

EXPLANATORY STATEMENT

Issued by the Minister for the Environment and Water

Water Act 2007

Water (Accredited Water Resource Plan—NSW Border Rivers Alluvium) Instrument 2022

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) provides that the Basin States 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) provides that the proposed water resource plan must be prepared in consultation with that other Basin State.

Subsection 63(3) provides that the Authority is required to 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) 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) the Minister is required to 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) 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, however section 42 (disallowance) of the *Legislation Act 2003*

(Legislation Act) does not apply to the decision. This is because an instrument to accredit, or not to accredit, a plan is made under the Act, which is legislation that facilitates the establishment and operation of an intergovernmental scheme involving the Commonwealth and the Basin States. Subsection 44(1) of the Legislation Act provides that section 42 (concerning disallowance) does not apply in relation to a legislative instrument if the enabling legislation (in this case, the Act) facilitates the operation of an intergovernmental scheme involving the Commonwealth and one or more States.

The purpose of this exemption is to avoid the potential undermining of the intergovernmental scheme set up by the Act and the significant uncertainty in the management of Basin water resources that would arise if an accredited water resource plan that has been given effect under Basin State law is subsequently disallowed by the Commonwealth Parliament.

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 Alluvium) Instrument 2022* (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 Alluvium water resource plan area, for the purposes of subparagraph 63(5)(b)(i) of the Act.

On 17 August 2022, the Authority gave the Minister the plan and recommended that the Minister accredit the plan.

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

In accordance with subsection 63(6), the Minister considered whether the plan is consistent with the relevant Basin Plan under subsection 56(2). The relevant Basin Plan for the plan (pursuant to subsection 56(2) and subsection 56(2A)) is the version that commenced on 5 August 2021.

The Minister considered that the plan is consistent with the relevant Basin Plan and considered the Authority's recommendation to accredit the plan. For the purposes of subparagraph 63(5)(b)(i), the Minister 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 Alluvium Water Resource Plan* on their website at <https://www.mdba.gov.au/publications/policies-guidelines/new-south-wales-border-rivers-alluvium-water-resource-plan> on 24 February 2022 and updated it on 9 August 2022. The First Nations consultation reports were not published as they contain culturally sensitive information. The plan sets out how New South Wales will meet its obligations under the Basin Plan in the NSW Border Rivers Alluvium water resource plan area.

The plan applies to all groundwater in the groundwater sustainable diversion limit (SDL) resource units within the NSW Border Rivers Alluvium Water Resource Plan area which include the NSW Border Rivers Alluvium and NSW Border Rivers Tributary Alluvium. The SDL resource units in the NSW Border Rivers Alluvium water resource plan area are identified in section 6.03 of the Basin Plan when read with Schedule 4 at table items 64 and 65 (groundwater).

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 17 August 2022, 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 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 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, subject to specified exceptions.

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

In preparing the plan, New South Wales undertook extensive community consultation, and consultation with affected Basin States in satisfaction of the requirement in subsection 63(2)

of the Act 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 submissions processes and a public exhibition phase, targeted consultation with key stakeholders such as NSW Groundwater Stakeholder Advisory Panels, and consultation with First Nations through face-to-face interviews.

As the NSW Border Rivers Alluvium water resource plan area is adjacent to a water resource plan in Queensland, subsection 63(2) of the Act requires that the plan is prepared in consultation with Queensland. Interjurisdictional consultation occurred between New South Wales and Queensland to ensure that adequate consideration is given to the connected nature of the groundwater resources. This included interjurisdictional meetings, and Queensland's involvement in the public exhibition process. The Authority determined that the consultation requirements had been met.

In considering the plan and preparing its recommendation, the Authority sought advice from Northern Basin Aboriginal Nations (NBAN) on whether the plan is consistent with the requirements regarding Indigenous values and uses in Part 14 of Chapter 10 of the Basin Plan.

The Authority determined that the Indigenous values and uses content of the plan is consistent with the Basin Plan.

Prior to making this Instrument, the Department of Climate Change, Energy, the Environment and Water (the Department) 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 in relation to the specific 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 organisations 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) 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 Instrument is therefore a legislative instrument for the purposes of the Legislation Act, but disallowance does not apply.

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

Water (Accredited Water Resource Plan—NSW Border Rivers Alluvium) Instrument 2022

Section 1—Name

This section provides that the name of the instrument is the *Water (Accredited Water Resource Plan—NSW Border Rivers Alluvium) Instrument 2022* (the Instrument).

Section 2—Commencement

This section provides that the Instrument commences the day after it is registered on the Federal Register of Legislation.

Section 3—Authority

This section provides that the Instrument is made under section 63 of the Act.

Section 4—Definitions

This section sets out the definitions used throughout the Instrument.

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

This section also includes a note that explains that a number of expressions used in the Instrument are defined in section 4 of the Act, including “Authority”, “Basin Plan”, “water resource plan” and “water resource plan area”.

Section 5—Accredited water resource plan

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

The accreditation is for the purposes of subparagraph 63(5)(b)(i) of the Act that 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) specifies the plan that is accredited for the purpose of subsection (1). The plan is the document titled *NSW Border Rivers Alluvium 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 2022.

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.