



Environmental
Defenders Office

**Submission to the Draft Evaluation framework for the
review of water sharing plans under Section 43A of the
*Water Management Act 2000***

20 September 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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Acknowledgement of Country

The EDO recognises and pays respect to First Nations Peoples. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from First Laws so that together, we can protect our environment and First Nations' cultural heritage through Western law. We recognise that their countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. Where possible, we have used specific references. More generally, we have chosen to use the term "First Nations". We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

INTRODUCTION

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission in response to the NRC's *Draft Evaluation framework for the review of water sharing plans under section 43A of the Water Management Act 2000 (August 2022) (Draft Framework)*.

The EDO acknowledges and commends the Natural Resources Commission (**NRC**) on its reputation for preparing robust reviews of Water Sharing Plans (**WSPs**).¹ It is against this backdrop that we make several recommendations where we think there is room to strengthen the process further.

We also take this opportunity to highlight weaknesses in the legislative framework as well as apparent resource constraints. We do this here because, unless these are addressed, they will continue to compromise the scope, quality and impact of the NRC review process – no matter how rigorous.

SUMMARY OF RECOMMENDATIONS

The Draft Framework

We make the following **recommendations** in relation to the Draft Framework:

1. Climate change and the principles of ecologically sustainable development (**ESD**) should be identified in Part 1 of the Draft Framework (Water sharing plan reviews – purpose and objectives), since these are of critical importance to a thorough and effective WSP review process.
2. The Evaluation Questions expressed in section 2.4 of the Draft Framework should:
 - a) expressly refer to the principles of ESD; and
 - b) incorporate a forward looking analysis that considers how the provisions of a WSP interact with the projected impacts of climate change, and the implications of this for the Minister's decision in relation to the WSP.
3. The Draft Framework should be amended to include a full extract of s 9 of the *Water Management Act 2000 (WMA)* and an explanation of the duty as it applies to the s 43A review process.
4. The NRC should consider whether it is restrained from releasing WSP review reports early (i.e., prior to the Minister making a decision or the expiration of 6 months, as referred to in WMA s 43A(5)). If the NRC is not restrained from doing so, then in the absence of strong public policy reasons against their release (in whole or in part), the NRC should release WSP review reports when, or soon after, they are provided to the Minister.

¹ In particular, EDO recognises the discussion of climate change, and associated recommendations, included in the recent reviews of the WSPs for the *Castlereagh Unregulated River Water Sources 2011* and *Border Rivers Unregulated River Water Sources 2012*.

In relation to engagement with First Nations we note that EDO is a non-Indigenous organisation, we do not speak on behalf of First Nations. However, we take this opportunity to **emphasise** the importance of ensuring that First Nations voices are adequately represented in the WSP review process and make the following **recommendations**:

5. The NRC should consider whether First Nations voices are adequately represented in the WSP review process, and should specifically consider the following:
 - a) Do First Nations stakeholders consider that the NRC approach to engagement is effective?
 - b) If it does not already, should the NRC employ First Nations (including in roles that relate specifically to the review process) to maximise the opportunity for First Nations voices to be represented and properly understood?
 - c) Could First Nations participation be improved with additional resourcing? (Noting that the Draft Framework acknowledges that time constraints currently limit the scope for First Nations participation.)

The legislative framework and resource constraints

We make the following **recommendations** in relation to the legislative framework and resourcing constraints:

6. In relation to the legislative framework:
 - a) The s 43A review mechanism should be strengthened by, for example, requiring the Minister to apply or act consistently with any NRC recommendations (rather than simply being required to “consider” NRC WSP reviews).
 - b) Where the Minister proposes to revoke an existing WSP and replace it with another, this should trigger an NRC review process (so that revocation does not offer a pathway for sidestepping the review process).
 - c) The WMA should require the NRC to be involved in the preparation of draft WSPs.
7. In relation to resourcing: The NSW Government should provide additional resourcing to the NRC to support the WSP review process. This could be supported by the NRC preparing publicly available feedback to the Government about how a review process would ideally be carried out (e.g., duration, scope) and what is currently being sacrificed because of resource constraints.

DISCUSSION: THE DRAFT FRAMEWORK

Climate change and the principles of ecologically sustainable development (ESD)

The NSW Water Strategy acknowledges that climate change poses risks and challenges. It states that “[p]rojected changes in rainfall patterns, warmer conditions and increased evaporation will impact future water availability”, and that predicted increases in the “frequency, intensity and duration of droughts... may affect water quality and the ecology of our rivers”.²

As presently drafted, the evaluation questions in Section 2.4 of the Draft Review contain only one specific reference to climate change (Key Question 1: consideration of “how drought and climate change are managed”). They do not, in our opinion, suggest or support a thorough evaluation of whether a WSP is appropriately drafted to account for, and respond to, the historical and likely future impacts of climate change.

In our opinion such an evaluation is supported – and arguably required – by the WMA. We note the following:

- WMA s 43A(3): This requires the NRC to consider how the provisions of a WSP have “materially contributed to the achievement of, or the failure to achieve, environmental, social and economic outcomes”. It also requires the NRC to review “whether changes to those provisions are warranted”. In other words, the NRC must consider whether the provisions of a WSP will remain appropriate *into the future*.
- As noted above, the NSW Water Strategy identifies that climate change is projected to impact future water availability and may affect water quality and ecology of rivers.
- Further, as is acknowledged in the Draft Framework, the NRC review process should be guided by the Objects of the WMA (s 3), the Water Management Principles (**WMPs**) (s 5) and the duty in s 9 (**Section 9 Duty**). Most relevantly, these include the following:
 - Objects:
 - the application of the principles of ESD (discussed further below) (WMA s 3(a)); and
 - the protection, enhancement and restoration of water sources, their associated ecosystems, ecological processes and biological diversity and their water quality (WMA s 3(b)).
 - WMPs, including:
 - the protection and restoration of water sources, floodplains and dependent ecosystems (s 5(2)(a));
 - the protection of habitats, animals and plants (s 5(2)(b));

² NSW Water Strategy p 22.

- the protection of all water sources (s 5(2)(c)); and
 - the application of the principles of adaptive management (s 5(h)).
- WMPs that specifically relate to water sharing (**Priority of Use Provisions**):
 - sharing of water from a water source must protect the water source and its dependent ecosystems (s 5(3)(a));
 - sharing of water from a water source must protect basic landholder rights (s 5(3)(b)); and
 - sharing or extraction of water under any other right must not prejudice the principles set out above (s 5(3)(c)).
- Section 9 Duty:
 - Section 9 of the WMA expressly states that “[i]t is the duty of all persons exercising functions under [the WMA]”:
 - to take all reasonable steps to do so in accordance with, and so as to promote, the WMPs; and
 - as between the Priority of Use Provisions (as referred to above and set out in s 5(3)(a)-(c)), to give priority to those principles *in the order in which they are set out* (WMA s 9(1)(b)). This in effect means that protection of a water source and its dependent ecosystems is the first priority, with basic landholder rights and then any other rights following.
- The principles of ESD are defined in s 6 of the *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**).³ They include the following:
 - **The precautionary principle:** “that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”. In applying the precautionary principle, public (and private) decisions should be guided by careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, as well as an assessment of the risk-weighted consequences of various options.
 - **Inter-generational equity:** “that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.”

³ WMA Dictionary.

- **Conservation of biological diversity and ecological integrity:** “that conservation of biological diversity and ecological integrity should be a fundamental consideration.”

Bearing the above in mind, in our opinion the Draft Framework should include more than just fleeting references to climate change and adaptive management. The Framework, including the Evaluation Questions, should include content that expressly foreshadows or commits the NRC to considering how climate change is relevant. In particular, the NRC should consider how climate change projections influence whether the WSP provisions are likely to be appropriate for the future. This would include consideration of, for example:

- how historical and future predicted climate change has interacted with and/or may interact with the provisions of a WSP, including any flow on effects to:
 - the maintenance or enhancement of the natural environment for the benefit of future generations; or
 - the conservation of biological diversity and ecological integrity; and/or
- whether the water sharing provided for in a WSP, in the context of climate change, may pose a threat of serious or irreversible environmental damage; and
- if there is a threat of serious or irreversible environmental damage, how to guide the Minister’s decision to avoid serious or irreversible damage to the environment.

Recommendations:

1. Climate change and the principles of ecologically sustainable development (**ESD**) should be identified in Part 1 of the Draft Framework (Water sharing plan reviews – purpose and objectives), since these are of critical importance to a thorough and effective WSP review process.
2. The Evaluation Questions expressed in section 2.4 of the Draft Framework should:
 - a) expressly refer to the principles of ESD; and
 - b) incorporate a forward looking analysis that considers how the provisions of a WSP interact with the projected impacts of climate change, and the implications of this for the Minister’s decision in relation to the WSP.

The Priority of Use provisions are of central importance to the legislative framework

As referred to above, s 9 of the WMA states that *all persons exercising functions under the WMA* have a duty to take all reasonable steps to exercise that duty in accordance with, and so as to promote, the WMPs. Further, in relation to the Priority of Use provisions, the Section 9 Duty establishes the protection of a water source and its dependent ecosystems as the highest priority.

The Independent Commission Against Corruption (**ICAC**) considered the interpretation and scope of the Priority of Use provisions in its *Report on Investigation into Complaints of Corruption in the*

Management of Water in NSW and Systemic Non-Compliance with the Water Management Act 2000 (Nov 2020) (ICAC Report). Among other things, the ICAC Report observed that:⁴

The principles referred to in s 5(2) and s (3), to which s 9(1)(a) and (b) make reference, are **central to the scheme enacted by the WMA for the sustainable and integrated management of the water resources of the state**. The duty prescribed by s 9 is central, not peripheral, to that scheme, in particular, to its integrity and effectiveness. (emphasis added)

When the NRC conducts a s 43A review it is exercising a function under the WMA. As such, the omission of s 9 from the Draft Framework is notable and should be rectified.

Recommendations:

3. The Draft Framework should be amended to include a full extract of s 9 of the *Water Management Act 2000 (WMA)* and an explanation of the duty as it applies to the s 43A review process.

Transparency: Consultation on draft reviews and release of the reviews

Section 2.7 of the Draft Framework (“Reporting”) notes that:

- once the NRC has prepared a draft report, it is shared with “relevant government organisations” for feedback in relation to accuracy, findings and recommendations; and
- the final report is released publicly “when a response is received from the Minister [responsible for Water] or within six months, whichever comes first”.

In our opinion, these procedures constrain public participation and access to justice and should be modified.

In relation to the former, it is not clear why feedback is only sought from government organisations. Consideration should be given as to whether, and which, third party stakeholders could offer useful contributions to this process.

In relation to the latter, the NRC appears to adopt the practice of delaying release of its report by reference to WMA s 43A(5).

Although WMA s 43A(5) clearly *requires* the NRC to release its final reports once the stated time frame has elapsed, it is not clear that the NRC is *restrained* from releasing its reviews sooner. We think this is important because delay in releasing a report may interfere with full public participation in the review process and access to justice if there are stakeholders who may wish to commence legal challenges in relation to WSP decisions.⁵ Further, it is not clear to us that there

⁴ ICAC, Investigation into Complaints of Corruption in the Management of Water in NSW and Systemic Non-Compliance with the *Water Management Act 2000* – Final Report, November 2020, p 33.

⁵ Note that the three-month limitation period that applies to proceedings seeking judicial review of a management plan (WMA s 47) does not apply to decisions to extend the duration of an existing WSP: WMA s 47(2).

are strong public policy reasons in favour of withholding the report for 6 months or until after the Minister makes a decision.

Recommendations:

4. The NRC should consider whether it is restrained from releasing WSP review reports early (i.e., prior to the Minister making a decision or the expiration of 6 months, as referred to in *Water Management Act 2000* (NSW) (**WMA**) s 43A(5)). If the NRC is not restrained from doing so, then in the absence of strong public policy reasons against their release (in whole or in part), the NRC should release WSP review reports when, or soon after, they are provided to the Minister.

Engagement with First Nations (“Aboriginal stakeholder engagement”)

First Nations peoples hold a deep cultural, customary and spiritual connection to water that is unique from the Anglo-Australian paradigm of water ownership and extraction.⁶ Aboriginal peoples in the Murray Darling Basin have proclaimed the importance of water to the continuation of their culture as well as to the protection of their sacred sites and to the strengthening of the health and wellbeing of their communities.⁷

EDO is a non-Indigenous organisation and we do not speak on behalf of First Nations. However, the EDO has a long history of representing and collaborating with First Nations people and groups across NSW. In our experience, many Aboriginal people and groups are concerned about unsustainable water management generally, and Aboriginal water dispossession specifically.

For the purposes of this review, we wish to emphasise the importance of ensuring that First Nations voices are adequately represented in the WSP review process.

Recommendations:

5. The NRC should consider whether First Nations voices are adequately represented in the WSP review process, and should specifically consider the following:
 - a) Do First Nations stakeholders consider that the NRC approach to engagement is effective?
 - b) If it does not already, should the NRC employ First Nations (including in roles that relate specifically to the review process) to maximise the opportunity for First Nations voices to be represented and properly understood?
 - c) Could First Nations participation be improved with additional resourcing? (Noting that the Draft Framework acknowledges that time constraints currently limit the scope for First Nations participation.)

⁶ Tony McAvoy, ‘Water - Fluid Perceptions’, *Transforming Cultures eJournal*, Vol 1, No 2, June 2006, pp 97-98.

⁷ Collective statement by the Northern Basin Aboriginal Nations Board, 14 January 2016 in Moree. Republished in: Murray Darling Basin Authority, *Our water, our life: an Aboriginal study in the northern basin* (2016), p 6 available at <https://www.mdba.gov.au/sites/default/files/pubs/Aboriginal-sociocultural-survey-report-Oct-16.pdf>.

DISCUSSION: THE LEGISLATIVE FRAMEWORK AND RESOURCE CONSTRAINTS

Giving the NRC review more teeth with stronger legislative provisions

Given the expertise of the NRC, the review process has the *capacity* to meaningfully improve the outcomes delivered by WSPs. However, WMA s 43A(3) merely requires the Minister “to consider” the NRC WSP reviews. As such, there is no requirement or guarantee that the reviews will have any actual effect on WSP decisions. We **recommend** that the NRC review mechanism be strengthened by, for example, requiring the Minister to apply or act consistently with any NRC recommendations. An intermediate approach might be to require that, if the Minister makes a decision that is inconsistent with an NRC recommendation, they provide reasons for doing so (by reference at a minimum to the WMA Objects and Water Management Principles).

NRC reviews can be bypassed if a WSP is replaced

It is a significant weakness in the legislative framework that the WSP review process can be bypassed if a plan is replaced prior to the legislated NRC review.⁸ We **recommend** that, where the Minister proposes to revoke an existing WSP and replace it with another, this should also trigger the/a similar NRC review process.

Similarly, as noted in the Draft Framework, if the Minister decides to replace a WSP in response to an NRC review, the NRC does not have a role in the revision process (with that process being led by the Department of Planning and Environment – Water (**Department**) (Draft Framework section 1)).

The Department’s approach to this process is set out in its “Replacement Water Sharing Plan Manual” (**Manual**) published in February 2022. The Manual states that “[i]f the commission recommends the replacement of a plan [following a s 43A review], the department considers the recommendations, completes a complementary departmental review and updates the current plan”. It is confusing that the Manual goes on to state that “[o]ften, the departmental review takes place **before** or at the same time as the Commission’s review” (emphasis added).⁹

In other words, the Manual suggests that the Departmental reviews – which are used to develop replacement WSPs – are often completed *before* or at the *same time* as NRC reviews. If correct, this process risks the Department either excluding, or at least not fully considering, the NRC recommendations.

Noting the expertise, experience, and knowledge of the NRC in relation to reviewing and assessing WSPs (when conducting s 43A reviews, s 43 reviews and s 44 audits) we **recommend** that the WMA require the NRC to be involved in the preparation of draft WSPs.

⁸ This issue was the subject of media attention in early 2020: Sydney Morning Herald, *NSW government avoids independent scrutiny of water sharing plans*, 9 March 2020, available at <https://www.smh.com.au/national/nsw/nsw-government-avoids-independent-scrutiny-of-water-sharing-plans-20200309-p5489q.html#:~:text=The%20NRC%20is%20required%20to%20review%20each%20water,has%20delivered%20its%20environmental%2C%20economic%20and%20social%20objectives.>

⁹ Department of Planning and Environment, “Replacement Water Sharing Plan Manual”, February 2022, p 12.

Properly resourcing the NRC

Several observations in the Draft Framework suggest that the NRC would benefit from additional resources to improve the review process. In particular, the Draft Framework:

- emphasises that the time spent on reviews is dictated by “the number of plan reviews, and the timing and resourcing available” (p 6); and
- notes that the short review timeframe “limits the time and opportunity available to develop recommendations in partnership with Aboriginal peoples”, which means that the NRC focusses on identifying issues and desired outcomes rather than the development of solutions (p 13).

As such, we **recommend** that the NRC specifically provide publicly available feedback to the Government that:

- describes how a review process would ideally be carried out (e.g., duration, scope); and
- identifies what is being sacrificed because of resource constraints (e.g., proper analysis of the interaction between WSPs and climate change impacts).

Recommendations

6. In relation to the legislative framework:
 - a) The s 43A review mechanism should be strengthened by, for example, requiring the Minister to apply or act consistently with any NRC recommendations (rather than simply being required to “consider” NRC WSP reviews).
 - b) Where the Minister proposes to revoke an existing WSP and replace it with another, this should trigger an NRC review process (so that revocation does not offer a pathway for sidestepping the review process).
 - c) The WMA should require the NRC to be involved in the preparation of draft WSPs.
7. In relation to resourcing: The NSW Government should provide additional resourcing to the NRC to support the WSP review process. This could be supported by the NRC preparing publicly available feedback to the Government about how a review process would ideally be carried out (e.g., duration, scope) and what is currently being sacrificed because of resource constraints.