Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012

Juli Tomaras, Law and Bills Digest Section
Bill McCormick, Science, Technology, Environment and Resources Section

This replaces the 30 October 2012 version of this Digest which contained an error on Page 10 relating to the five per cent limitation on the SDL adjustment.

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Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012

Date introduced: 20 September 2012

House: House of Representatives

Portfolio: Sustainability, Environment, Water, Population and Communities

Commencement: Royal Assent

Purpose

The Bill amends the Water Act 2007 (the Water Act) to allow the long-term average sustainable diversion limit (SDL)\(^1\) set by the Murray-Darling Basin Plan (the Basin Plan) to be adjusted within defined parameters without invoking the formal Basin Plan amendment process\(^2\), though providing for transparency by requiring the use of this mechanism to be reported formally and publicly to the parliament.\(^3\)

Background

The Water Act

The Water Act establishes the Murray-Darling Basin Authority (MDBA), a statutory authority that with the Basin state and territory governments, manages the Murray-Darling Basin’s water resources. The MDBA is required to produce a Basin Plan\(^4\) taking on the basis of particular parameters set out in the Water Act.\(^5\)

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1. SDLs are described in the Water Act as the maximum long term annual average quantities of water that can be taken on a sustainable basis from the Basin or a part of the Basin.
2. The formal amendment process to the Basin Plan is under Subdivision F of Division 1 of Part 2 of the Water Act.
5. Sections 21 and 22 of the Water Act.

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The Basin Plan

The Basin Plan is subject to approval by the Minister and then subject to disallowance by the Parliament.

In general terms, the objects of the Water Act and the Basin Plan are:\(^6\):

- to enable the Commonwealth, in conjunction with the Basin states, to manage the Basin water resources in the national interest
- to give effect to relevant international agreements\(^7\)
- in giving effect to the relevant international agreements, to provide for the use of the Basin water resources in a way that optimises economic, social and environmental outcomes
- to provide for the establishment of environmentally sustainable limits on the quantities of water that may be taken from Basin water resources
- improved water security for all uses of Basin water resources
- subject to the environmentally sustainable limits, to maximise the net economic returns to the Australian community and
- to provide for the collection, collation, analysis and dissemination of information about Australia’s water resources and the use and management of water in Australia.

Sustainable diversion limits (SDLs)

The linchpin of the Water Act and the Basin Plan is the requirement to establish SDLs across the Basin. SDLs are described in the Act as the maximum long-term annual average quantities of water that can be taken on a sustainable basis from the Basin or a part of the Basin.\(^8\) SDLs in the Basin Plan aim, amongst other things, to return water to the environment. The Act requires that the SDLs reflect an ‘environmentally sustainable level of take’ (ESLT).\(^9\) The ESLT is basically the level of water that can be taken out of the system for human use without compromising the environment and the productive base of the system.\(^10\)

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6. Ibid., section 3.
7. Section 4(1) of the Water Act provides that relevant international agreement means:
   - the Ramsar Convention
   - the Biodiversity Convention
   - the Desertification Convention
   - the Bonn Convention
   - China-Australia Migratory Bird Agreement (CAMBA)
   - Japan-Australia Migratory Bird Agreement (JAMBA)
   - Republic of Korea-Australia Migratory Bird Agreement (ROKAMBA)
   - the Climate Change Convention and
   - any other international convention to which Australia is a party and that is:
     - relevant to the use and management of the Basin water resources and
     - prescribed by the regulations for the purposes of this paragraph.
8. Item 6 of subsection 22(1).
9. Ibid., subsection 22(1).
10. See the definition at subsection 4(1) of the Water Act.

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In performing its functions in developing the Plan, the MDBA must act on the basis of the best available scientific knowledge and socio-economic analysis.\textsuperscript{11}

The Basin Plan, presently being developed by the MDBA under the Water Act, must include:

\begin{itemize}
  \item the setting of long-term average SDLs for surface water and groundwater water resource units
  \item an Environmental Watering Plan, a Water Quality and Salinity Management Plan
  \item requirements for Water Resource Plans which are accredited for ten years
  \item the setting of the amount of water required to meet critical human needs in times of severe drought and the triggers and arrangements for water sharing when required and
  \item the setting of water trading rules in the Murray-Darling Basin (MDB).\textsuperscript{12}
\end{itemize}

The Murray-Darling Basin has a complex hydrology with highly variable flows, combined with a complex system of water use primarily for irrigated agricultural production. The Murray-Darling Basin is currently subject to great change in water availability and use, partly because of the recently released proposed Murray-Darling Basin Plan (MDBA, 2011a), partly because of other factors like climate change (CSIRO, 2008), and partly because of other changes such as rise of water trading (eg. Kirby et al, 2012b).\textsuperscript{13}

The most contentious part of the Basin Plan relates to the approach to dealing with overallocation in the MDB by the setting of SDLs and the requirement to reduce existing water use in surface water catchments (see map) and groundwater areas (see map) within the Basin. SDLs will not be enforced until 2019 and existing water entitlements will continue to be recovered for environmental flow purposes between now and then. A review of the Basin Plan will also take place in 2015 to re-examine the SDLs in light of the science at the time and changes to river management.\textsuperscript{14}

**Achievement of SDLs**

The Water Act requires that the SDLs reflect an environmentally sustainable level of take\textsuperscript{15}, which the draft Basin Plan has estimated to be 10 873 Gigalitres (GL)/year (y) for surface water.\textsuperscript{16} The Baseline Diversion Limit (BDL) for surface water was calculated to be 13 623 GL/y as at 2009. Therefore a total of 2750 GL/y in reduction of diversions will be required by 2019. The BDL had already taken into account 823 GL/y of environmental water recovered before 2009 through various

\begin{itemize}
  \item Paragraph 21(4)(b) of the Water Act.
  \item Section 22 of the Water Act.
  \item Subsection 23(1) of the Water Act.
\end{itemize}

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Subsequently a significant amount of reduction has been achieved so that, up to September 2011, 1068 GL/y was recovered through the Australian Government’s Water for the Future programs, the New South Wales RiverBank program and stage one of the Northern Victoria Irrigation Renewal Project (NVIRP). A further 214 GL/y will be recovered through stage two of the NVIRP. The MDBA has estimated that, as of 30 June 2012, 1547 GL per year has been recovered for the environment, leaving a further 1203 GL per year to be recovered. This means that total amount of water recovered to the environment by 2019 will be 3573 GL.

Table S2.1 below, from the November 2011 ‘plain English summary of the draft Basin Plan’, gives a breakdown of the estimated Surface Water SDLs showing how the 2750 GL/y in reductions are to be achieved by catchment. It lists the 2009 BDLs, the required local reduction amount and what is termed the catchment’s share of the shared reduction amount for either the Northern Basin (143 GL/y) or the Southern Basin (971 GL). Not all the catchments in these Basins were required to contribute to a share of the reductions. The table also identifies how much of the local reduction amount had already been recovered, as at September 2011, and the required reduction still to be achieved. In the August 2012 ‘draft Basin Plan’ the amended local reduction amounts and the reductions achieved, up to 30 June 2012, are included for each catchment but no similar table is available.

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17. Ibid.
18. Ibid.

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### Table 82.1 Estimated surface-water SDLs

<table>
<thead>
<tr>
<th>Water resource plan area</th>
<th>Surface-waterSDL resource unit and unit code</th>
<th>Estimated SDL (GL/a)</th>
<th>Local reduction amount (GL/a)</th>
<th>Shared reduction amount (GL/a)</th>
<th>Estimated long-term average SDL (GL/a)</th>
<th>Local reduction achieved by SDL</th>
<th>Local gap remaining</th>
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<tr>
<td>Queensland</td>
<td>Punco (S529)</td>
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<tr>
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<td></td>
<td><strong>Total for southern basin</strong></td>
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* These SDL resource units have met their local contribution. As a result, SDL in the northern basin will contribute to the shared reduction.


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Basis of policy commitment

November 2011 Draft Basin Plan

The public submissions to the ‘November 2011 draft Basin Plan’ raised the issue of adjustments to the SDLs as a result of the 2015 review of the Basin Plan. The inclusion of an SDL adjustment mechanism in the Basin Plan, which will be facilitated by this Bill, has been sought by all basin governments. There was a concern that if Parliament disallowed an amendment to the Plan that changed SDLs (to account for water savings achieved from projects implemented after the original Plan was implemented) the required adjustments of the SDLs could not take place. The MDBA noted that a possible mechanism needed to operate but with the caveats that there can be a decrease in SDLs only if the social and economic outcomes are at least equivalent (and no worse than) those proposed in the Basin Plan and there can be an increase in SDLs only if the environmental outcomes are at least equivalent (and no worse than) those proposed in the Basin Plan.

House of Representatives Standing Committee on Regional Australia July 2012 Report

In its July 2012 report into certain matters relating to the draft Basin Plan, the House of Representatives Standing Committee on Regional Australia recommended that a mechanism should be developed to automatically adjust SDLs to respond to efficiencies gained from environmental works and measures. While the report did not say so, the term ‘automatically’ may be interpreted as meaning that such adjustments would not be disallowable.

MDB Ministerial Council

The MDB Ministerial Council requested that the MDBA work with the Basin states to develop a SDL adjustment mechanism by the end of July 2012. The mechanism was envisaged as operating within the range of 2400-3200 GL. It noted that:

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22. Ibid., p. 51.
24. The MDB Ministerial Council is composed of Ministers from the Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian and Victorian governments and has an advisory role in the preparation of the Basin Plan.

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...the Commonwealth envisages that, in the first instance, it would align its water recovery strategy to reflect the possibility that up to 650GL would be achieved through environmental works and measures. The water recovery strategy would be reviewed when any SDL adjustments have been made in 2016, and again in 2019. Ministers envisage that the SDL adjustment mechanism would operate by 30 June 2015, based on proposed initiatives, and be recalculated in mid-2019, in light of progress with the initiatives. The results would be announced on both occasions. Adjustments attributable to initiatives that are already in operation by mid-2019 would have immediate effect. Adjustments attributable to initiatives that will come into operation between 2019 and 2022 would have effect once they have commenced operation.26

The MDBA responded to these recommendations with a revised draft Basin Plan on 6 August 2012 that added a new Part 3 to Chapter 6, consisting of 13 new provisions and a new Schedule 5 outlining a mechanism for adjusting SDLs.27 In commenting on this revised draft Plan the Council requested that the SDLs should formally take effect in 2019 and that:

the intent of the SDL adjustment mechanism be made clearer for stakeholders by:

a. clarifying that at least 600GL of water recovery from existing committed Commonwealth investments in more efficient irrigation infrastructure is assumed to have occurred in reaching the proposed 2750GL SDL reduction;

b. clarifying that any additional water recovery for the purpose of increasing the SDL reduction may require the removal of constraints and would:

i. have regard to the extent of expected water savings from supply measures and the outcomes of the Constraints Management Strategy, to be known by 2016;

ii. come from additional investments that achieve a neutral or better impact on production for participating farms, or such other arrangements as are agreed with the relevant state that achieve socio-economic neutrality;

iii. depend on the availability of Commonwealth funding and uptake by farmers of this funding.

c. clarifying that the 5% limitation on operating the SDL adjustment mechanism operates in net terms, such that it is possible to achieve larger adjustments in either direction (e.g., a 650GL reduction from the 2750GL SDL reduction) provided there is an offsetting investment in measures that work in the opposite direction. It is anticipated that any downward movement in the reduction amount would be limited to 650GL in total.28

26. Ibid.

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It should be noted that a five per cent limitation on the adjustment of 10 873 GL SDL is 543.65 GL so the range of potential adjustment would be between 2206.35 and 3293.65 GL. The five per cent limitation applies to the Basin as a whole and can be exceeded within catchments. This limitation is lower than the one argued by the Victorian Government, 25 per cent of the SDL reduction amount, which would have allowed a deviation of 687.5 GL. South Australia on the other hand did not agree with the use of 2750 GL as a benchmark because:

Scientific analysis based on modelling and information to date indicates that the water recovery volume of 2750 GL does not achieve key environmental outcomes and that this is compounded by the impact of constraints on environmental water delivery.

**MDB Modelling**

MDB modelling has now predicted that, if key system constraints on the Murray, Goulburn, Murrumbidgee and lower Darling are relaxed to allow increased river flow, there may be environmental benefits for both 2800 GL and 3200 GL reductions in diversion limits.

Where the flow constraints were relaxed in the 2800 GL scenario the following environmental benefits were predicted.

- increased flow peak and duration for existing inundation events in the southern Basin
- overall, no net change in the number of environmental flow indicators achieved, but:
  - the achievement of an additional high-flow target in the Upper Murray (Barmah–Millewa Forest indicator: 35 000 ML/d for 30 days)

- an increase in the average number of high-flow days per year in the Lower Murray.

However, environmental flows were not enhanced sufficiently to achieve additional flow indicator targets for mid-to high-level floodplains.

An additional 400 GL of environmental flows under the 3200 GL scenario will result in many more flow indicators being met for the River Murray plus the capacity to water mid-to high-level parts of the floodplain in the Lower Murray. Where the flow constraints were relaxed for this scenario, the following environmental were predicted.

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• flow peak and duration for inundation events in the southern Basin were further increased
• 17 of the 18 ‘active management’ flow indicator targets in the River Murray were achieved
• several high-flow targets at four River Murray hydrologic indicator sites were achieved, indicating the potential for improved environmental outcomes for the mid- to high-level floodplain and colonial waterbird breeding:
  - 35 000 ML/d for 30 days at Barmah–Millewa Forest
  - 40 000 ML/d for 60 days at Gunbower–Koondrook–Perricoota Forest
  - 20 000 ML/d for 150 days at Gunbower–Koondrook–Perricoota Forest
  - 70 000 ML/d for 42 days at Hattah Lakes and
  - 80 000 ML/d for 30 days at Riverland–Chowilla Floodplain
• limited improvement in achievement of Coorong, Lower Lakes and Murray Mouth flow and salinity indicators compared to the benefits of additional environmental water recovery alone as represented in the BP-3200 scenario.32

South Australian Premier, Jay Weatherill, concurred with Goyder Institute director, Tony Minns, who said that the 3200 GL figure, plus the removal of flow constraints, could deliver a healthy river. The Premier indicated that South Australia would drop its threat of a High Court challenge to the Basin Plan if 3200 GL were set as the reduction limit for SDLs in the Plan.33

The issues relating to how these flow constraints can be relaxed through actions such as by obtaining flood easements, upgrading roads and bridges, enhancing flood mitigation works and increasing outlet capacity for some dams, have not been resolved.34 This includes the economic and social costs associated with these actions. The modelling report noted that:

> even if the Constraints Management Strategy confirms the feasibility of overcoming constraints and that the benefits outweigh the costs; delivery of environmental flows to the ‘actively managed’ floodplain are still generally not expected to exceed currently identified minor flood levels. Any third party impacts that arise from these events would need to be addressed through mechanisms such as easements.35

On 26 October 2012, Prime Minister Julia Gillard and Minister for Sustainability, Environment, Water Population and Communities, Tony Burke, announced that 3200 GL of water would be returned to

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32. Ibid.
33. D Wills, ‘Murray deal so close: Burke’, The Adelaide Advertiser, 10 October 2012, p. 6, viewed 10 October 2012, http://parlinfo/parlinfo/search/display/display.w3p;adv=yes;orderBy=date-eFirst;page=0;query=modelling%20Date%3A10%2F10%2F2012%20Dataset%3Apressclp;rec=4;resCount=Default
34. Murray-Darling Basin Authority, Hydrologic modelling of the relaxation of operational constraints in the southern connected system: methods and results, op. cit.
35. Ibid., p. xiii.

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the MDB, up from the 2750 GL in the draft Basin Plan. The return of the additional 450 GL would be achieved through water recovery projects funded with an additional $1.77 billion over ten years from 2014.\(^{36}\)

$200 million will be used to remove constraints such as low lying bridges and undersized dam outlets that currently limit both the volume of water that can flow through river systems and the environmental uses to which it can be put.\(^ {37}\)

Both the NSW and Victorian governments indicated they would not support this proposal.\(^ {38}\)

**Committee consideration**

**House Standing Committee on Regional Australia**

The Bill was referred to the House Standing Committee on Regional Australia for inquiry. The Committee presented its report on 10 October 2012. Tony Windsor, Chair of the Committee, noted that the amendment was in direct response to one of the Committee’s recommendations in its report earlier this year (see above). He felt that the Bill struck ‘an appropriate balance between the need for parliamentary oversight and the need for the MDBA to be responsive to the community’.\(^ {39}\)

The majority of the Committee was satisfied that consultation processes for state water resources plans should be adequate to address community concerns for consultation.\(^ {40}\) The report noted that the Bill relates to parliamentary scrutiny of changes to SDLs and that any such change could potentially be delayed for over six months due to consultation processes for amendments to the Basin Plan.\(^ {41}\)

> Through both inquiries that this Committee has conducted into the Murray-Darling Basin Plan it has been clear that the community wants the MDBA to have more capacity to react in a timely and effective manner to changes in environmental conditions and river management.\(^ {42}\)

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37. Ibid.


40. Ibid., p. 3.

41. Ibid., p. 4.

42. Ibid.

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The Committee felt that, since the SDL adjustments will be put forward in response to environmental works and measures proposed by the Basin states, stakeholders will be adequately consulted. Due to this and the fact that SDL adjustment will be limited to five per cent, the Committee recommended that the House of Representatives pass the Bill. 43

**Senate Standing Committee on Rural and Regional Affairs and Transport**

The Senate Standing Committee on Rural and Regional Affairs and Transport made the following comments about the adjustment mechanism outlined in the August draft Basin Plan.

The committee notes that the relevant amendment to the *Water Act 2007* to provide for an adjustment mechanism was only introduced into Parliament on 20 September 2012. Because of the timeframe the committee has not been able to form a specific view on the provisions of the bill.

Overall, the committee is very concerned with the lack of information about how the adjustment mechanism would work and the details in determining changes. The 2750 GL/y is a highly controversial figure but the committee is of the view that the public and Parliament need to be reassured that any changes are based on appropriate information and processes. These are yet to be detailed by the MDBA. As a result, the Parliament is again being asked to legislate on a matter with insufficient information. 44

**Senate Scrutiny of Bills Committee**

The Senate Standing Committee for the Scrutiny of Bills reported that the ‘Committee has no comment on this Bill.’ 45

**Joint Parliamentary Committee on Human Rights**

The Joint Parliamentary Committee on Human Rights ‘considers that the Bill does not appear to raise any human rights concerns and the statement of compatibility is adequate’. 46

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43. Ibid.

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Policy position of non-government parties/independents

In a dissenting report, the Coalition members of the House of Representatives Standing Committee on Regional Australia, Michael McCormack, Dr Sharman Stone and Dan Tehan, strongly opposed the conclusions of the Committee’s advisory report on the Bill.47

While we support the concept of a Sustainable Diversion Limit adjustment mechanism which takes into account environmental works and measures and other savings, this Bill does not identify the processes or safeguards, and sits in the vacuum created by the fact that there is still no information on a final SDL.48

The Coalition members of the Committee were concerned that this Bill was rushed into Parliament with lack of consultation and transparency. They stated that the Committee’s previous report’s recommendation about the adjustment mechanism did not mention an adjustment percentage and MDBA involvement. They opposed the removal of both the power of the Minister to direct the MDBA in relation to the Plan and the disallowance provision for amendments to the Basin Plan.49

By taking away the power of the Minister and the Parliament to consider the appropriateness or otherwise of a key feature of the Basin Plan. The SDL, which is of critical importance to the achievement of a triple bottom line outcome. The Bill would give unprecedented and unfettered power to the MDBA. The Regional Australia Committee in previous reports as well as stakeholders has been rightly critical of this entity throughout the course of the plan’s development. It has proven incapable of meaningful engagement, has produced social and economic impact work which has been roundly criticised. It has not used the science appropriately and was not at any stage designed to be a power unto itself. (Refer Report of Drought and Flooding Rains 3.83). It is clear the MDBA has, in coming to a position on the proposed SDLs made a number of poor assumptions using what is otherwise sound science. In addition, the logic for applying three per cent for climate change appears flawed and clearly needs to be given serious reconsideration.50

In their minority report of the Senate Standing Committee on Rural and Regional Affairs and Transport, Greens Senators Hanson-Young and Whish-Wilson felt the water recovery level of 2750 GL was too low to achieve adequate environmental outcomes. Therefore the adjustment mechanism does return enough water to meet the ‘full range of flow targets described by the MDBA’. They wanted all water savings from either upgrading irrigation infrastructure or in-stream works and measures to go back to the environment and not be shared with socio-economic use.51

They made the following recommendations about the adjustment mechanism:

47. House of Representatives Standing Committee on Regional Australia, Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012, op. cit.
48. Ibid., p. 8.
49. Ibid., p. 10.
50. Ibid., pp. 10–11.

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Recommendation 6

The adjustment mechanism should be structured to better accommodate the removal of constraints and to facilitate a future decrease in SDLs but not to facilitate any less water being returned to the river.

Recommendation 7

The adjustment mechanism should be altered to facilitate and encourage future buybacks where they are strategic and voluntary as buybacks are proven to be the most cost-efficient and secure manner of recovering water from consumptive use.  

Position of major interest groups

Many groups supported the inclusion of an adjustment mechanism in the Water Act but were opposed to the fact that the adjustments cannot be disallowed by Parliament.

However, in his second reading speech, the Minister stated that:

Under the Water Act, the Basin Plan itself is a disallowable instrument and parliament will have the opportunity by that means to consider the precise elements of the SDL adjustment mechanism that will be written into the Basin Plan.  

Louise Burge, from Southern Riverina Irrigators, did not agree with the MDBA overseeing the adjustment process. Ben Haslett, from SA River Communities is concerned about setting the amount of water that needs to be returned to the environment because there was not much trust left in the MDBA. Andrew Gregson of the New South Wales Irrigators Council said the MDBA hadn’t listened to community concerns and so shouldn’t be given sole power to change SDLs.

When it comes down to it, if this is going to be a political and a policy process, which it is, then the final say on it must be by elected representatives, not an unrepresentative, unelected authority, that’s proven that it’s incapable of meaningful stakeholder engagement.

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52. Ibid., p. 46.
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fa0c9c3b1-a08d-42ca-995d-7f4622b24e7%2F0009%22
54. L Smith and L Kingsberry, ‘Irrigators opposed to sustainable diversion limit amendments’, ABC Rural, Australian Broadcasting Corporation (ABC), 21 September 2012, viewed 4 October 2012, 
http://www.abc.net.au/rural/news/content/201209/s3594987.htm
55. Ibid.
56. A Vidot, ‘Amendments confirm Basin Authority power to decide diversion limits’, ABC Rural, Australian Broadcasting Corporation (ABC), 20 September 2012, viewed 4 October 2012, 
http://www.abc.net.au/rural/news/content/201209/s3594349.htm
57. Ibid.

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National Farmers’ Federation (NFF) CEO Matt Linnegar called for the amendments to be shelved because of lack of consultation, saying the NFF had serious concerns with the legislation, including the fact that the MDBA would ultimately decide on the adjustments to the SDLs.58

Three Victorian environment groups had serious reservations about the MDB Ministerial Council’s July 2012 proposal for the SDL adjustment mechanism. While they would welcome a SDL adjustment mechanism that allows more of the targets to be met with a higher degree of certainty, it needed to be ‘robust, transparent and objective, and have a credible environmental benchmark’.59

Financial implications

The Explanatory Memorandum states that the Bill does not appropriate funds.

Human Rights Statement of Compatibility

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.60

Key provisions

Mandatory content of Basin Plan

Subsection 22(1) of the Water Act provides a table setting out the matters that must be included in a Basin Plan. Amongst other things the Basin Plan must include:

- the maximum long-term annual average quantities of water that can be diverted on a sustainable basis from both Basin water resources and water resource plan areas, as well as the method for determining the extent of compliance with the diversion limits61
- temporary diversion provisions including compliance with diversion limits62
- identification of the risks for Basin water resources63

60. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
61. Water Act, items 6 and 8 of subsection 22(1) and section 23.
62. Water Act, items 7 and 8 of subsection 22(1) and section 24.

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• the requirements that State water resource plans need to comply with in order to be accredited under the Water Act\(^{64}\)
• an environmental watering plan\(^{65}\)
• a water quality and salinity management plan\(^{66}\) and
• water trading rules.\(^{67}\)

As above, items 6 and 7 of the table deal with the SDLs (long term average and temporary) that can be taken from the Basin water resources as a whole and from the water resources of each water resource plan area.

**Item 6** of the Bill repeals and re-enacts the cell at item 6 of subsection 22(1) of the Act under the heading of ‘Specific requirements’. The inclusion of references to proposed sections 23A and 23B, which deal with the adjustments to the SDLs, means that they will be part of the mandatory content of the Basin Plan.

<table>
<thead>
<tr>
<th>OLD</th>
<th>NEW</th>
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<tbody>
<tr>
<td>The limit must comply with section 23. Section 75 requires particular matters to be specified in the Basin Plan if a long-term average sustainable diversion limit for the water resources, or a particular part of the water resources, of a water resource plan area is reduced.</td>
<td>The limit must comply with section 23. <strong>Sections 23A and 23B deal with adjustments to the limit.</strong> Section 75 requires particular matters to be specified in the Basin Plan if a long-term average sustainable diversion limit for the water resources, or a particular part of the water resources, of a water resource plan area is reduced.</td>
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</table>

Item 11 of the table in subsection 22(1) of the Act provides for the matters that must be included in the accreditation requirements the Basin Plan places on water resource plans. **Item 8** of the Bill proposes to add a reference to proposed subsections 22(6A) and 22(6B) under the heading ‘Specific requirements’, resulting in the following change:

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63. Water Act, item 3 of subsection 22(1).
64. Water Act, item 11 of subsection 22(1) and subsection 22(3).
65. Water Act, item 9 of subsection 22(1), and sections 28-32.
66. Water Act, item 10 of subsection 22(1) and section 25.
67. Water Act, item 12 of subsection 22(1) and section 26.

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The requirements must relate to matters that are relevant to the sustainable use and management of the water resources of the water resource plan area. Subsection (3) provides that certain matters must be included in the requirements.

The requirements must relate to matters that are relevant to the sustainable use and management of the water resources of the water resource plan area. Subsections (3), (6A) and (6B) provide that certain matters must be included in the requirements.

**Item 9** of the Bill inserts **proposed subsections 22(6A) and 22 (6B)**. **Proposed subsection 22(6A)** provides that the requirements in paragraph 22(3)(b) must include a requirement for a water resource plan to contain a mechanism for incorporating and applying the long-term annual diversion limit for the water resources of that plan area (or for a particular part of those water resources), as that limit is after it has been amended to take account of a relevant SDL adjustment.

**Proposed subsection 22(6B)** provides that a relevant SDL adjustment, in relation to a water resource plan area, is an adjustment of the long-term average sustainable diversion limit for the water resources of that plan area (or for a particular part of those water resources). These adjustments are to be adopted under **proposed subsection 23B(6)** only after a water plan is accredited.

**Long-term sustainable diversion limits**

Section 23 of the Act requires that long-term average SDLs, whether for Basin water resources as a whole, or part of them, must reflect an environmentally sustainable level of take.

**Item 10 of the Bill** repeals and re-enacts section 23 of the Act and inserts **proposed sections 23A and 23B**.

Only minor amendments which are necessary to recognise the introduction **proposed sections 23A and 23B**— the core provisions giving effect to anSDL adjustment mechanism—are proposed to section 23.

**Proposing adjustments of long-term average sustainable diversion limits**

**Proposed subsection 23A(1)** of the Act allows the MDBA to propose adjustments to the SDLs against criteria in the Basin Plan, provided that it results in a total Basin adjustment of no more than plus or minus five per cent in net terms (**proposed subsections 23A(4) and 23A(5)**). This allows for individual water resources plan areas or parts of water resource plan areas to be adjusted by more or less than

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68. Subsection 22(3) of the Water Act deals with accreditation requirements for water resource plans. It provides, at paragraph 22(3)(b), that a water resource plan area must include, amongst other things, requirements in relation to the incorporation, and application, of the long-term annual diversion limit for the water resources of the water resource plan area.

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five per cent. **Proposed subsection 23A(2)** requires that if adjustments are proposed under subsection 23A(1), then the Basin Plan must include criteria for determining whether the MDBA should propose an adjustment, (proposed paragraph 23(2)(a)), a requirement that criteria triggering a proposal have been satisfied (proposed paragraph 23(2)(b)) and a requirement that advice be sought from the Basin Officials Committee before an adjustment is proposed (proposed paragraph 23(2)(c)).

**Proposed subsection 23A(5)** of the Act provides definitions for ‘*Basin reference limit*’, ‘*proposed Basin limit*’, ‘*proposed plan area limit*’, ‘*reference time*’ and ‘*total Basin adjustment percentage*’. These definitions are related to the quantity and timing of any adjustment and are necessary to give proper operative effect to any adjustment of the SDL. Marker definitions have also been placed in section 4(1), the definitions section of the Water Act, by the amendments made by item 1 of the Bill.

**Adopting proposed adjustments as amendments of Basin Plan – the process**

**Proposed section 23B** of the Act specifies the process the MDBA is required to follow when adopting proposed adjustments to the long-term average SDLs. **Proposed subsection 23B(2)** requires the MDBA to prepare a notice of the proposed adjustment or adjustments and give the notice to the Minister (proposed subsection 23B(5)).

For each water resource plan area (or each part) for which an adjustment is proposed, the MDBA must include the following information in a notice:

- the longterm average SDL for the water resources of the plan area (or the particular part of those water resources), that applied at the reference time
- the proposed plan area limit
- the amount of difference between the SDL that applied at the reference time and the proposed new SDL, expressed as a percentage
- if any adjustments have been adopted by the Minister since the reference time, the SDL as adjusted and
- an outline of the material on which the Authority based its decision in determining that the criteria referred to in paragraph 23A(2)(a) had been met in relation to the adjustment, and the amount of the adjustment.

**Proposed subsection 23B(3)** also requires that the notice state the Basin limit that is proposed as a result of the proposed adjustments. There must also be included an outline of the material on which the MDBA based its decision in determining that the criteria referred to in paragraph 23A(2)(a) had been met in relation the SDL limit for the Basin water resources, and the amount of the adjustment.

**Proposed subsection 23B(4)** of the Act requires the MDBA to prepare an amendment to the Basin Plan giving effect to the proposed adjustments and to provide the amendment and the notice to the Minister (proposed subsection 23B(5)).

**Proposed subsection 23B(6)** of the Act requires the Minister to adopt, in writing, any amendment received under the abovementioned process, as soon as practicable after receiving the proposed

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amendment. The requirement is premised on the adjustments to the SDL being technical decisions made in accordance with criteria and a process described in the Basin Plan, rather than a substantive change to the Basin Plan. The amendment is a legislative instrument under the Legislative Instruments Act 2003. Once adopted by the Minister, the amendment must be registered on the Federal Register of Legislative Instruments and the Minister must table the amendment in both Houses of Parliament.69

Disallowance of an amendment to Basin Plan under subsection 23B(6)

Item 13 of the Bill: proposed paragraph 33(2A) provides that section 42 of the Legislative Instruments Act does not apply to an amendment of the Basin Plan adopted by the Minister under proposed subsection 23B(6). Section 42 of the Legislative Instruments Act allows for the disallowance of legislative instruments by the Parliament.


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