

EXPLANATORY STATEMENT

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

Water Act 2007

Water (Accredited Water Resource Plan—NSW Border Rivers) Instrument 2024

Legislative Authority

The *Water Act 2007* (the Act) makes provision for the management of the water resources of the Murray–Darling Basin, and for other matters of national interest in relation to water and water information, and for related purposes.

Subsection 54(1) of the Act requires that there be a water resource plan for each water resource plan area identified in the *Basin Plan 2012* (the Basin Plan). Water resource plans set out water management arrangements for surface water and groundwater within each water resource plan area.

Section 63 of the Act sets out the process for accrediting water resource plans prepared by Basin States (Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory).

Subsection 63(1) of the Act provides that a Basin State may give a proposed water resource plan to the Murray–Darling Basin Authority (the Authority) for a water resource plan area located within the Basin State and ask the Authority to give the proposed water resource plan to the Minister for accreditation.

If a water resource plan area is adjacent to a water resource plan area in another Basin State, subsection 63(2) of the Act provides that the proposed water resource plan must be prepared in consultation with that other Basin State.

Subsection 63(3) of the Act provides that the Authority must consider the proposed water resource plan, prepare recommendations for the Minister on whether the proposed water resource plan should be accredited and give the proposed resource plan and recommendations to the Minister.

If the Authority gives the Minister a proposed water resource plan and recommendations, pursuant to subsection 63(5) of the Act, the Minister must consider the proposed water resource plan and the recommendations and may either accredit, or not accredit, the plan.

Under subsection 63(6) of the Act, the Minister must accredit a proposed water resource plan if satisfied that the plan is consistent with the relevant Basin Plan. The relevant Basin Plan for the water resource plan is the version of the Basin Plan that the Minister applies in relation to the water resource plan under subsection 56(2) of the Act.

Section 63(7) of the Act provides that the decision by the Minister to accredit, or not to accredit, a plan must be made in writing and is a non-disallowable legislative instrument. Paragraph 63(7)(b) specifically provides that the decision by the Minister to accredit, or not to accredit, a plan is a legislative instrument.

Section 42 (disallowance) of the *Legislation Act 2003* (Legislation Act) does not apply to the decision of the Minister.

A decision to accredit a water resource plan under section 63 of the Act is also not subject to sunseting as outlined in Part 4 of Chapter 3 of the Legislation Act. This exemption operates by force of law in accordance with item 67 of the table under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. It is appropriate to exempt this type of legislative instrument from sunseting as, together with the Act and Basin Plan, it underpins an intergovernmental scheme involving the Commonwealth and the Basin States to manage the Murray–Darling Basin. The management of the Murray–Darling Basin is facilitated through ongoing cooperation between the Commonwealth and the Basin States, and the potential sunseting of such instrument could undermine this intergovernmental cooperation.

Water resource plans are a critical element of the Basin Plan. They are the main mechanism through which the Commonwealth enforces sustainable diversion limits. In the absence of accredited water resource plans the Inspector-General of Water Compliance’s compliance and enforcement powers are limited.

The *Water (Accredited Water Resource Plan—NSW Border Rivers) Instrument 2024* (the Instrument) has been made in compliance with all legislative preconditions and applicable legislative requirements.

Purpose

The purpose of the Instrument is to set out the decision of the Minister for the Environment and Water (the Minister) to accredit the proposed water resource plan (the plan) for the NSW Border Rivers water resource plan area, for the purposes of subparagraph 63(5)(b)(i) of the Act.

On 25 March 2024, the Authority gave the Minister the plan and recommended that the Minister accredit the plan.

As required under subsection 63(5) of the Act, the Minister considered the plan and the Authority’s recommendations.

In accordance with subsection 56(1) of the Act, the Minister had regard to the extent to which the plan is consistent with the Basin Plan under subsection 56(2) of the Act. The relevant Basin Plan for the plan (pursuant to subsection 56(2) and subsection 56(2A) of the Act) is the version that was registered on 27 October 2021 and was in effect up to and including 7 December 2023 (F2021C01067). The Minister was satisfied that the plan is consistent with the relevant Basin Plan and for the purposes of subparagraph 63(5)(b)(i) of the Act, decided to accredit the plan.

Background

The plan was developed by the State of New South Wales, in consultation with key stakeholders and regional communities.

The Authority published the plan titled *NSW Border Rivers Surface Water Resource Plan* on their website at [NSW Border Rivers water resource plan | Murray–Darling Basin Authority \(mdba.gov.au\)](https://www.mdba.gov.au/NSW-Border-Rivers-water-resource-plan). The plan sets out how New South Wales will meet its obligations under the Basin Plan in the NSW Border Rivers water resource plan area.

The plan applies to all surface water resources within the NSW Border Rivers surface water resource plan area.

As required by subsection 63(3) of the Act, the Authority considered the plan and prepared recommendations for the Minister on whether the plan should be accredited. The Authority considered that the plan met requirements for accreditation and recommended that the Minister accredit the plan. On 25 March 2024, the Authority provided the Minister with the plan and the recommendation that the Minister accredit the plan.

The Minister considered the plan and the Authority's recommendations as required by subsection 63(5) of the Act and was satisfied that the plan is consistent with the relevant Basin Plan. As required by subsection 63(6) of the Act, the Minister made the decision to accredit the plan.

Impact and Effect

The plan is given effect through sections 58 and 59 of the Act.

Section 58 of the Act provides that the Authority and any other agency of the Commonwealth must perform its functions, and exercise its powers, consistently with, and in a manner that gives effect to, an accredited water resource plan, subject to specified exceptions.

Section 59 of the Act provides that the Basin Officials Committee, an agency of a Basin State, an operating authority, an infrastructure operator or the holder of a water access right must not act inconsistently with, or fail to act consistently with, an accredited water resource plan.

The accreditation of the plan, together with these sections, will impose legal obligations for Commonwealth agencies (including the Authority), other agencies and bodies and New South Wales. The plan sets out arrangements for water sharing within the sustainable diversion limits for the water resource plan area, establishes rules to meet environmental and water quality objectives and will take into account and manage or mitigate potential and emerging risks to water resources.

Consultation

Section 17 of the Legislation Act requires that the rule-maker must be satisfied that any consultation that the rule-maker considers to be appropriate and reasonably practicable to undertake has been undertaken.

Under section 10.07 of the Basin Plan, a water resource plan must contain a description of the consultation in relation to the plan (including in relation to any part of the plan), if any, that was undertaken before the State gave the plan to the Authority under subsection 63(1) of the Act. In addition, sections 10.52 and 10.53 of the Basin Plan provides that a water resource plan must be prepared having regard to the views of relevant Indigenous organisations. In preparing the plan, New South Wales undertook extensive community consultation, and

consultation with relevant Indigenous organisations including First Nations peoples using a nation-based approach in relation to Part 14 of Chapter 10 of the Basin Plan.

Consultation by New South Wales occurred in the form of broad public consultation via a submission process, a public information session and a public exhibition phase, and targeted consultation with key stakeholders on the NSW Border Rivers stakeholder advisory panel including representatives from government, industry and Northern Basin Aboriginal Nations (NBAN).

Consultation on the proposed plan with First Nations groups culturally connected with the NSW Border Rivers plan area resulted in 5 consultation reports on the objectives and outcomes for indigenous values and uses from the Bigambul, Githabul, Kambuwal, Kwiambal and Ngarabal First Nations groups.

Where New South Wales has not been able to consult with a First Nations group culturally connected with the NSW Border Rivers plan area, they have committed to seek further opportunities to consult with those groups and to report back to the Authority regarding progress within two years of accreditation.

First Nations' advice was sought on whether the plan is consistent with the Basin Plan requirements regarding Indigenous values and uses as outlined in Part 14 of Chapter 10. The First Nations advice was coordinated by i2i Development Global Pty Ltd (i2i Global). In preparing this advice, i2i Global undertook consultation with relevant First Nations representatives from the Plan area on the adequacy of the Part 14 content of the plan and concluded that the proposed plan did not meet the Part 14 requirements.

In considering the plan and preparing its recommendation, the Authority reviewed the First Nations advice as coordinated by i2i Global. The Authority determined that the Indigenous values and uses content of the plan is consistent with the Basin Plan.

Section 63(2) of the Act requires that if a water resource plan area is adjacent to a water resource plan area in another Basin state, the proposed water resource plan must be prepared in consultation with that State. The water resource plan area is adjacent to water resource plan areas in Queensland. The Authority is satisfied that the plan was prepared in consultation with Queensland.

The Authority determined that the consultation requirements had been met.

Prior to making this Instrument, the Department of Climate Change, Energy, the Environment and Water consulted with the Authority as part of the process set out in section 63 of the Act.

As extensive consultation was undertaken in the preparation of the plan by New South Wales, it was considered unnecessary to undertake additional consultation specifically in relation to the Instrument. It is sufficient to rely on the consultation process undertaken by New South Wales, and subsequent consultation by the Authority with relevant First Nations groups for this Instrument, as the Instrument is focused on the decision to accredit the plan, not the content of the plan itself.

The Office of Best Practice Regulation has advised that the Instrument does not require a regulation impact statement (ID: 21669).

Details / Operation

Details of the Instrument are set out in Attachment A.

As set out above, paragraph 63(7)(b) of the Act provides that a decision by the Minister to accredit, or not to accredit, a water resource plan is a legislative instrument, but that section 42 (disallowance) of the Legislation Act does not apply to the decision. The effect of this provision is provided for under paragraph 44(2)(a) of the Legislation Act which provides that section 42 (disallowance) does not apply in relation to a legislative instrument if an Act declares, or has the effect, that section 42 does not apply in relation to the instrument or provision.

Part 4 of Chapter 3 (sunsetting) of the Legislation Act specifies that legislative instruments are automatically repealed after a fixed period of time (subject to some exceptions) and such an automatic repeal is called sunsetting. However, under paragraph 54(2)(b) of the Legislation Act, this Part does not apply in relation to a legislative instrument if it is prescribed by regulation for the purposes of this paragraph. Item 67 of the table under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* specifies that Part 4 of Chapter 3 of the Legislation Act does not apply to a decision to accredit a water resource plan under section 63 of the Act.

The Instrument is therefore a legislative instrument for the purposes of the Legislation Act, but disallowance and sunsetting do not apply.

As the Instrument is not a disallowable instrument, paragraph 15J(2)(f) of the Legislation Act provides that a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required. Consequently, a statement of compatibility with Human Rights has not been prepared.

Water (Accredited Water Resource Plan—NSW Border Rivers) Instrument 2024

Section 1—Name of Instrument

This section provides that the title of the instrument is the *Water (Accredited Water Resource Plan—NSW Border Rivers) Instrument 2024* (the Instrument).

Section 2—Commencement

This section provides that the Instrument commences the day after it is registered.

Section 3—Authority

This section provides that the Instrument is made under section 63 of the *Water Act 2007* (the Act).

Section 4—Definitions

This section sets out the definitions used throughout the Instrument.

The term ‘Act’ is defined to mean the *Water Act 2007*.

This section also includes a note that provides that a number of expressions used in the Instrument are defined in section 4 of the Act. These include the terms ‘Authority’, ‘Basin Plan’, ‘water resource plan’ and ‘water resource plan area’.

Section 5—Accredited water resource plan

Subsection 5(1) of the Instrument provides that the proposed water resource plan for the NSW Border Rivers water resource plan area specified in subsection (2) is accredited.

The accreditation is for the purposes of subparagraph 63(5)(b)(i) of the Act, which provides that if the Authority gives the Minister a proposed water resource plan and recommendations under subsection 63(3) of the Act, the Minister may either accredit, or not accredit, the plan.

Subsection 5(2) of the Instrument specifies the plan that is accredited for the purpose of subsection 5(1). The plan is the document titled *NSW Border Rivers Surface Water Resource Plan* as in force on the day that the Minister made the Instrument, excluding any material identified as not forming part of the plan. The exclusion is required to make clear that there is material contained within the document that is not intended for accreditation. The document clearly sets out the structure and form to assist with reading and identifies the material that is not intended for accreditation.

Three notes follow subsection 5(2).

Note 1 explains that the plan could be found on the Authority website at www.mdba.gov.au in 2024.

A specific URL is not cited in order to avoid a possible dead link (or where a hyperlink on a website has been moved or deleted) following an anticipated future website design. To mitigate any concerns associated with website design, the Authority has clear, accurate and user-friendly headings and titles to ensure that a member of the public can locate and access the plan on the Authority's website.

Note 2 provides that the plan meets the requirements that a water resource plan for a water resource plan area must comply with to be accredited. The note directs the reader to table item 11 of subsection 22(1) of the Act and Chapter 10 of the Basin Plan.

Note 3 provides that the accreditation of the plan ceases to have effect in accordance with the Act. The note directs the reader to sections 54 and 64 of the Act.