WATER AMENDMENT (LONG-TERM AVERAGE SUSTAINABLE DIVERSION LIMIT ADJUSTMENT) BILL 2012

REVISED EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

(Circulated by the authority of the Minister for Sustainability, Environment, Water, Population and Communities)
GENERAL OUTLINE

1. The Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 (the Bill) amends the Water Act 2007 (the Water Act) to allow the long-term average sustainable diversion limit (SDL) set by the Murray-Darling Basin Plan (Basin Plan) to be adjusted within clearly defined limits without invoking the formal Basin Plan amendment process.

2. This amendment will allow an adjustment mechanism to be included in the Basin Plan in a way which will aid confidence and transparency in the operation of such a mechanism.

3. It is not the purpose of the Bill to create the legal possibility of a mechanism. This can be done under the section 23 of the current Water Act. However, all jurisdictions and the Murray-Darling Basin Authority (the Authority) have now agreed that it is desirable for the Basin Plan to include an improved adjustment mechanism. The Bill sets out the broad parameters for the mechanism, how it is intended to operate and introduces transparency in the process, requiring any use of the mechanism to be reported formally and publicly to the Parliament.

4. Under the Water Act, the Basin Plan itself is a disallowable instrument. The current version of the Basin Plan includes an adjustment mechanism in accordance with the current Act.

SDL adjustment mechanism

5. The Water Act requires that the Basin Plan include an SDL for the water resources of the Murray-Darling Basin. This SDL must reflect an environmentally sustainable level of take. This Bill allows the Authority to make adjustments to the SDL in accordance with criteria specified in the Basin Plan.

6. It is envisaged that criteria to be specified in the Basin Plan will include that the mechanism must operate on a no-detriment basis. The adjustments would then not be able to weaken the social, economic and environmental outcomes inherent in the Basin Plan. Projects that enable environmental water to be used more efficiently, thereby reducing the need to remove additional water from productive use, must achieve equivalent environmental outcomes to those in the Basin Plan. Projects to enable improved environmental outcomes, must maintain or improve the socio-economic circumstances of Basin communities compared with the Basin Plan. These projects could include for example, improved irrigation efficiency, enabling more water to be made available for the environment.

7. The amendment provides for adjustments to Basin Plan SDLs to be made in a comprehensive and transparent manner, within a set variance threshold (plus or minus 5 per cent of the SDL for Basin water resources as a whole).

8. The mechanism allows adjustments to take account of findings on variances to SDLs without the need to engage in the formal amendment process to the Basin Plan, under Subdivision F of Part 2, Division 1 of the Water Act (the existing amendment process).

9. To formally adjust the SDL the Authority must prepare a notice to the Minister proposing changes to SDLs in comparison to the currently applicable SDLs and to specify the total adjustments and the new Basin-wide SDL. At the same time the Authority must prepare an amendment to the Basin Plan to reflect the SDL adjustments in the notice. The Minister must be provided with the notice and proposed amendment for consideration. The Minister then has a discretionary decision to adopt or not adopt an amendment proposed by the Authority. If the Minister adopts the amendment, he must then table both the notice and amendment in the Parliament.
10. The Bill also provides that the amendment to the Basin Plan is a legislative instrument.

11. The combination of the notice and a formal amendment to effect the adjustment provides transparency for the adjustment process. The Bill also requires that the Basin Plan requirements for accreditation of water resource plans include a requirement that water resource plans include a mechanism for incorporating and adjusting a relevant change in the limit for that water resource plan area.

**Stakeholder support for SDL adjustment mechanism**

12. The inclusion of an SDL adjustment mechanism in the Basin Plan, which will be facilitated by this amendment, has been sought by all Basin governments. Stakeholders also raised the need for such a mechanism as part of the 20 week public consultation on the Basin Plan. The House of Representatives Standing Committee on Regional Australia, in its July 2012 Report into certain matters relating to the proposed Murray-Darling Basin Plan, also recommended the Commonwealth develop a mechanism to adjust SDLs.

13. The Bill requires the Authority not to propose an adjustment without seeking and considering advice from the Basin Officials Committee and conducting public consultations.

**FINANCIAL IMPACT STATEMENT**

14. This Bill does not appropriate funds.

**REGULATORY IMPACT STATEMENT**

15. This Bill makes amendments to the Water Act of a technical and machinery nature. The Office of Best Practice Regulation has advised that no Regulatory Impact Statement (RIS) is required.

16. It is unlikely that there will be any additional regulatory burdens on business or not for profit organisations resulting from this Bill. A RIS is being prepared for the Basin Plan. If the Basin Plan includes an adjustment mechanism as a result of this Bill, the Basin Plan RIS will include a discussion of the costs and benefits of the operation of the SDL adjustment mechanism.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS- PART 3 HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011**

17. The Bill engages the right to an adequate standard of living and right to health in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to an adequate standard of living is protected in Article 11 of the ICESCR and the right to physical and mental health is protected in article 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights, established to oversee the implementation of the ICESCR, has interpreted these articles as including a right to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’. ¹

18. The overall framework of the Water Act supports access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses. This is reflected in section 20 which sets out the purpose of the Basin Plan and is supported through specific content required to be included in the Basin Plan by the Water Act, including content relating to critical human water needs and water quality.

¹ CESCR General Comment No. 15: The Right to Water E/C 12/2002/11.
19. The establishment of an SDL adjustment mechanism and the related amendment to the water resource plan accreditation requirement continues support for access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses by providing that an adjusted SDL must reflect an environmentally sustainable level of take. It does not change that Basin Plan provisions must be prepared having regard to the fact that the Commonwealth and the Basin States have agreed that critical human water needs are the highest priority water use for communities who are dependent on Basin water resources (paragraph 86A(1)(a)). It does not affect the Water Act requirements for the Basin Plan to include a water quality and salinity management plan under Item 10 of subsection 22(1).

20. The Bill is compatible with human rights because it supports the rights identified in ICESCR as interpreted by the Committee on Economic, Social and Cultural Rights.

NOTES ON INDIVIDUAL CLAUSES

Clause 1- Short Title

21. This clause provides that the Act is to be cited as the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Act 2012.

Clause 2- Commencement

22. This clause specifies that the Act will commence on the day that it receives the Royal Assent.

Clause 3- Schedule(s)

23. This clause provides for amendments to the Water Act specified in Schedule 1.

Schedule 1- Amendments

Water Act 2007

Items 1 to 5 -Subsection 4(1) - Definitions

24. These items insert five new definitions into subsection 4(1). These definitions have been included to provide clarity about the operation of any adjustment to the SDL, including the timing and quantity of any adjustment.

25. Item 1 inserts the definition of ‘Basin reference limit’ and provides that it has the meaning given by subsection 23A(5).

26. Item 2 inserts the definition of ‘proposed Basin limit’ and provides that it has the meaning given by subsection 23A(5).

27. Item 3 inserts the definition of ‘proposed plan area limit’ and provides that it has the meaning given by subsection 23A(5).

28. Item 4 inserts the definition of ‘reference time’ and provides that it has the meaning given by subsection 23A(5).

29. Item 5 inserts the definition of ‘total Basin adjustment percentage’ and provides that it has the meaning given by subsections 23A (5) and (6).
Item 6 - Subsection 22(1) - Mandatory Content of Basin Plan - (cell at table item 6, column headed “Specific requirements”)

30. This item repeals and re-enacts the cell at table item 6, subsection 22(1), which specifies the content of the Basin Plan provisions regarding the maximum long-term annual quantities of water (SDL) that can be taken from Basin water resources as a whole and an area or part of Basin water resources. The only substantive change to the wording is the inclusion of the references to sections 23A and 23B which deal with the adjustments to SDLs. The effect of these amendments is that both SDLs and adjustments to SDLs form mandatory content of the Basin Plan, as they are fundamental to the integrated management of Basin water resources.

Item 7 – Subsection 22(1) - Mandatory Content of Basin Plan - (cell at table item 11, column headed “Specific requirements”)

31. This item adds new subsections 6A and 6B to those matters that must be included in the accreditation requirements the Basin Plan places on water resource plans.

Item 8 – Paragraph 22(3)(b)

32. This item inserts into the paragraph that requires the Basin Plan to include as a requirement of a water resource plan a requirement for the incorporation and application of the SDL for the water resources of a water resource plan area, a requirement to see the new subsections 6A and 6B which are relevant in what is required of a water resource plan.

Item 9 – After subsection 22(6)

33. This item provides for Basin Plan accreditation requirements on water resource plans for the incorporation and application of SDL adjustments into water resource plan limits.

New subsection 6A

34. Section 22(3) specifies a number of accreditation requirements for water resource plans. Paragraph (3)(b) provides that a water resource plan must include requirements in relation to the incorporation and application of the SDL for the water resources of the water resource plan area. This item provides that the requirements in paragraph (3)(b) include a requirement for a water resource plan to contain a mechanism for incorporating and applying any relevant SDL adjustments.

New subsection 6B

35. This item identifies that relevant SDL adjustments that must be able to be incorporated into the limits of take of water in a water resource plan are those that are adopted as amendments under subsection 23B(6). No other amendments to the Basin Plan must be incorporated into water resource plans during the generally ten year accreditation period of a water resource plan.

36. Only adjustments that occur after a water resource plan has been accredited must be incorporated into the water resource plan. Adjustments that occur more than two years prior to the water resource plan being given to the Commonwealth Minister responsible for water would be included as part of the accreditation process.

Item 10 - Section 23

37. This item gives effect to the SDL adjustment mechanism.
38. The item repeals and re-enacts section 23 with only minor amendments resulting from the inclusion of the adjustment mechanism in new sections 23A and 23B, the key operative provisions giving effect to an SDL adjustment mechanism. These sections set out the process the Authority must follow when proposing an adjustment to an SDL and impose several conditions on the Authority in exercising this power. The SDL adjustment mechanism provisions are closely related to section 23 which sets out requirements relating to the SDL.

New section 23

39. Subsection 23(1), when read with subsection 23(3), provides that a long-term average sustainable diversion limit must reflect an environmentally sustainable level of take for the Basin water resources, for the water resources of a particular water resource plan area, or for a particular part of those water resources. This subsection is substantively identical to the current section 23(1).

40. New subsection 23(2) continues to provide that an SDL may be specified as: a particular quantity of water per year; or, as a formula or other method that may be used to calculate a quantity of water per year; or, in any other way that the Authority determines to be appropriate. The subsection is substantively identical to the current section 23(2). It includes a new Note which directs the reader to new sections 23A and 23B, which set out how an SDL may be adjusted.

41. The references to Basin water resources and water resource plan areas in the current section have been relocated to the new subsection 23(3) to ensure that the new sections 23, 23A and 23B are clear to read and interpret. The new paragraph 23(3) preserves the intent of the current expression in section 23.

New section 23A

42. New subsection 23A(1) provides that under the Basin Plan the Authority may propose an adjustment to an SDL for the water resources of particular water resource plan area or a particular part of those water resources within a set amount, and, as a result of these adjustments, an adjustment to the SDL for Basin water resources as a whole. This adjustment is subject to the limitation provided in subsection 23A(4).

43. New subsection 23A(2) provides that if the Basin Plan includes provisions as described in subsection 23A(1), the Basin Plan must include; criteria for determining whether the Authority should propose an adjustment as referred to in subsection 23A(1) and the amount of the adjustment, and, a requirement that the Authority determine that it is satisfied that these criteria have been met. The Basin Plan must also include a requirement that the Authority must not propose an adjustment to the SDL without seeking and considering advice from the Basin Officials Committee and, conducting public consultations and considering submissions from members of the public.

44. New subsection 23A(3) provides that the Authority may propose an adjustment to the SDL without the need to amend the Basin Plan under Subdivision F of Part 2, Division 1. For the avoidance of doubt, the subsection also provides that any adjustments proposed to the SDL must reflect an ‘environmentally sustainable level of take’ as defined in subsection 4(1) of the Water Act. The Note to this paragraph directs the reader to new subsection 23B(6), which provides that a proposed SDL adjustment may be adopted by the Minister as an amendment of the Basin Plan.

45. New subsection 23A(4) provides that adjustments proposed by the Authority under subsection 23A(1)(a) or (b) may only be proposed if they result in a total Basin adjustment percentage of no more than 5 per cent. The variance for individual water resource plan areas or parts of water resource plan areas may be more or less than 5 per cent provided the overall Basin adjustment...
percentage does not exceed this limit. The effect of this provision when read with the definition of 'total Basin adjustment percentage' in new section 23A(5) is the difference between the proposed Basin limit as a result of the proposed adjustments and the Basin reference limit as a percentage of the Basin reference limit cannot exceed a variance of 5 per cent. The provision allows for an increase or decrease of up to 5 per cent. 'The Basin reference limit' which is defined in new section 23A(5) is the SDL for the Basin water resources at the time the Basin Plan first takes effect, or following a review of the Basin Plan under Subdivision G of Part 2, Division 1 of the Water Act.

46. New subsection 23A(5) inserts the definitions of ‘Basin reference limit’, ‘proposed Basin limit’, ‘proposed plan area limit’, ‘reference time’ and ‘total Basin adjustment percentage’. These definitions enable the Basin-wide SDL to be identified and re-set with certainty.

47. The ‘Basin reference limit’ is defined as the SDL for the Basin water resource that applied at the reference time.

48. The ‘proposed Basin limit’ is defined as the SDL for Basin water resources proposed by the Authority under paragraph 23A(1)(b).

49. The ‘proposed plan area limit’ is defined to mean the SDL for the water resources of a particular water resource plan area or particular part of those water resources as a result of an adjustment proposed by the Authority under paragraph 23A(1)(a).

50. The definition of ‘reference time' provides that the reference time will initially be the time when the Basin Plan first takes effect. If the Basin Plan has been reviewed under Subdivision G of Part 2, Division 1, the reference time refers to the most recent review. If the Minister adopts an amendment to one or more SDLs as a result of the review the reference time will be the time when the amendment or amendments are adopted. If however the Authority advises the Minister when it provides the report of the results of the review under subsection 50(5) that the Authority has decided not to prepare an amendment of any SDLs the reference time will be the time when the report is provided to the Minister.

51. ‘Total Basin adjustment percentage’ is defined as the difference between the proposed basin limit taking into account all adjustments proposed under paragraph 23A(1)(a) and the Basin reference limit expressed as a percentage of the Basin reference limit.

52. New paragraph 23A(6) provides that if the total Basin adjustment percentage in subsection 23A(5) is negative it is expressed as positive amount. This ensures that the total of any adjustments SDL does not exceed a variance of 5 per cent of the Basin reference limit.

New section 23B

53. New section 23B outlines the process for adjustments to the SDL proposed by the Authority may be adopted by the Minister as an amendment to the Basin Plan. The new section sets out the requirements that the Authority must follow, which include preparing a notice and an amendment to the Basin Plan that must be given to the Minister for consideration.

Proposing an adjustment- the process

54. Section 23B applies if the Authority proposes one or more adjustments under paragraph 23A(1)(a). An adjustment may be proposed for an SDL relating to either the Basin water resources, the water resources of a particular water resource plan area, or a particular part of those water resources.
55. Subsection 23B(2) requires the Authority to prepare a notice of the proposed adjustment or adjustments and give the notice to the Minister. It is intended that a single notice should be prepared covering all adjustments made at the same time to the water resources of a particular water resource plan area, or a particular part of those water resources.

56. The notice must include the following information for each water resource plan area (or the part) proposed to be adjusted:

(a) the SDL that applied at the reference time for the water resources of the plan area or part of those water resources which is proposed to be adjusted;

(b) the proposed new SDL for each water resource plan areas or part of those water resources as a result of the adjustment proposed;

(c) the amount of difference between the SDL that applied at the reference time and the proposed new SDL, each expressed as a percentage of the amount referred to in (a);

(d) if any adjustments have been adopted by the Minister since the reference time, the SDL as adjusted; and

(e) 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.

57. Subsection 23B(3) also requires the notice prepared under subsection 23B(2) to include the proposed Basin limit and the total Basin adjustment percentage taking into account all the water resources of particular water resource plan areas, or a particular part of those water resources affected by the proposed adjustments. The notice must also include 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 the SDL limit for the Basin water resources, and the amount of the adjustment.

58. Subsection 23B(4) requires the Authority prepare an amendment to the Basin Plan giving effect to the proposed adjustments. This amendment must set out the proposed plan area limit for each plan area which will be affected by the proposed adjustment and the proposed Basin limit that is included in the notice. The amendment is a legislative instrument.

59. Subsection 23B(5) requires the Authority to provide to the Minister at the same time the amendment under subsection 23B(4) for adoption and the notice under subsection 23B(2).

60. Subsection 23B(6) provides as soon as practicable after receiving the amendment, the Minister must consider the amendment and either adopt, in writing, the amendment or give the Authority notice, in writing, that the Minister has decided not to adopt the amendment.

61. The Note at the end of subsection 23B(6) provides that if a long-term average sustainable diversion limit for the water resources of a particular water resource plan area (or a particular part of those water resources) is amended, the long-term annual diversion limit for those water resources is also amended (see table item 7 of the table in subsection 22(1)).

62. The amendment is a legislative instrument under the Legislative Instruments Act 2003. Once the Minister has adopted the SDL adjustment amendment, the amendment must be registered on the Federal Register of Legislative Instruments and the Minister must table the amendment in both Houses of Parliament.
63. Subsection 23B(7) provides that when the amendment made under 23B(6) is tabled before a House of the Parliament the notice prepared by the Authority under subsection 23B(2) will be tabled at the same time.

64. Paragraph 23B(7)(b) provides that the notice prepared by the Authority under subsection 23B(2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The notice is a document prepared as part of the process for amending the Basin Plan to explain any adjustments which have occurred. As a notice of decision, the notice falls within the class of instruments declared not to be legislative instruments (items 20 of Part 1, Schedule 1 to the Legislative Instruments Regulations 2004). The exemption provided in this paragraph is included for the sake of clarity and certainty.

**Item 11 - Subsection 33(2)**

65. This item amends subsection 33(2) to reflect that an amendment of the Basin Plan made under the new paragraph 23B(6) and adopted by the Minister is a legislative instrument.

**Item 12 - Paragraph 33(2)(b)**

66. This item amends paragraph 33(2)(b) of the current Water Act to include that an amendment adjusting the SDL of the Basin Plan made under the new subsection 23B(4) is taken to be made on that day which the Minister adopts the amendment in writing.

**Item 14 - Paragraph 251(2)(b)**

67. This item provides that the Minister may not delegate the power to adopt an amendment made in accordance with the SDL adjustment mechanism. The power to adopt an amendment under section 48 (in accordance with the amendment process in Subdivision F of Part 2, Division 1) cannot be delegated under the current Water Act and the item maintains this position.