
The Parliament of the Commonwealth of Australia

Advisory Report

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

**House of Representatives
Standing Committee on Regional Australia**

October 2012
Canberra

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Foreword

The Standing Committee on Regional Australia has undertaken two inquiries into matters related to the Murray-Darling Basin Plan. The first inquiry, resulted in the report *Of Drought and Flooding Rains*, and called for greater community focus in Basin planning processes. The second report, *Report on certain matters relating to the proposed-Murray Darling Basin Plan*, identified a number of issues that needed to be addressed prior to parliamentary scrutiny of the Basin Plan.

The current inquiry has examined a proposed amendment to the *Water Act 2007*, which is in direct response to one of the recommendations made in the Committee's second inquiry. The recommendation was endorsed by all Members who participated in that inquiry.

I commend the Government for its responsiveness to the Committee's findings in relation to Murray-Darling Basin arrangements and processes and particularly the most recent inquiry into the Murray-Darling Basin Plan. This is the first time the Parliament has had a committee that is specifically charged with matters concerning Regional Australia and this bill is proof of the effectiveness and critical importance of this committee's existence.

While the Committee believes that it is fundamentally important that the community has input to the Basin Plan, the final responsibility for approving it rests with the Federal Parliament. We as parliamentarians must be confident that any Basin Plan provides the balance between social, economic and environmental outcomes for the Basin as a whole.

The *Water Act 2007* provides the process for developing and amending the Basin Plan. This process appropriately involves a lengthy community and parliamentary consultation process. However, it does not allow for the Murray-Darling Basin Authority (MDBA) to react quickly in response to local conditions.

Both of the Committee's previous inquiries found a need for the MDBA to be more responsive to local conditions and improvements in water use. I believe that the proposal put forward in this bill strikes an appropriate balance between the need for parliamentary oversight and the need for the MDBA to be responsive to the community.

Tony Windsor MP
Chair



Membership of the Committee

Chair Tony Windsor MP

Deputy Chair Steve Gibbons MP

Members Hon Joel Fitzgibbon MP

Barry Haase MP

Kirsten Livermore MP

Michael McCormack MP

Dan Tehan MP

Rob Mitchell MP

Supplementary member for the purposes of the inquiry

Hon Dr Sharman Stone MP

Committee Secretariat

Secretary Glenn Worthington

Inquiry Secretary Siobhán Leyne

Administrative Officers Daniel Miletic

Emily Costelloe



Terms of reference

The terms of reference are the text of the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill.



List of recommendations

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

Recommendation 1

The Committee recommends that the House of Representatives pass the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012.

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

- 1.1 On 20 September 2012, the House of Representatives Selection Committee referred the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 (the Bill) to the Committee for inquiry and report.
- 1.2 The reason for referral/principal issues for consideration given were:
- This bill gives the Murray-Darling Basin Authority authority to make adjustments to the Basin Plan without ministerial or parliamentary approval.¹

Intent of the bill

- 1.3 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 ... without invoking the formal Basin Plan Amendment process.'²
- 1.4 Section 23 of the Water Act sets out how the long-term average SDL will be specified. The Explanatory Memorandum (EM) to the Bill states that this section currently creates the legal possibility of an adjustment mechanism. However, no adjustment mechanism is currently specified.³

1 Selection Committee, *Report No. 66*, p. 4.

2 Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 Explanatory Memorandum (EM), p. 2.

3 EM, p. 2.

- 1.5 If s23 provides a legal possibility of an adjustment mechanism, this means that the SDL can be adjusted without any formal notification to the community or Parliament. The Bill proposes a mechanism whereby any adjustment must undertake a formal notification process.
- 1.6 The proposed adjustment process provides that the Murray Darling Basin Authority (MDBA) may propose an adjustment of the SDL by no more than plus or minus five percent:
- with reference to the Basin Officials Committee;
 - without preparing an amendment to the Basin Plan under Subdivision F of the Water Act;
 - with notice to the Minister, who must then adopt the adjustment and table the adjustment before Parliament as a non-disallowable instrument under section 38 of the *Legislative Instruments Act 2003*.⁴
- 1.7 Adjustments will be determined through savings or offsets found through environmental works and measures projects.⁵ The existing process for selecting and implementing environmental works and measures will not be amended as a result of this proposal. Proposed projects will still be required to undergo stakeholder consultation processes as set out by Basin State water resource planning processes prior to the MDBA's consideration of their inclusion in any SDL adjustment.
- 1.8 In addition, the Basin Ministerial Council has stated that it is their expectation that the SDL adjustment mechanism will operate as follows:
- To ensure stakeholders confidence and facilitate the preparation of water resource plans, Council requests that the SDL adjustment mechanism and associated provisions in the Basin Plan:
- a. simplify the operation of the mechanism such that the SDLs determined by the operation of the mechanism in 2016 are adopted in the Basin Plan at that time, to take effect from 2019;
 - b. allow for the construction and implementation of adjustment measures to be finalised in a specified timeframe and confirm the Commonwealth's responsibility to continue to bridge the gap over this period;
 - c. account for situations where adjustment measures do not proceed as planned;
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4 Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012, pp. 5-9.

5 EM, p. 2.

d. enable state water resource plans to account for the time taken to complete adjustment measures, particularly through the use of 'reasonable excuse' or 'permitted take' provisions or the incorporation of formula based SDLs in state water resource plans; and

e. clarify how any formula-based SDLs in state water resource plans should operate to reflect progress in SDL adjustment initiatives from 2019.⁶

- 1.9 It is also worth noting that the Ministerial Council has agreed that environmental works and measures should include any further modelling of works under the Living Murray Program.⁷
- 1.10 The Committee is satisfied that the processes already in place for community and stakeholder consultation as specified in state water resources plans should adequately address any concerns about adjustments being subject to community consultation.
- 1.11 The Committee is further satisfied that consensus view of the Murray Darling Basin Ministerial Council, as outlined above, outlines the clear intent of the Basin States to ensure that all stakeholders will be involved in any processes they put in place to determine projects to be considered in the proposed SDL adjustment mechanism.

Reason for the proposed amendment

- 1.12 An SDL adjustment mechanism to respond to efficiencies gained in environmental works and measures was recommended by this Committee in its July 2012 report on certain matters relating to the Murray-Darling Basin Plan.⁸
- 1.13 In addition, the Murray-Darling Basin Ministerial Council, representing the Commonwealth and all Basin State governments, recommended that an SDL adjustment mechanism be included in the Basin Plan 'through

6 Notice by Murray-Darling Basin Ministerial Council under Section 43A(7) of the *Water Act 2007*: Views of the Council as a Whole, consensus view, 27 August 2012, p. 3.

7 Notice by Murray-Darling Basin Ministerial Council under Section 43A(7) of the *Water Act 2007*: Views of the Council as a Whole, consensus view, 27 August 2012, p. 3

8 Standing Committee on Regional Australia, *Report on certain matters relating to the Murray-Darling Basin Plan*, July 2012, p. 6.

which environmental works and measures could be counted as reductions against held water'.⁹

Impact of the proposed amendment

- 1.14 The proposed amendment relates solely to parliamentary scrutiny of amendments to SDLs.
- 1.15 Under the Water Act as it currently stands, if the SDL is expressed as a quantity of water in the Basin Plan, to adjust the SDL the MDBA must comply with Subdivision F. Section 47 of this subdivision sets out the consultation process for an amendment to the Basin Plan which includes:
- a public consultation period of at least eight weeks, followed by;
 - a six week consultation with the Murray-Darling Basin Ministerial Council, followed by;
 - an allowance of 12 weeks for the Minister to consider the amendment and table it in Parliament, followed by;
 - Parliament's consideration of the amendment for a period of 20 sitting days as a disallowable instrument.
- 1.16 This means that any amendment to the SDLs could potentially be delayed for over six months.
- 1.17 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.
- 1.18 The Bill gives some extra responsibility to the MDBA, as unanimously recommended by this Committee. Therefore the Committee considers that it will give the MDBA the capacity to appropriately react to proposals in a timely manner and on a valley-by-valley basis.
- 1.19 In addition, as SDL adjustments will be in response to environmental works and measures put forward by Basin States, the Committee is confident that due diligence will be adequately followed and all stakeholders appropriately consulted.
- 1.20 Finally, the MDBA will be limited in any SDL adjustment by a percentage amount of plus or minus five percent and the Parliament must be

9 Murray-Darling Basin Authority, *Communiqué: Murray-Darling Basin Water Ministers meet in Canberra to consider draft Basin Plan*, 29 June 2012.

informed through a non-disallowable instrument. Proposed adjustments of greater than this amount will invoke Subdivision F of the Water Act as outlined above. Therefore, the Committee is confident that these safeguards are appropriate.

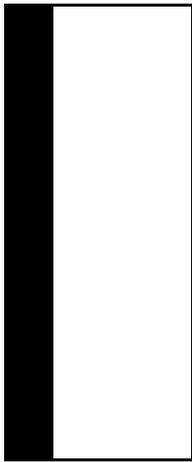
Committee comment

- 1.21 The Committee is confident that the proposed amendment strikes an appropriate balance between allowing the MDBA the capacity to act in a timely manner when making SDL adjustments and continued Parliamentary oversight.
- 1.22 Given that the scope and intent of this bill is limited to governance issues and is in direct response to a House Committee report, the Committee recommends that the Bill be passed.

Recommendation 1

The Committee recommends that the House of Representatives pass the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012.

**Tony Windsor MP
Chair
4 October 2012**



Dissenting report –Michael McCormack MP, Sharman Stone MP, Dan Tehan MP

1. This Bill amends the Water Act 2007 such that a Sustainable Diversion Limit (SDL) can be adjusted, give or take five per cent, without any formal notification to the community or Parliament.
2. This could/would be done by the Murray-Darling Basin Authority under certain provisos:
 1. Reference to the Basin Officials Committee (yet able to override that committee's consideration or recommendations either way);
 2. Without the necessity of amending the Basin Plan as part of the Water Act; and
 3. By notifying the relevant Minister who would then adopt the MDBA's adjustment and table it before Parliament as a non-disallowable instrument.
3. We the undersigned are strongly opposed to the inquiry conclusions of the House of Representatives Standing Committee on Regional Australia following the private meeting held in Parliament House, Canberra, on 4 October, 2012.
4. In particular we are extremely concerned with the cursory attention paid by the inquiry to a request (which was denied) for proper consultation and input from relevant stakeholders in the preparation of the report.

5. The contents, consultation and adjustment processes for the future Murray-Darling Basin Plan are of critical importance for the 3.4 million people living in the basin; for its economic and hence social wellbeing and environmental sustainability.
6. As stated in the report of the first inquiry by this committee into the impact of the Guide to the Murray-Darling Basin Plan (May 2011), the release of the proposed Basin Plan “sent shock waves through regional communities” and “Unfortunately, the way the MDBA went about developing and communicating this document and the scale of the reductions it proposed invoked a high degree of anger and bewilderment in Basin communities” (p. viii)
7. In the second Report made by the House of Representatives Standing Committee on Regional Australia (July 2012), the committee stated that ...
1.9 “... this report recommends a number of areas where the Committee believes that information needs to be provided before the Plan is put before Parliament to give Members, Senators and the community a level of certainty regarding both the planning process and science necessary prior to the Plan’s finalisation.” (p. 2)
8. 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.
9. It is quite inexplicable why this small, inadequate and disembodied element was rushed into Parliament in this way.
10. For example, paragraph 1.16 in the second Committee report of July 2012 stated “The Committee considers that a water recovery strategy is an essential planning tool for all stakeholders and the fact that it has not been developed to date is of serious concern. The Committee considers that it should be released as a matter of priority and well in advance of the introduction of the Plan to the Parliament.” (p. 3)
11. Despite these urgings, nothing further has been put into the public domain prior to the Minister for Sustainability, Environment, Water, Population and Communities tabling the Amendment Bill and on 20 September 2012 rushing the Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment) Bill 2012 into Parliament.

12. The Bill deals with the issue of parliamentary scrutiny of any amendments to SDLs which it states can be adjusted up or down by 5%. These adjustments are to be made by the MDBA, with the Minister merely informed of the decision.
13. Para 1.8 of this report makes it clear that there is still Basin Ministerial Council uncertainty about “(b).the construction and implementation of adjustment measures,” and how to “(c) account for situations where adjustment measures do not proceed as planned ...”.
14. This work should have been completed as part of the overarching MDBA plan and in close consultation with stakeholders. The introduction of this Bill at this time again raises concerns about the competency of the Federal Government in dealing with this issue, the inadequacy of the planning process and consultation and the consequent lack of proper attention to critical detail.
15. We therefore cannot accept the recommendation of this report.
16. The following details our specific concerns:
17. We, the undersigned, as members of the House of Representatives Standing Committee on Regional Australia who participated in the Inquiry into the impact of the Guide to the Murray-Darling Basin Plan (report released May 2011) and subsequent Report on certain matters relating to the proposed Murray-Darling Basin Plan (July 2012), oppose this Water Amendment Bill.
18. We do so on the following grounds:
 1. The Bill states that the MDBA can suggest adjustments to the SDL in a range of plus or minus 5%. At this stage we do not know what the final figure will be. So it is unclear what volume the 5% will relate to? Taking the current size of the environmental water holding, a 5% increase could represent a volume equivalent to all of the water allocated to South Australia.
 2. There has been a lack of effective consultation and transparency throughout this whole process. If it is so important, why was there such haste to have this amendment agreed to and why such a reluctance to even have it considered by the Regional Australia Committee. We the undersigned remain critical that the Bill only received a cursory glance at the single meeting lasting just 27 minutes. As stated no evidence was called, no stakeholders consulted.

3. The Regional Australia Committee Chair maintains the Amendment was in fact one of the four recommendations the committee made in its latest report. In fact recommendation 3 does not make any mention of an adjustment percentage or MDBA involvement. Nor did we recommend that parliamentary scrutiny of an adjustment SDL be denied.
4. It is said that the Bill is needed to implement the adjustment mechanism. Such implication is not, however, correct. The Act contains a mechanism for amendment of the Basin Plan (Subdivision F, sections 45-49). This mechanism requires formal consultation (including with stakeholders) and is subject to the review of the Minister and to the disallowance of Parliament.
5. The adjustment mechanism can, in fact, be implemented under the current Act.
6. The removal of the ability of stakeholders to have input into the adjustable mechanism is totally unacceptable.
7. The Minister's role and parliamentary scrutiny should not be usurped by the MDBA and that is what this Bill allows. It is the role of the Minister to take responsibility for the Basin Plan. Pursuant to the Act as it stands, the Minister can direct the Authority and can choose whether or not to take the Basin Plan to the Parliament. The Bill would remove this capacity and require the Minister to simply notify parliament of a MDBA action.
8. Under the current Act, an amendment to the Basin Plan is subject to the disallowance of Parliament. The Bill would remove this provision in the instance of the adjustment mechanism operation. That is, the elected representatives would not have the capacity to review the critical element of the Basin Plan. We do not agree with this.
9. 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 (also refer Report *Of Drought and Flooding Rains*, 7.12 p. 165).

10. There are no protections in this Bill for an adjustment weakening economic or social outcomes. In section 23A(3)(b) it states clearly that any adjustments must “reflect an environmentally sustainable level of take”. Why doesn’t this Bill provide the same references to protections for economic and social outcomes?
 11. We are concerned that we have no evidence that legal advice has been taken as to whether such economic or social outcomes are already provided for or should be included in the Bill.
 12. The Bill does not clarify whether any extra water for the environment could or should come from irrigation efficiency upgrades and how will the MDBA determine the viability or impacts of irrigation efficiency upgrades when it has never been responsible for assessing these types of projects before?
 13. There is no reference in this Bill to a process of dispute resolution should a State disagree with an adjustment? How will the MDBA manage this?
19. This Regional Australia report also argues that it could take up to 6 months to go through a consultation process of adjusting an SDL. We argue that a signification adjustment that was not time critical could be allowed to take that long, however using the format of a disallowable instrument significantly reduces that time, but still allows proper parliamentary scrutiny.

20. We now strongly urge the appropriate Senate Committee to consult and consider this Bill in order to compensate for its rushed and inadequate treatment by the House of Representatives Standing Committee on Regional Australia.

Mr Michael McCormack MP
Federal Member for Riverina

Dr Sharman Stone MP
Federal Member for Murray

Mr Dan Tehan MP
Federal Member for Wannon

5 October 2012