

# Landscape South Australia

## Regulations Explanatory Paper

### Draft Water Register Regulations 2020

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## Introduction

The *Landscape South Australia Act 2019* (the Act) passed Parliament in November 2019. To support the implementation of Schedule 4 of the Act, which establishes the South Australian Water Register (water register), the draft *Landscape South Australia (Water Register) Regulations 2020* (the draft regulations) have been developed and released for public consultation.

Regulations support the implementation of the Act by providing guidance on how certain parts are interpreted and will establish further requirements, functions and powers related to the Act. The Act will be brought into operation on 1 July 2020.

The draft regulations have been prepared by the Department for Environment and Water (DEW), based on feedback received from earlier consultation with industry stakeholder and peak bodies, to understand the desired features and key requirements for an improved register.

The regulations will come into operation in stages to align with the launch of a new online water management portal currently being developed through the \$14.7 million Water Management Solutions (WMS) Program, funded by the Australian and South Australian Governments. These water register regulations are intended to commence during the middle of 2021. Further information about the WMS Program can be found at: [Reforming our water licensing business and delivering a modern online water register](#).

Stakeholder feedback on the draft regulations is sought during a six week period from 27 July to 4 September 2020.

Should you have any feedback on the proposed regulations, please communicate this to us through the feedback form provided on the South Australian Government's **YourSAy** website. Your feedback will be used to support decision making and finalise the regulations.

A consultation report will be produced, to document how public input influenced the regulations and any other issues which may be addressed at a later date. Thank you for taking the time to review these draft regulations. Your time and effort is sincerely appreciated.

## The Water Register Regulations

Broadly, the draft water register regulations aim to:

- Prescribe the scheme for the registration of security interests and caveats against water licences and water access entitlements needed to support operation of provisions under Schedule 4 of the Act;
- Enable water licence holders to register the nature of their joint ownership of a water licence as joint tenants or tenants in common and clarify consent arrangements for parties to deal with and mortgage their water interests;
- Provide an optional two stage transfer process for permanent transfers of water licences and water access entitlements. This will support property settlement processes by providing certainty that an approved transfer will not be registered prior to settling a transfer, if that is the option chosen;
- Provide greater flexibility for customers to manage their water assets by providing a new transaction type to subdivide or consolidate a water licence;
- Prescribe additional information to be recorded and accessible on the Register including information in relation to security interests, caveats and the nature of joint ownership of water licences to enable better informed decision-making;
- Prescribe arrangements for licence holders and their representatives to register for “notifiable” events to be alerted to relevant changes to the Register. This will be achieved through a notification system, meaning licence holders and their authorised representatives will be alerted about activity on accounts, allowing licence holders to be informed and make account management decisions;

- Enable the Minister to specify standards for verification of identify and authority of persons seeking to undertake dealings on the Register to safeguard against fraud and ensure the validity of transactions recorded on the Register; and
- Promote efficient dealings and minimise transaction costs by enabling the establishment of an electronic lodgement network for eligible agents or trusted parties to lodge applications and undertake verification of identify and authority on behalf of the Minister.

The regulations have been developed to deliver:

- Expected improved access to capital and business development opportunities, stemming from greater lender confidence to offer lending against water licences;
- The enabling of a caveat function to allow action to be taken by parties with an interest in a water licence or water access entitlement. This enables a hold to be placed on registration of dealings with a water asset. For example, the capacity for lenders to protect their unregistered mortgage by registration of a caveat. This provides licence holders with improved opportunity to secure funding in advance of registration of the transfer of a water access entitlement;
- Greater security and confidence to trade water as an approved trade will not be registered before money changes hands through an optional two-stage transfer process;
- Quicker and easier access to better quality information when compared to the existing register. This will support trade and investment decisions, while private and sensitive information will be safeguarded;
- The ability to register the nature of ownership of jointly held water assets (all joint tenants or tenants in common), and therefore provide greater clarity as to how water property rights should be dealt with in the event of the death of a licence holder, facilitating more efficient transmission of ownership;
- The ability to subdivide and consolidate water licences;
- The ability to authorise agents to trade on behalf of a licence holder;
- The ability to record and search information regarding outstanding levy or penalty (debt owing), noting that the ability to search debt owing information pertaining to a water asset would be restricted to the licence/entitlement holder of that asset and their authorised representative(s);
- Improved safeguards against fraud, through increased level of identity verification standards to ensure water assets are secure; and
- Support for an electronic lodgement facility for authorised agents/trusted parties to lodge applications on behalf of water licence/entitlement holders. This will lower transaction costs and allow for quicker settlement by allowing a licence holder to authorise agents or trusted parties to lodge applications for dealings with water rights on their behalf.

The proposed regulations, together with the new system features, will also assist financial institutions/lenders with an interest in a water licence/entitlement by:

- Allowing security interest holders to register, transfer, discharge security interests (e.g. mortgages) and caveats;
- Allowing a holder of a registered security interest to exercise a power of sale where there is default on the payment of a debt owing, increasing lender confidence in allowing their customers to use water licence/entitlements as security; and
- Increasing the ability for interest holders to search the water register for information pertaining to water licences/entitlements that they hold an interest in.

The remainder of this document sets out the intent and effect of the main regulations that have been drafted. However, there may be other areas that are of particular importance to you and we recommend reviewing the draft regulations in full prior to providing any feedback.

## Information on the register

**Regulation 2** sets out the order for when the clauses of these regulation will come into effect. This is required to allow the transition of data and the establishment of the new water register and its features to align with business requirements.

**Regulation 3** sets out the definitions.

**Regulation 4** sets out all the information to be recorded on the register. Covered are water access entitlements, allocations, water resource works approvals, site use approvals, security interests, levies and other fees and charges, water affecting activity permits and caveats.

**Regulation 5** says that a date and time of registration to be recorded in the Register and where more than one document (application) relating to the same entitlement or interest is lodged then the documents will be registered in the order in which they are lodged unless a different intention is indicated by the registering parties. It also states that a registration comes into effect at the time and date that a registration is made.

**Regulation 6** sets out how a registration can be altered in the register.

## Transfers

**Regulation 7 and 8** set out how transfers are given effect. The intent of these regulations is to allow the seller of a water access entitlement to choose which stage they would like a transfer of their entitlement to take effect on the register, either:

1. at the same time the Minister has approved a transfer without waiting for settlement to first occur, or
2. within 2 months, when the Minister has approved a transfer and settlement has occurred and the Minister has been notified that settlement has occurred and the registration of the transfer can now take effect (i.e. the seller of the water entitlement has received payment for the sale of their entitlement).

These regulations also clarify that if an entitlement is held by joint tenants, then consent from all parties is needed for transfers of entitlement. However, if the owners are tenants in common, then consent from only one tenant is required in relation to a transfer that relates to their interest.

## Security Interests

**Regulation 9 and 10** say that a tenant in common may create a security interest over their interest (their part of a water licence or entitlement) without the consent of the other tenants in common. This reflects the standing in law of a tenant in common when compared to joint tenants. Joint tenants have an equal interest in the whole of the entitlement unlike tenants in common who have distinct shares in an entitlement.

**Regulation 11** says that the Minister is not required to consider the legal effect of the registration of the security interest; he or she must simply register it. The legal effect of the security interest is created by an agreement between the parties (the owner of the water licence and the financier). It is also possible for a security interest to arise by operation of law.

**Regulation 12** says that if a water licence or water access entitlement has or is being transferred for a limited period (temporary transfer) then a security interest cannot be recorded against it.

**Regulation 13** says that the registration of a security interest does not affect the ability of the Minister to administer the related water licence as he or she normally would. It also says that the registration of

a security interest over a water licence or water access entitlement does not allow a security interest holder to prevent a transfer of a water allocation and it does not require the holder of the security interest to consent to any transfer of a water allocation during a particular water use year.

**Regulation 14, 15** set out the effect and priority of a security interest. It allows for the water licence or entitlement to be used as security for the payment of a debt under a contract, and provides the holder of the security interest with a scheme for the enforcement of the security interest in the case of default by the water licence or entitlement holder. If there are multiple security interests registered, a priority scheme is also established.

**Regulation 16** clarifies that the holder of an interest in a security interest, or of a part interest in a security interest, may apply to the Minister for a transfer of the security interest to another person. For example, where a mortgage is re-financed a lender may wish to transfer its interest in the security interest to another lender.

**Regulation 17** sets out how a discharge of a security interest may be made. It can be done through the application by the security interest holder, of the owner of the water licence or entitlement (where the Minister is satisfied that the security interest has been extinguished), power of sale, court order or under any other Act or law.

**Regulation 18** sets out how security interests are enforced, using the concepts of defaulter of debt (generally the owner of the licence) and a claimant (generally the lender of the finance). It sets out the procedure that the claimant must follow to serve notice and then the process and timeframe which the person in default must follow to rectify the debt, and if that does not occur, the provisions then require the claimant to notify the defaulter that they will proceed to offer the interest in the relevant water licence or water access entitlement for sale, before proceeding to sell the water licence or water access entitlement and then to apply to the Minister for the transfer of the interest to fulfil the debt, and provides for the priority of payments against that debt.

Should a defaulter not agree with the proceedings made against him/her, this regulation allows for an application to be made to the Environment, Resources and Development Court (the ERD Court) that a sale or transfer should not proceed. Rights of compensation are also provided in appropriate circumstances.

**Regulation 19** says that security interests will expire after seven (7) years, however this timeframe may be extended by successful application to the Minister.

## Caveats

**Regulation 20 and 21** set out how a person may apply to the Minister, to claim that they have a caveatable interest and why the Minister may register a caveat.

**Regulation 22** sets out the effect of the registration of a caveat. It prevents certain registrations such as transfers, variations or surrenders of a water licence or a registration of security interest against a water licence, unless the caveator consents. It also allows for the Minister to go about his/her normal undertaking with the water licence to allow for the administration of the water resource in accordance with the Act.

**Regulation 23, 24, 25 and 26** set out how a caveat will lapse or expire and allow for a person who has an interest in the relevant entitlement that is subject to a registered caveat, to apply to the ERD Court for an order that the caveat is not valid, and the caveator to apply to the ERD Court to continue the caveat. The ERD Court is then allowed to make orders, which can be provided to the Minister. If a caveat lapses whilst subject to ERD court matters, it cannot be reinstated without the permission of the ERD court and the consent of the holder of the entitlement.

## Notice of prescribed events

**Regulation 27** says that a person with a registered interest in a water licence (such a security interest or a caveat) may apply to the Minister to be notified of events (with the permission of the water licence holder) that may be placed on the water licence holder under the relevant sections of the Act.

## Electronic lodgement network

**Regulations 28 and 29** say that the Minister may establish a scheme to allow for the electronic lodgement of documents and other material. The electronic lodgement scheme would allow trusted parties or authorised representatives to apply to the Minister to participate in the electronic lodgement scheme. A trusted party or authorised representative would be a conveyancer, lawyer or broker who has been engaged by a water licence holder to lodge applications for dealings with their water licence on their behalf. An electronic notification scheme may also be established to notify water licence holders that a lodgement has been made on their behalf.

**Regulations 30 and 31** say that the Minister may provide evidence of a transaction or lodgement of an application that has been made by a trusted party or authorised representative using the electronic lodgement network and that this may be in the form of an electronic representation of the document/application.

## Facilitation of the administration of the register

### Subdivision and consolidation of water licences

**Regulation 32** allows for water licence to be subdivided, upon the application of the holder(s). Should there be more than one holder, and one holder is unwilling, then an application may be made to the ERD court for the application to proceed.

**Regulation 33** allows for water licence to be consolidated (2 or more) upon application to the Minister. Rules are established for such action to ensure that water licences are from the same prescribed water resource and consumptive pool and that there is compatibility between classes, if relevant and that a water licence arising from a consolidation will be consistent with the relevant water allocation plan. Security interests and caveats are also considered.

### Verification information

**Regulation 34** establishes proof of identity requirements and the verification of identity of a person in a manner and to an extent determined by the Minister. It also says that the Minister may allow another person to undertake the proof of identity and/or verification of identity.

### Agent trading

**Regulation 35** allows for the holder of a water licence to appoint another person (an agent) to act on their behalf in relation to the trading of a water access entitlement, part of a water access entitlement or a water allocation; in a manner determined by the Minister. The period of this appointment is up to the water licence holder, and whilst in place, does not prevent the holder of the water licence from acting in any matter with relation to the water licence.

## Miscellaneous

**Regulation 36** says that joint owners must declare in relevant applications to the Minister whether they are joint owners or tenants in common. Licence holders for licences in existence before this scheme commences will be able to declare whether they are joint tenants or tenants in common. Tenants in common must specify the portion of the licence held by each party. Regardless of being joint tenants or tenants in common, such holders are able to appoint a nominee to act on their behalf.

**Regulation 37** allows for alterations to be made to tenancy arrangements between joint owners i.e. joint owners of a water licence may apply to the Minister to record an alteration in a way in which the licence is held by those persons. This may include a change from a joint tenancy to tenant in common arrangement and vice versa. Where the change in tenancy arrangement is from joint tenants to tenants in common, the application must specify the proportions to be held by each person.

**Regulation 38** establishes a scheme for the recording of names and addresses for the purposes of serving notices in connection with the operation or administration of the register.

**Regulation 39** sets out how that a person to whom an interest in a water licence has devolved by operation of the law (the survivor or beneficiary) may apply to the Minister to be recorded on the Register as the holder of the water licence.

These regulations clarify that the transmission of ownership in the event of the death of a water licence holder is to be recorded on the Register for the transmission to have effect. It also clarifies that a legal personal representative water licence holder may apply to the Minister for the recording of transmission of ownership to legal personal representative of the water licence holder or the beneficiary of the relevant estate of the water licence holder for the purpose of dealing with the water licence. These regulations intend to facilitate streamlined transmission of ownership for survivors and beneficiaries and facilitate the administration of a deceased persons affairs, where they have been appointed to do so.

**Regulation 40** says that in the case of bankruptcy, the trustee in bankruptcy of either a prescribed entitlement or an interest in a prescribed entitlement may apply to the Minister for the transfer of the prescribed entitlement or interest. This makes the trustee in bankruptcy the owner of the entitlement and interest.

**Regulations 41** says that in the case of company insolvency (administration), the administrator of a body corporate of either a prescribed entitlement or an interest in a prescribed entitlement may apply to the Minister for the transfer of the prescribed entitlement or interest. This makes the administrator of the body corporate the owner of the entitlement and interest.

**Regulation 42 and 43** allow the Minister to require any information as a statutory declaration or correct the register as required by a court or constituted by law and consequently correct the register.

**Regulation 44** says that a bill of sale over a water licence that is registered on the bills of sale register and is current at the time the new water register is launched, will be transitioned to the new water register for the remainder of its term under the *Bills of Sale Act 1886*. It also maintains the priority of order of a registered bill of sale, as the time and date it was registered on the Bills of Sale register, when it is transitioned to the new Register.

**Regulation 45** establishes a scheme to allow for the transfer of existing security interests from the current water register to the new water register. This regulation says that where an interest is noted against a water licence on the water register under the repealed Act, upon application to the Minister, the noted interest may be registered as a security interest on the new Register. However, these interests will be registered behind any bill of sale or bills of sale to be registered under regulation 44 in relation to the same water licence.

## Frequently Asked Questions

### How were stakeholders involved in defining the improvements to the new system?

Comprehensive feedback from users of DEW's current water management system (including growers, water traders and brokers, irrigators, financiers, bore drillers and dam constructors) was essential to developing the business case and securing funding to develop the new water licensing system. The industry group interviewees represented over 2,400 irrigators and growers and there was general agreement and support for water management system reforms to support South Australian business. User groups reported they would like to see:

- A system similar to online banking linking licences, water use, reports, trades etc;
- Improved use of technology to approve requests, submit meter readings (eg mobile, smartphone);
- Improved tracking of application progress;
- Improved data access (e.g. water allocation);
- A customer friendly portal;
- The ability to trade water entitlements and allocations;
- The ability to make online applications and payments;
- The ability to monitor the progress of an application;
- The ability to manage and update their contact details;
- Improved search function; and
- An improved security interest and caveat function.

During pre-consultation on the regulations, most questions were asked about the search function and security interest and caveat functions. Consequently, the following frequently asked questions focus on these three elements of the draft regulations.

### What information will be available for searching on the Water Register in the future and why?

The current register allows anyone to search for information currently held in the register by a licence or approval number or a land reference. The information currently accessible online includes licence holder name, prescribed area or water resource, management zone (if relevant), entitlement and volume of water allocation held, licence conditions and notes, expiry date (if relevant), land on which water can be taken and details of any limited term or permanent transfer.

In addition to the information that is recorded on the current water register, the proposed regulations will allow details of registered security interests, caveats and joint ownership (as joint tenants or tenants in common), new transactions such as subdivision or consolidation of a water licence and other matters to be recorded and searchable.

Information on outstanding levy or penalty charges owing will also be recorded on the new water register. However, this type of sensitive information will only be accessible to the water licence holder that the outstanding debt applies to or their authorised representative.

A small fee will apply to download and print versions of water register records. This fee is yet to be determined, however will be comparable to search fees other interstate water registers.

Currently, the proposed new information to be made available online is only accessible through in-person requests made to DEW in business hours. Making this information available online will assist timely investment and trade decisions.

## What is a security interest?

A security interest means a mortgage or charge over a water licence or entitlement that secures the payment of a debt or the performance of some other obligation under a contract or other legally enforceable arrangement. It may be necessary to permit a security interest to be registered in order for a lender to permit a water asset to be used as collateral for a loan.

## Can a security interest be registered against my water licence without my consent?

In most circumstances, a security interest cannot be registered without the consent of the licence holder. Where a water licence is co-owned (as joint tenants), the consent of both holders will be required to register a security interest.

Where a water licence is held as a tenants in common, one holder may give consent to the registration of a security interest in relation to their interest without the consent of the other co-holder(s). This has been included in the proposed regulations to allow a co-holder to use their interest in a water licence as security for a loan, without the security interest having to apply to the interest of the other holders.

## What is the effect of a security interest being registered?

Where a security interest is registered, the written consent of security interest holder is required before the Minister may grant approval for a transfer, variation, subdivision, consolidation or surrender of licence.

The regulations also allow for a registered security interest holder to exercise a power of sale after following a defined procedure in the case of default on the payment of a debt owing.

## Can a security interest be registered against a water allocation?

No. This is because, unlike a water access entitlement, a water allocation is an annual rather than perpetual asset with fluctuating value therefore would not be appropriate to use as security.

## What is a caveat?

A caveat stops or changes transactions being approved by the Minister in relation to the water licence it is registered against unless or until the caveat is removed.

## In what circumstances might a caveat be registered?

The registration of an 'absolute' caveat prevents the registration of any transfer, security interest, change in the manner in which a co-held water licence is held, or the voluntary surrender of a water licence or water access entitlement which affects that interest.

For example, in the event of a divorce where only one party is the holder of the water licence, but the other party wishes to claim an interest in the water licence as part of the divorce settlement, the second party could place a caveat against the water licence to ensure the water licence holder does not transfer the licence (or entitlement) while divorce proceedings are finalised.

There may also be other circumstances in which it is desirable for a party with an interest in a water licence to seek to protect their legal position and provide a warning or formal notice to tell the public that there is an interest in a water licence for a particular reason. For example, this may be desirable if a person contributed to the purchase of a water licence but is not registered as an owner, or where a person has a court order restraining an owner from dealing with their water licence. Only genuine interests able to be demonstrated under a contract or court order would be able to be registered in these circumstances.

The regulations also provide flexibility for a caveator to consent to certain dealings that would otherwise be prevented by an absolute caveat. This type of permissive caveat is intended to allow a caveat to operate in the same manner as a priority notice where an intended transfer or dealing can be allowed. This may be used for example by parties to a contract for a transfer of a water licence to ensure their scheduled transfer is not displaced by the registration of another transfer. In addition, parties to an

intended lending arrangement may register a consent caveat to ensure their scheduled registration of a mortgage is not displaced by other interests being registered in advance of the contract settlement.

### Could a person lodge a caveat without a caveatable interest?

Only a person who has a caveatable interest can lodge a caveat. Lodging a caveat without reasonable cause is a serious matter. A court may order you to compensate any person who suffers a financial loss as a result of your incorrect caveat.

### Can a caveat be registered against my water licence/entitlement? If so, under what circumstances?

It is proposed that a caveat can be registered in relation to a caveatable interest in a water licence or in all or part of a water access entitlement (i.e. in the same manner in which a security interest may be registered). If a caveat is registered in relation to part of a water access entitlement, it is intended that this may only relate to the holding of a tenant in common.

A caveat will be able to be lodged for registration on the water register by the relevant water licence holder(s) or the person claiming an interest in the licence or entitlement. In most circumstances, the consent of the relevant water licence holder(s) is required in order for a caveat to be registered. However, if a caveat is lodged by a person claiming an interest, without the express consent of the relevant water licence holder(s), there would need to be a written agreement between the water licence holder(s) and the person claiming an interest that allow for a caveat to be registered under the Act.

Another scenario where a caveat may be registered without consent of the water licence/entitlement holder could be by a representative seeking to protect an interest arising under legislation (e.g. a guardian or power of attorney) or by the Minister to prevent fraud or an improper dealing, or if it appears that an error has occurred on the register.

Water licence holder(s) will be notified that a caveat has been registered. The intent of providing notice is to ensure the water licence holder(s) is aware of the caveat and able to take steps to seek for it to be removed if it is disputed.

### Can a caveat be applied to a water allocation?

No. A caveat may only be registered in respect of a caveatable interest in a water licence, water access entitlement or part of a water access entitlement.

### How can I get a security interest or caveat removed?

A security interest may be discharged by the security interest holder making application to discharge the interest.

If water licence/entitlement holder want to have a registered interest removed but the registered interest holder is unable or unwilling to do so, it is proposed that discharge may be allowed on application by the water licence holder(s) if it can be demonstrated to the Minister that the security interest has been extinguished (e.g. by providing a copy of the agreement extinguishing the mortgage) or if a Court order is supplied ordering the discharge.

A caveat may be withdrawn by the caveator (or person with legal authority to act on behalf of the caveator). A caveat may also lapse upon an expiry date or specified event (such as the registration of a transfer or mortgage), if an expiry date is requested on the caveat application form.

### Will my current notation of interest on the existing water register be affected by the proposed regulations?

No. However, you will need to fill out some additional paperwork if you wish for the notation of interest to be transitioned to the new water register. Where an existing notation of interest can be confirmed to be current, the notation of interest will be transitioned as a security interest on the new water register. During the transition phase, DEW will be in contact with existing notation of interest holders to advise how they can confirm that their notation of interest is current.

### Will my current bill of sale over a water licence be affected by the proposed regulations?

Prior to the new water register being launched, bills of sale over water licences will continue to be able to be registered on the Bills of Sale register, maintained by Land Services SA. Where an existing bill of sale over a water licence is registered on the Bills of Sale register and is current at the time the new water register is launched, the security interest will be transitioned to the new water register until such time that the bill of sale expires.

When a bill of sale expires and it is required to be renewed, the interest holder will be required to apply online to register a security interest over a water licence/entitlement via the new water register. DEW will be in contact with existing bills of sale holders to advise how they can confirm that their bill of sale is current.

For more information in relation to registering Bills of Sale please contact [Land Services SA](#).

### When are the changes expected to be completed by?

It is intended that the majority of changes will be operational by mid-2021. Some elements outlined above may come into effect at a later date due to the complexities involved.

### What will the financial impacts of the changes be?

DEW will cover the establishment costs that are incurred from making the proposed improvements to the new water register. Fees will be recoverable from applicants when they apply to conduct a water licensing service/ transaction, but DEW intends to have comparable application fees to those of other water registers interstate for new application types. There may also be fees associated with downloading searches of water register records.

### How do I ensure my personal details are up to date?

If your personal details are not up to date, please contact your [local Water Licensing team](#) (Adelaide, Berri or Mount Gambier) to update them.