

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Corporations Act 2001 and Australian Securities and Investments Commission Act 2001

Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014: Water Trading Exemptions

The *Corporations Act 2001* (the Act) provides for the regulation of corporations, financial markets and products and services, including in relation to licensing, conduct, financial product advice and disclosure.

Subsection 1364(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Paragraph 761D(3)(d) of the Act provides that the *Corporations Regulations 2001* (the Principal Regulations) may declare anything not to be a derivative for the purpose of Chapter 7 of the Act.

Subsection 251(1) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the ASIC Act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to the ASIC Act.

Paragraph 12BAA(8)(p) of the ASIC Act provides that a facility, interest or other thing declared by regulations made for the purposes of subsection 12BAA(8) not to be a financial product for the purposes of Part 2, Division 2 of the ASIC Act. This Division of the ASIC Act deals with unconscionable conduct and consumer protection in relation to financial products.

There is legal uncertainty around whether tradeable water rights, as defined in the *Water Act 2007*, and the contracts to buy and sell these rights would be defined as a derivative under the Act and therefore be subject to financial services and products licencing and other regulatory arrangements.

The *Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014: Water Trading Exemptions* (the Regulation) explicitly excludes tradeable water rights, and certain arrangements to buy and sell these rights, from the definition of a derivative under the Act. Consequentially, the Australian Securities and Investments Commission (ASIC) will not regulate such arrangements as derivatives for the purposes of the Chapter 7 of the Act. The Regulation will also ensure that ASIC will not be responsible for regulating them as financial products under the ASIC Act.

Consequentially, certain water market intermediaries facilitating trade in basic tradeable water rights will not be required to hold an Australian Financial Services Licence (AFSL) and operators of markets in basic tradeable water rights will not be required to hold an Australian Market Licence (AML) and will not be subject to regulation by ASIC as a financial market.

Similarly, operators of facilities that provide a mechanism for the clearing or settlement of transactions relating to basic tradeable water rights and certain arrangements in relation to tradeable water rights will not be required to hold an

Australian Clearing and Settlement Facility Licence (CSFL) and will not be subject to regulation by ASIC as a clearing facility or a settlement facility.

The Regulation will apply to tradeable water rights, contracts to buy and sell certain tradeable water rights and derivative contracts whether entered into before or after the commencement date of the Regulation. The Regulation aims to reduce the regulatory obligations that water market participants may potentially be required to comply with and will not directly or indirectly impose additional obligations or alter existing property rights or contractual rights.

The Regulations were released for public consultation by Treasury for a period of 4 weeks, closing on 7 June 2013. Direct consultation occurred with thirteen government authorities, twenty-five irrigation and agricultural industry organisations, three water brokers and five other industry organisations. A number of issues were raised and have been addressed in the Regulations.

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

The Regulation commences on the day after registration.

Details of the Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014: Water Trading Exemptions

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014: Water Trading Exemptions*.

Section 2 – Commencement

This section provides for the Regulation to commence on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*.

Section 4 – Schedule(s)

This section provides that Schedule 1 amends the *Australian Securities and Investments Commission Regulations 2001* and the *Corporations Regulations 2001*.

Schedule 1 – Amendment

Item [1]

Item 1 to Schedule 1 provides that the unconscionable conduct and consumer protection provisions in relation to financial products and services, in the ASIC Act, will not extend to tradeable water rights, or certain arrangements with respect to tradeable water rights.

Item [2]

Item 2 to Schedule 1 replaces existing subregulation 7.1.04(8) with a new subregulation 7.1.04(8) and inserts new subregulations 7.1.04(9) and 7.1.04(10) into the *Corporations Regulation 2001*.

Paragraph 7.1.04(8)(a) provides that tradeable water rights *per se* will not be considered to be derivatives for the purposes of Chapter 7 of the Act.

Paragraph 7.1.04(8)(b) provides that arrangements between a buyer and seller, which relates to the transfer of ownership of tradeable water rights or replacement water rights will not be considered to be a derivative for the purposes of the Act.

The terms 'buy' and 'sell' are to be read broadly, and are capable of covering those situations where there is no monetary exchange, or where some other form of valuable consideration is provided.

Subregulation 7.1.04(9) provides that the arrangements described in 7.1.04(4) to (8) are not derivatives, whether or not a matter mentioned in those subregulations are described in subsection 761D(1) of the Act. This subsection replicates the former subsection 7.1.04(8), other than the additional inclusion of the replacement subsection 7.1.04(8).

Subregulation 7.1.04(10) defines the term ‘replacement water rights’ and clarifies that the term ‘tradeable water rights’ has the same meaning as the *Water Act 2007*.

The definition of ‘replacement water rights’ is designed to capture scenarios where the form of a tradeable water right sold by one party may not be strictly identical to that received by the other party. A replacement water right includes a water right arising out of a transformation arrangement. Transformation arrangements means arrangements of the kind referred to in paragraph 97(1)(a) of the *Water Act 2007* and the *Water Market Rules 2009*. Transformation arrangements provide for the transformation of the whole or a part of an irrigation right against an irrigation infrastructure operator, in accordance with transformation arrangements, into a water access entitlement.

The non-singular ‘tradeable water rights’ is used in subregulations 7.1.04(8) and (10) because the plural of the term is used in the definitions in the *Water Act 2007*. The singular can be taken as a reference to the plural, and vice versa by virtue of the operation of section 23 of the *Acts Interpretation Act 1901*.

The exclusion of tradeable water rights and certain arrangements in relation to tradeable water rights from being a derivative will result in those rights, and trades in those rights, not falling within the definition of a financial product solely on the basis of being a derivative. Paragraph 764(1)(c) of the Act provides that a derivative is a financial product.

As a consequence, the provisions in the Act and the ASIC Act relating to financial services, financial markets and clearing and settlement facilities will not apply to certain basic tradeable water rights and certain arrangements in relation to basic tradeable water rights.

Part 7.6 of the Act requires a person who carries on a financial services business must hold an AFSL covering the provision of the financial services. Section 766A of the Act provides that certain dealings in a financial product, financial product advice and market making in relation to financial products will be a financial service.

Part 7.2 of the Act provides for a licensing regime in relation to financial markets. Section 767A defines a ‘financial market’ with reference to offers or invitations to acquire or dispose of financial products.

Part 7.3 of the Act provides for the licensing of clearing and settlement facilities. Section 768A defines a ‘clearing and settlement facility’ with reference to transactions relating to financial products.