive report is required to be prepared every two years from 1 July 2018.

The Commonwealth is required to prepare and give to the Authority an annual report at the end of each financial year (clause 30 **[Item 133]**).

The Amendment Regulations provide that the Authority must prepare status reports, summary reports and comprehensive reports (clause 31 **[Item 133]**). Status and summary reports are required to be prepared every two financial years from 1 July 2017, and comprehensive reports are required to be prepared every two financial years from 1 July 2018.

Status reports are required to be provided to the Basin Officials Committee, along with a copy of each State Contracting Government's status report for that year, and a copy of the Commonwealth's report.

Summary reports are required to be provided to the Ministerial Council and must include a summary of information contained in the State Contracting Governments' status reports, the Commonwealth's report, and the Authority's status report (clause 31 **[Item 133]**).

Comprehensive reports are also required to be provided to the Ministerial Council, and include:

a. a summary of each State Contracting Government's comprehensive report, and of the Commonwealth's report, received for that year, and

b. outcomes of the audit and assessment report prepared by auditors (clause 34 **[Items 134 – 144]**).

**Item 134** replaces the heading of Clause 34, to refer to both Audit and assessment. **Item 135** amends subclause 34(1) to reflect that audits are not undertaken annually but instead are undertaken every second financial year following the financial year starting 1 July 2018. **Items 136** and **137** reflect that auditors may now resign by written notice to the Authority and may only be removed by the Basin Officials Committee. **Items 140-144** make minor amendments to reflect the changed schedule of audits and that the audit includes the performance of the Commonwealth as a Contracting Government.

The Amendment Regulations provide that the Authority's status, comprehensive and summary reports must be published by the Authority on its website.

**8. Auditing**

Auditors continue to be appointed as required by the existing Schedule (clause 34). Appointed auditors are independent and are required, under subclauses 34(3) and (4), to annually reach a

view by consensus on the performance of each State Contracting Government and the Authority in implementing the provisions of the BSMS and prepare a report setting out the findings and recommendations. However, the Amendment Regulations provide that audits are to be carried out every two years rather than annually **[Item 138]**.

Auditors (clause 34(3), **[Item 139]**):

a. audit reports of each review carried out in the preceding two years in accordance with the Review Plan;

b. audit the Registers; and

c. assess the implementation of the *Basin Salinity Management 2030* strategy, and the implementation of the Review Plan.

An audit and assessment will commence by November after the end of the financial year for which a comprehensive report was prepared **[Item 138]**. The Amendment Regulations provide that the Authority may, in consultation with Contracting Governments, amend the terms of reference for an audit or assessment to include additional matters **[Item 139]**.

### 9. Reviews of Schedule and the *Basin Salinity Management 2030* strategy

#### *Review of Schedule*

The Amendment Regulations provide that the Authority must review and report on the operation of the Schedule at such times as the Basin Officials Committee directs (clause 35 **[Item 145]**). The Authority may also report on the operation of Schedule B at any time it considers appropriate. The scope of the review will be determined as appropriate, but may include matters set out in clause 35(2) **[Items 146 – 147],** such as a summary of Delayed salinity impacts (defined as a salinity impact that occurs after 1 January 2000 due to actions taken earlier) and salinity impacts of Accountable Actions. Clause 35(3) removes the word 'State' before the words 'Contracting Governments', as it is not strictly necessary, as per the definition in the Agreement **[Item 148].**

#### *Review of the Basin Salinity Management 2030 Strategy*

Clause 35A **[Item 149]** provides that the Authority is required to commence a review of the *Basin Salinity Management 2030* strategy before the end of 2026. Clause 35A provides that the Authority must, before the end of 2025, prepare a plan to review the strategy in consultation with the Contracting Governments. The review must cover matters including but not limited to those envisaged for the Basin Salinity Management 2030 Strategic Review referred to in the *Basin Salinity Management 2030* strategy, or as required by BSM procedures, and must also include a review of the operation of the schedule.

### 10. BSM procedures

A new provision allows for BSM procedures to be made. BSM procedures set out administrative and technical details as required to give effect to the parties' intentions for the implementation of the Schedule (clause 40A **[Item 163]**). All former references to protocols are replaced in the Amendment Regulations with references to BSM procedures.

BSM procedures are made by the Basin Officials Committee, and must be published by the Authority.

The BSM procedures, once made, will be publicly available, and free of charge, on the Authority's website. The Authority will also provide the BSM procedures to groups who are likely to regularly refer to the Basin Salinity Management 2030 strategy, via

Govdex/Govteams, to members of the Basin Salinity Management Advisory Panel (previously the Basin Salinity Management Strategy Implementation Working Group), and other relevant committees such as the Salt Interception Technical Working Group and the Technical Working Group for Salinity Modelling, who are likely to regularly use the BSM procedures. Advisory Panel and Working Group members are Basin state and territory agency staff who are involved in implementing the Basin Salinity Management 2030 strategy and who undertake their jurisdictions obligations under Schedule B of the Agreement, in Schedule 1 of the Act.

The references to the BSM procedures in Schedule B to the Agreement refer to those procedures as in force from time to time. Clause 40A of Schedule B to the Agreement relevantly provides for the Basin Officials Committee (the BOC) to make, amend or revoke BSM procedures from time to time. Other provisions of Schedule B to the Agreement refer to the BSM procedures as in force from time to time (see the definition of 'BSM procedures' in subclause 2(1) which refers to subclause 40A(1)). The relevant provisions in Schedule B to the Agreement form part of the amendments to the Agreement, set out in Schedule 1 to the Act, as amended by the Amendment Regulations.

***References to the BSM procedures in the Agreement***

Section 14(2) of the Legislation Act relevantly provides that, unless a contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, for the reasons set out below, this limitation does not apply in relation to the references to the BSM procedures in the Agreement.

Section 18C of the Act provides that the 'regulations may make amendments to Schedule 1 by incorporating into the Agreement amendments made to, and in accordance with, the Murray-Darling Basin Agreement'. The 'Agreement' means 'the Murray-Darling Basin Agreement, as amended from time to time in accordance with that agreement and as set out in Schedule 1' (see section 18A of the Act). Section 18C provides the source of power to make the Amendment Regulations.

The Amendment Regulations set out amendments to the text of the Agreement set out in Schedule 1 to the Act, which are agreed to in accordance with clause 5 of the Agreement. The Amendment Regulations do not, themselves, make provision in relation to a matter by applying, adopting or incorporating a matter contained in a document (such as the BSM procedures) as in force from time to time for the purposes of subsection 14(2) of the Legislation Act. Rather the Amendment Regulations make amendments to the text of the Agreement in Schedule 1 to the Water Act, which have been agreed to in accordance with clause 5 of the Agreement. It is the Agreement which makes provision for matters by reference to a document as in force from time to time (ie the BSM procedures), rather than the Amendment Regulations.

Alternatively, a contrary intention is provided in the Act. By enabling the regulations to amend Schedule 1 'by incorporating into the Agreement amendments made to, and in accordance with' the Agreement, section 18C, read in the context of Part 1A of the Act, provides this contrary intention. The Agreement is not a Commonwealth law that is subject to the limitation in subsection 14(2) of the Legislation Act. Accordingly, it is possible, under clause 5 to the Agreement, for that agreement to be amended to incorporate a matter in an instrument or other writing from time to time. In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act.

In order for section 18C to be able to reflect the range of possible amendments to the Agreement in the text of Schedule 1 to the Water Act, it is necessary to interpret section 18C as

evidencing a contrary intention for the purposes of subsection 14(2) of the Legislation Act. **Accordingly, sections 18C and 256 of the Water Act provide the power for the Amendment Regulations to incorporate the BSM procedures as in force from time to time, by amending the text of the Agreement in Schedule 1 of the Water Act.**

Clause 41 **[Items 164 – 171]** provides additional examples of matters about which BSM procedures may be made. Additional BSM procedures are required for new areas of responsibility, such as the Collective and Commonwealth Accounts and new reporting requirements, such as the Review Plan, where it is useful to have administrative guidance that can be updated as processes are developed. The changes include:

a. in relation to administering the Registers (**Item 167**):

   i. the purpose and operation of the Collective Account, including attribution of debits or credits to the Collective Account;

   ii. the attribution or transfer of credits to or from the Commonwealth Account;

   iii. access by a Contracting Government to its share of credits held in the Collective Account; and

   iv. provisional entries and rules about the use of such entries.

b. monitoring Delayed salinity impacts and at End-of-Valley Target sites (**Item 168**);

c. the form and content of reports prepared by the Authority and the Contracting Governments;

d. the form and content of the Review Plan, and the way reviews under that Plan should be conducted and the contents of review reports;

e. matters to be included in a review of the Schedule or of the *Basin Salinity Management 2030* strategy (**Item 169**);

f. removal of items relating to valley reports and reviews, and about meeting End-of-Valley Targets, as a consequence of changes outlined in this Explanatory Statement (**Item 170**); and

g. ensuring that reporting obligations and the nature and content of reports are consistent with the reporting requirements of the Basin Plan, land and water management plans and relevant statutory requirements (**Item 171**).

## 11. Other amendments made throughout the Amendment Regulations

### Redundancies

Estimated baseline conditions (sub-clauses 5(3) and 5(4) [**Item 32**]) and End-of-Valley Targets (clauses 6 and 8 [**Items 40 and 43**]) for the Australian Capital Territory are removed from the Schedule, because these clauses and sub-clauses are no longer be required, by virtue of this information being incorporated through Appendix 1 in the Amendment Regulations.

### Updating, modernisation or correction

***Purpose of the Schedule – clause 1***

The purpose of Schedule B is amended to reflect the *Basin Salinity Management 2030* strategy accountability arrangements for all actions that result in significant salinity impacts, including those for environmental water recovery, delivery and use (clause 1 **[Items 1 – 8]**). **Item 1** adds

subclause 1(1) to the clause. **Items 2 and 7** update the reference to the relevant Strategy to refer to *Basin Salinity Management 2030*. **Item 3** provides that salinity will be managed as set out in the following subclauses. **Item 4** amends paragraph 1(a) to provide that salinity can be managed by promoting works, measures and other action. **Item 5** inserts a note to provide that salinity targets under Schedule B also apply for some purposes under the Basin Plan. **Item 6** repeals paragraph 1(c) and substitutes it with a new paragraph that updates the requirements regarding Registers (which were established under the previous Strategy) and sets out that there are a range of accountability arrangements for actions that result in significant salinity impacts. **Item 8** adds subclause 1(2) which sets out that the accountability arrangements as inserted by **Item 6** include maintaining Registers and that this includes recording salinity impacts and allocating salinity credits and debits to Contracting Governments.

***Definitions – clause 2***

There are a number of terms used in the Schedule which are defined in the Agreement or the Act. A provision is added at the end of clause 2 **[Item 26]** which provides that such terms as used in the Schedule that are not defined in the Schedule have the meaning given to them by the Act or Agreement. A note is also inserted before clause 2 alerting the reader to the fact that terms Authority, Basin Plan, Committee and Ministerial Council are defined in Clause 2 **[Item 9]**.

Some of the definitions contained in clause 2 are amended, and some new terms are added **[Items 10 – 24]**. These changes are discussed in relevant paragraphs above.

*Clause 3*

**Item 27** corrects an error in paragraph 3(4)(a) by substituting the word 'Committee' with the words 'Ministerial Council'. The subclause refers to subclause 72(1) of the Agreement which outlines what the Ministerial Council must determine in relation to apportionment of costs.

*Clause 4*

**Items 28** and **29** amend the numbering and punctuation in clause 4 as a result of the amendment made by **Item 30**. **Item 30** removes subclause 4(2) which is no longer required, reflecting the change in relevance of End–of-Valley Targets discussed above under the heading 'Salinity management in valleys'.

*Clause 45*

**Item 175** amends the numbering in clause 45 as a result of the addition of sub-clause 45(2) by **Item 177**. **Item 176** removes the reference to 'State' in paragraph 45(a), when describing Contracting Governments, so that the Commonwealth is also included as a Contracting Government. **Item 177** adds a requirement for the Authority to consult with the Committee before it undertakes an act under subclause 45(1). Under subclause 45(1), the Authority has two obligations. The first is that it must consult with the relevant Contracting Government with a view to remedying a situation leading to a determination under either clause 43 or 44. The second is that the Authority must include in its report to the Ministerial Council the Authority's proposal for remedying that situation.

*Appendix 1 – End-of-Valley Targets*

The amendments to Appendix 1 **[Item 185]** were developed in consultation with jurisdictional representatives. Changes include clarifying that the Basin Salinity Target listed there is the target referred to in clause 7 to the Schedule, and also correcting an historical transposition of figures in two entries – the Bogan End-of-Valley Targets (as absolute values) median salinity and peak salinity values are around the wrong way, and this is corrected by **Item 185**.

Clause 7 is amended to reflect that the Basin Salinity Target is to maintain the average daily salinity at Morgan under the hydrological conditions of the Benchmark Period, and that E.C. stands for Electrical Conductivity **[Items 41 – 42]**.

***Appendix 2 – Joint works and measures***

Appendix 2 **[Item 186]**, the list of authorised JWM and S&DS works or measures referred to in clause 12, is updated to reflect Ministerial Council resolutions made since the Appendix was last updated.

Changes include describing the Waikerie Salt Interception Scheme (SIS) in its three component parts. One of the parts (Waikerie Phase 2A SIS), nominated as an S&DS work or measure, is also explicitly added to the definition of S&DS works or measures **[Item 21]**. The explicit inclusion of this work in the definition of S&DS works or measures addresses any potential doubt about its status that may otherwise have arisen due to the date on which it was declared effective and entered on the Register.

***'Baseline Conditions' and estimates of baseline conditions***

Baseline Conditions are the conditions that contributed to the movement of salt through land and water within the Basin as at 1 January 2000. The current Operational Protocols made under Schedule B list those conditions as the suite of conditions in place within catchments and rivers on 1 January 2000 for:

- land use (level of development of the landscape);
- water use (level of diversions from the rivers);
- land and water management policies and practice;
- river operating regimes;
- salt interception schemes;
- run-off generation and salt mobilisation processes; and
- groundwater status and condition.

Salinity, salt load and flow regime at various sites under these Baseline Conditions can be estimated by modelling.

The parties and the Authority (and previously, the Murray-Darling Basin Commission) have estimated salinity and salt load under Baseline Conditions at each of the End-of-Valley Target sites, and at the Basin Salinity Target site at Morgan. These revised estimates were approved by the Authority (and previously the Murray-Darling Basin Commission), and are now set out in Appendix 1 **[Item 185]** of the Schedule.

The distinction between 'Baseline Conditions' and the estimates of the salinity and salt load at particular sites under those conditions is not clear from the current definition of 'Baseline Conditions' and clause 5.

The Amendment Regulations alter the definition of the term 'Baseline Conditions' to mean the conditions that contributed to the movement of salt through land and water within the Basin on 1 January 2000.

The amendments to clause 5 **[Items 31 - 32]** provide that estimates of salinity and salt loads under Baseline Conditions at each End-of-Valley Target site and at Morgan are those set out in Appendix 1.

The amendments to clause 5 set out the process for amending estimates **[Items 33 – 39]**. The Amendment Regulations provide that a State Contracting Government or the Authority may from time to time propose an amendment to an estimate. The Authority must then appoint an appropriately qualified panel to consider a proposed amendment.

The Amendment Regulations provide that once the Authority has considered the advice of the panel it may, on the advice of the Basin Officials Committee [**Item 36**]:

a. endorse a proposed amendment;

b. endorse a proposed amendment subject to it being modified as agreed between the Authority and the relevant Government; or

c. refuse to endorse a proposed amendment [**Item 37**].

The Amendment Regulations provide that after endorsing a proposed amendment, the Authority must then recommend to the Ministerial Council that Appendix 1 be amended in accordance with the endorsed amendment **[Item 38]**.

The Amendment Regulations provide that a State Contracting Government may use a proposed amendment that has been endorsed by the Authority from the time that it is endorsed **[Item 38]**. If a proposed estimate were to be endorsed by the Authority subject to a modification, the relevant Government must, within six months, modify its estimate and give the Authority a copy of the modified estimate. If the Authority were to endorse a proposed amendment subject to modification under paragraph 5(7)(b), the relevant Contracting Government may then use the estimate originally proposed until the relevant Government modifies the estimate in accordance with that agreement, and gives the Authority a copy of the modified estimate (clause 5(9) **[Item 39]**).

The Authority's role in 'endorsing' amendments rather than 'approving' them (as per the current Schedule) reflects the respective responsibilities of the Authority and Ministerial Council. That is, it is the Ministerial Council rather than the Authority that is the body with power to agree to amendments being made to Schedule 1 under clause 5 of the Agreement. The amendments formalise past practice, under which changes to Appendix 1 (i.e. to include estimates for the Australian Capital Territory site) have been provided to the Ministerial Council for subsequent amendment of Appendix 1.

***Salinity impacts arising due to change in location of permitted water use***

Provisions in the current Schedule relating to salinity impacts of transfers of water entitlements are removed. These changes affect clauses 20(2) and (3), and 21(2)(c) **[Items 96 and 105]**.

The reason for the amendments to these clauses is that salinity impacts only arise from changes in the use of water, not from changes in ownership of water entitlements. If a Contracting Government believes that a transfer of a water entitlement will result in a salinity impact due to a change in use (e.g. because of changes in rules about water use, or a change in a water use licence or permit), then the change in use should, under the amendments, be notified as an Accountable Action and dealt with in accordance with Schedule B.

Consequential amendments to Schedule D to the Agreement to complement these changes in Schedule B have been progressed by the Authority in tandem with other amendments being prepared for Schedule D.

There are three existing Register entries referred to as 'permanent trade accounting adjustment'. The entries were made to reflect changes in the permitted location of use of water following trade. The entries are currently reviewed in accordance with existing Operational Protocols, which will be revised prior to being re-made as BSM procedures. No additional

provisions were considered necessary in the Schedule to accommodate these entries or the manner of their review.

***Program of Joint works and measures – continued commitment to Basin Salinity Target***

The BSMS committed the Contracting Governments to a Joint Program of JWM sufficient to offset increases in salinity by 61 E.C., by the end of 2007. That commitment was set out in clause 10 of the Schedule. The last JWM to have been constructed under the Joint Program was declared effective during 2014, and the parties continue to commit to implementing a Joint Program as required to maintain water quality. This commitment involves carrying on the JWM listed in Appendix 2 to the Schedule.

**Items 52, 53 and 54** makes only minor amendments to clause 10, retaining a general commitment to implement a Joint Program to maintain the quality of water in the upper River Murray and River Murray in South Australia, ensuring that salinity levels are appropriate for agricultural, environmental, urban, industrial and recreational uses. The date in paragraph 10(1)(b) **[Item 53]**, that prescribes the requirement for Contracting Governments to implement a Joint Program before 31 December 2007, is updated to before 31 December 2014, to retrospectively reflect the work done by the Contracting Governments up until that time. This change corresponds to subclause 10(2) **[Item 54]**, and also requires a consequential change to subclause 13(2) **[Item 65]**, so that the Basin Officials Committee may determine what costs, salinity credits or debits relating to a Joint work or measure undertaken after 1 January 2015 must be contributed by the Government of Queensland or the Australian Capital Territory [**Items 63 - 64**].

**Item 51** repeals the heading for Part IV and substitutes with a heading to properly reflect its contents, which deal with all works and measures authorised under the Agreement: that is, both JWM and S&DS works or measures.

Clause 12 is amended **[Items 57 - 62]** to provide that the Ministerial Council is required to maintain Appendix 2 as a list of all JWM, and all S&DS works or measures, authorised under clause 56 of the Agreement. Clause 12 in its current form does not clearly require the Appendix to include S&DS works or measures.

***Continuing to recognise works and measures from three distinct eras***

Works and measures are constructed or implemented by the parties for the purposes of salinity management in order to implement both the Salinity and Drainage Strategy and the BSMS. Further works and measures will be carried out for the purposes of the *Basin Salinity Management 2030* strategy.

Amendments are made to more simply reflect the three eras of Basin salinity management:

a. A new provision requires the Authority to maintain, in accordance with BSM procedures, a record of the proportions in which salinity debits and credits made under each of the three eras of Basin salinity management (clause 21B **[Item 106]**);

b. The term 'Former salinity and drainage work' is replaced with the term 'S&DS works or measures', without altering its meaning; and

c. The term 'BSMS works or measures' is used to identify works and measures done for the purposes of the BSMS.

*Monitoring*

Amendments are made to ensure that requirements about monitoring for Delayed salinity impacts are explicit, as follows.

Clause 25 is amended **[Item 124]** so that the Authority and each State Contracting Government must carry out such monitoring as it is required to undertake, in accordance with any relevant BSM procedures.

Clause 27, including its title, is amended **[Items 126 – 131]**:

a. so that the clause applies to monitoring for Delayed salinity impacts as well as monitoring impacts of Accountable Actions;

b. to require a State Contracting Government to give to the Authority, within three months, proposed monitoring programs that enable the assessment of Delayed salinity impacts; and

c. to clarify that the obligation to provide monitoring programs for a State Action is imposed on a State Contracting Government, not all Contracting Governments.

If salinity debits or credits arising from an Accountable Action were to be attributed in whole or part to the Collective Account (see clause 21A) **[Item 106]**, the Basin Officials Committee is responsible for specifying which Contracting Government will be responsible for monitoring the action, and for giving the Authority proposed monitoring programs.

Clause 27 is also amended **[Item 127]** so that if a JWM were to be later designated by the Authority as a State Action (see clause 24(2) of the Schedule), the State responsible for that Action is required to give a proposed monitoring program to the Authority within three months after the designation.

Clause 28 **[Items 131 and 132]**, which states the obligation of a Contracting Government to carry out monitoring in accordance with a program accepted under clause 27 **[Items 126 – 130]**, is amended consistently with the changes to clause 27.

**Models**

Various amendments are made to provisions about models to bring them up to date, as follows.

***Models developed by the Authority***

The Authority is required to both develop and maintain the models referred to in subclause 36(1) **[Items 150 - 152]**. The Amendment Regulations provide that a model must be capable of estimating or supporting the estimation of:

a. any salinity impacts of Accountable Actions (i.e., JWM, S&DS works or measures, State Actions and delivery of Basin Plan Water); and

b. any Delayed salinity impacts,

at Morgan and such other relevant locations as the Authority may determine, for each of 2000, 2015, 2030, 2050, 2100 and in such other years as the Authority may determine.

A Contracting Government must, under the amendments, provide the Authority information about an Accountable Action or about Delayed salinity impacts that that government holds, in order to assist with the Authority's development, maintenance or alteration of models.

***Models developed by State Contracting Governments***

Each State Contracting Government is required to both develop and maintain models to simulate the effect of Accountable Actions and Delayed salinity impacts. A State Contracting Government is not be required to develop and maintain a surface water model if a model developed by the Authority is capable of simulating the matters required for a surface water model under subclause 37(1)(a).

Subclause 37 **[Item 154]** is also amended consistently with clause 36 **[Items 150 - 153]**, so that a model or suite of models must be capable of estimating or (in the case of groundwater models) supporting the estimation of the salinity impacts of Accountable Actions and Delayed salinity impacts for each valley and each End-of-Valley Target site for each of 2000, 2015, 2030, 2050, 2100 and such other years as the Authority may determine.

***Assessment and approval of certain models, review of models***

Subclause 38(1) **[Item 155]** requires any new model or alteration to a model (whether made by the Authority or by a State Contracting Government) to be assessed in accordance with the BSM procedures. It is envisaged that the BSM procedures will stipulate a form of independent assessment appropriate to each type of model.

A State Contracting Government is required to give a copy of an approved model or alteration to the Authority only if the Authority requests it (subclause 38(6) **[Items 158 - 159]**).

Clause 39 **[Item 160]**, which required the review of models, is removed. Review of models is now be covered by the Review Plan (clause 32, [**Item 133**]).

***Sharing costs of S&DS works and measures***

The existing Schedule (clause 49) requires that the costs of undertaking an S&DS work or measure must be met entirely by the Contracting Government nominated under the Agreement as being responsible for the work or measure. This is not consistent with the Contracting Governments' intention or with the way that costs for JWM authorised under the Agreement are met. The provision appears to have stemmed from a long-standing error in the Schedule, and has never been applied. **Item 182** repeals clause 48 and substitutes it with a clause to provide for the costs of both JWM, and S&DS works and measures, to be shared amongst the parties in accordance with the cost-sharing provisions set out in clause 72 of the Agreement. Cost shares may be varied amongst Contracting Governments under an agreement made under clause 23 of the Schedule. **Item 184** repeals clause 49.

**Transitional provisions**

The Amendment Regulations include transitional provisions **[Items 183 – 184]]** to:

a. Recognise that things started by the Contracting Governments, the Authority or the auditors under the current Schedule may not be completed prior to commencement of the Amendment Regulations (clause 52). Such things must be completed in accordance with the current Schedule, unless it is more appropriate for the thing to be completed under the amended Schedule. The clause covers, for example, any re-estimation of salinity impacts that is underway at commencement.

b. Recognise that things have been done by Contracting Governments, the Authority and auditors in anticipation of the amendments (clause 53). This clause covers annual reporting that has been undertaken since the *Basin Salinity Management 2030* strategy was approved by the Ministerial Council, which accords with the new provisions. It also covers the recent appointment of auditors for clause 34, under expanded terms of reference that are consistent with the new provisions.

c. Ensure that the amendments do not affect things already done under the Schedule prior to the amendments (clauses 54, 55 and 56). These provisions cover, for instance, entries on Registers, calculations of salinity impacts etc.

d. Continue the existing Operational Protocols made by the Authority in existence as BSM procedures (clause 57). The instruments will be progressively replaced by new BSM procedures made by the Basin Officials Committee.

e. Provide that an entry currently on a Register that is stated to be a provisional entry, will be taken to have been made as a provisional entry under clause 20A **[Item 97]**.

## Table 1: Timeline for Basin Salinity Strategies and Salinity Schedules

| 1988 | 1989 | | | 1992 | 1993 | | | | | | | 2000 | 2001 | 2002 | | | | | 2008 | | | | | | 2015 | | | 2018 | Beyond 2018 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Salinity and Drainage Strategy 1988-2000* **(S&DS)** | | | | | | | | | | | | | *Basin Salinity Management Strategy 2001-2015* **(BSMS)** | | | | | | | | | | | | | | | | ***Basin Salinity Management 2030*** **(BSM2030)** | |
| | | | | | **Schedule C – Salinity and Drainage Strategy**<br>**Oct 1993**<br>Implemented S&DS<br>Referred to in current and amended Schedule as '*Salinity and Drainage Strategy*' | | | | | | | | **Schedule C – Basin Salinity Management**<br>**1 Nov 2002**<br>Implemented BSMS<br>Replaced previous Schedule C<br>Referred to in current and amended Schedule as '*former Schedule*' | | | | | | | **Schedule B – Basin Salinity Management**<br>**8 Dec 2008**<br>Implemented BSMS<br>Replaced the 'former Schedule', with minor changes to reflect replacement of MDBC with MDBA and BOC.<br>Referred to in current Schedule as '*this Schedule*' | | | | | | | | | ***Schedule B – Basin Salinity Management***<br>*2018*<br>*Amends current Schedule to implement BSM2030* |
| **MDB Agreement 1982**<br>As amended 1987, 1990 | | | | | **MDB Agreement 1992**<br>As amended from time to time, including last in 2006. Replaced the 1982 Agreement (cl 4).<br>Referred to in Water Act as '*former Agreement*' | | | | | | | | | | | | | | | | **MDB Agreement 2008**<br>As amended from time to time. Revoked the 1992 Agreement (cl 4).<br>Referred to in Water Act as '*Agreement*' | | | | | | | | | | |

Notes:

1. **S&DS** was adopted by the Ministerial Council in April 1989. Implementation of the Strategy was to commence 1 January 1988.
Schedule C was made in October 1993.

2. **BSMS** was adopted by the Ministerial Council on 28 August 2001.
Schedule C was replaced by the new Schedule C on 1 November 2002 (Council meeting 32). Schedule B replaced the new Schedule C in December 2008.

3. ***Basin Salinity Management 2030*** **strategy** was adopted by the Ministerial Council on 27 November 2015

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

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

*Water Amendment (Murray-Darling Basin Agreement—Basin Salinity Management) 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 Schedule B to the Murray-Darling Basin Agreement (the Agreement), which is set out in Schedule 1 to the Act to give effect to aspects of the new *Basin Salinity Management 2030* strategy, to guide joint salinity management until 2030.

Human rights implications

This legislative instrument engages the right to an adequate standard of living and the right to health in the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The right to an adequate standard of living is protected in Article 11 of the ICESCR and the right to physical and mental health is protected in Article 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights, established to oversee the implementation of the ICESCR, has interpreted these articles as including a human right to water which encompasses an entitlement to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[1] The Amendment Regulation promotes these articles by providing a framework to support water quality through salinity management in the Murray-Darling Basin.

This legislative instrument deals with managing salinity in the Basin to ensure that salinity levels of the upper River Murray and the River Murray in South Australia are appropriate for agricultural, environmental, urban, industrial and recreational uses.

The human rights implications of the legislative instrument must be considered in the context of the Act. The overall framework of the Act supports access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses. This is reflected in Section 1, Part 1, Schedule 1 of the Agreement which specifies that the purpose of the Agreement is to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Basin, including by implementing arrangements agreed between the Contracting Governments to give effect to the Basin Plan, the Water Act and State water entitlements.

The Amendment Regulation supports the Committee's interpretation of the ICESCR as it supports the right to an adequate standard of living by establishing a framework that promotes Contracting Governments to manage salinity into the future, and uphold water quality standards to support communities and industries. This improves environmental and socio-economic outcomes, and provides certainty for communities who use the Basin water resources for cultural, social, environmental, spiritual and economic purposes; including farmers, who need reliable stock and domestic supplies; tourism operators, rural and regional communities and cities, which need reliable, clean, drinking supplies.

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

The Amendment Regulation also supports Article 8(c)(d) and (i) of the Convention of Biological Diversity (CBD), through promoting water quality in the Murray-Darling Basin, by regulating biological resources with a view to ensuring conservation and sustainable use; promoting the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; endeavouring to provide the conditions needed for compatibility between present uses and the conservation of biological diversity, and the sustainable use of its components.

The Amendment Regulation additionally supports Article 10(e) of the CBD by encouraging cooperation between governmental authorities and its private sector in developing methods for sustainable use of biological resources, by virtue of the consultative process required under the Water Act to enable these amendments to be agreed amongst Basin States.

Conclusion

The legislative instrument is compatible with human rights because it supports the human right to clean, accessible water, through promoting water quality.

**The Hon. David Littleproud MP**
**Minister for Agriculture and Water Resources**