Chapter 1

Introduction

Conduct of the inquiry

1.1 On 20 September 2012, the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 (the Adjustment Mechanism bill) was introduced to the House of Representatives by the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP.[1]

1.2 On 11 October 2012, the Senate referred the provisions of the Adjustment Mechanism bill to the Environment and Communications Legislation Committee (the committee) for inquiry and report by 19 November 2012. The provisions were referred on the recommendation of the Selection of Bills Committee. Reasons for referral included that:

> The Bill will remove the power of the Minister and Parliament to oversee potentially significant changes to the Murray Darling Basin Plan…
>
> Doubts have been expressed by various States, upstream and downstream, and stakeholder groups of all persuasions (irrigators and environmentalists) about the content of this Bill.[2]

1.3 On 30 October 2012, during the course of the committee's inquiry, the Adjustment Mechanism bill was amended in the House of Representatives.[3] The amendments are discussed in further detail later in this report.

1.4 The Water Amendment (Water for the Environment Special Account) Bill 2012 (the Special Account bill) was introduced to the House of Representatives on 31 October 2012.[4]

1.5 The provisions of the Special Account bill were referred to the committee on 1 November 2012 for inquiry and report by 19 November 2012. The Selection of Bills Committee's reason for referral was that 'this bill commits future Parliaments to appropriate $1.77 billion. This approach deserves scrutiny given its impact on the budget'.[5]

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1 *House of Representatives Hansard*, 20 September 2012, p. 11363.

2 Senate Selection of Bills Committee, Report No. 13 of 2012, Appendices 7 and 8, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=selection_bills_ctte/reports/2012/rep1312.htm (accessed 19 October 2012).

3 *House of Representatives Hansard*, 30 October 2012, pp 96-97.

4 *House of Representatives Hansard*, 31 October 2012, p. 9.

5 Senate Selection of Bills Committee, Report No. 14 of 2012, Appendix 5, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=selection_bills_ctte/reports/2012/rep1412.htm (accessed 7 November 2012).

1.6 Given the close relationship between the two bills, the committee decided to consider these bills together.

1.7 In accordance with usual practice, the committee advertised the inquiries on its website and in *The Australian* newspaper. The committee also wrote to relevant organisations inviting submissions.

1.8 The committee received 20 submissions to its inquiry into the Adjustment Mechanism bill 2012 and 16 submissions to its inquiry into the Special Account bill 2012. These are listed at Appendix 1.

1.9 The committee held public hearings relating to the bills in Adelaide on 8 November 2012 and in Canberra on 12 November 2012 (see Appendix 2).

1.10 The committee would like to thank the organisations who made submissions to the inquiries and the representatives who gave evidence at the public hearings. In particular, the committee notes the short period of time to provide a submission on the Special Account bill and thanks those who made an effort to do so.

Note on references to submissions

1.11 Unless otherwise specified, references to submissions in Chapter 2 of this report are references to submissions to the inquiry into the provisions of the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012. Similarly, references to submissions in Chapter 3 are references to submissions to the inquiry into the provisions of the Water Amendment (Water for the Environment Special Account) Bill 2012.

Background

1.12 The *Water Act 2007* (the Water Act) requires the Murray-Darling Basin Authority (MDBA) to prepare a Murray-Darling Basin Plan (the Basin Plan). Section 22 of the Water Act establishes the mandatory content of the Basin Plan. In particular, the Basin Plan must include a specific limit on the quantity of water that may be taken, on a sustainable basis, from the Basin as a whole, and a limit on the quantities of water that can be taken from the 'water resources, or parts of the water resources, of each catchment area'. These are known as 'sustainable diversion limits' (SDLs).[6]

1.13 Under section 23 of the Water Act, these SDLs must reflect an 'environmentally sustainable level of take'. This is defined in the Water Act to mean the level of water extraction from a water resource which, if exceeded, would compromise the resource's key environmental assets, key ecosystem functions, productive base or key environmental outcomes.[7]

1.14 The MDBA released a *Guide to the Altered Proposed Basin Plan* in October 2010. The first proposed basin plan was released in November 2011, a revised draft was released in May 2012, and the most recent draft plan was provided

6 Item 6 of section 22 of the Water Act.

7 Section 4 of the Water Act.

to the minister in August 2012.[8] In the August 2012 plan, the MDBA estimated that the:

> …long-term average sustainable diversion limit for all surface water SDL resource units to be 10,873 [gigalitres (GL)] per year. This reflects a reduction of 2,750 GL per year from the Authority's estimate of the BDL [baseline diversion limit] for all surface water SDL resource units.[9]

1.15 On 26 October 2012, the Prime Minister announced a government commitment to recover a further 450GL of environmental water, primarily through farm efficiency projects, on top of the 2750GL environmental water recovery in the proposed Basin Plan. This included an announcement to provide $1.77 billion over ten years from 2014 to 'relax key operating constraints and allow an additional 450GL of environmental water to be obtained through projects to ensure there is no social and economic downside for communities'.[10]

1.16 On 1 November 2012, the minister wrote to the MDBA providing suggestions on its proposed Basin Plan.[11] Some of these suggestions as they relate to the bills are discussed in Chapters 2 and 3.

1.17 The minister has stated the Basin Plan is 'on track to be finalised before the end of the year'.[12]

Calls for an adjustment mechanism

1.18 The explanatory memorandum (EM) to the Adjustment Mechanism bill states that an SDL adjustment mechanism 'has been sought by all Basin governments' as well as stakeholders.[13]

1.19 The Murray-Darling Basin Ministerial Council has requested that the MDBA work with Basin States to develop a proposal for a 'SDL Adjustment Mechanism'. The Council noted that:

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8 See further MDBA, *Altered Proposed Basin Plan*, http://www.mdba.gov.au/proposed-basin-plan (accessed 26 October 2012).

9 Section 6.04, *Proposed Basin Plan*, August 2012, http://download.mdba.gov.au/altered-PBP/APBP-Proposed-Basin-Plan-20120806.pdf (accessed 26 October 2012). Note that separate SDLs are set for groundwater resources.

10 Prime Minister and Minister for the Environment, *Returning the Murray-Darling Basin to Health*, media release dated 26 October 2012, http://www.pm.gov.au/press-office/returning-murray-darling-basin-health (accessed 30 October 2012).

11 Department of Sustainability, Environment, Water, Population and Communities, *About the Basin Plan*, http://www.environment.gov.au/water/basin-plan/about.html (accessed 9 November 2012).

12 The Hon. Tony Burke, Minister for Sustainability, Environment, Water, Population and Communities, *Returning the Murray-Darling Basin to Health*, media release dated 26 October 2012, http://www.environment.gov.au/minister/burke/2012/mr20121026.html (accessed 30 October 2012).

13 Explanatory Memorandum, Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 (Adjustment Mechanism bill), p. 3.

> It would be essential that the Adjustment Mechanism operates on a transparent and legally sound basis using the best available science, and a methodology developed in consultation with jurisdictions.[14]

1.20 The House of Representatives Standing Committee on Regional Australia recommended in its July 2012 report on the proposed Murray-Darling Basin Plan that:

> …the Commonwealth Government develop a mechanism to adjust sustainable diversion limits automatically in response to efficiencies gained by environmental works and measures.[15]

1.21 In coming to this conclusion, the House of Representatives Standing Committee observed that relying on the general mechanism for amendments to the Basin Plan in sections 45–48 of the Water Act would mean that 'any amendment to the SDLs could potentially be delayed for over six months'.[16]

Other recent inquiries

1.22 The Murray-Darling Basin Plan has also recently been considered by the Senate Rural and Regional Affairs and Transport References Committee during its inquiry into the management of the Murray-Darling Basin. In its second interim report, that committee did not form a specific view on the Adjustment Mechanism bill due to lack of time. However, the Rural and Regional Affairs and Transport References Committee stated:

> 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.[17]

1.23 The House of Representatives Standing Committee on Regional Australia considered the Adjustment Mechanism bill in October 2012. That committee concluded by recommending that the bill be passed, stating that it was:

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14 *Notice by the Murray-Darling Basin Ministerial Council under section 43A(4) of the Water Act 2007*, 9 July 20012, available at: http://download.mdba.gov.au/revised-BP/AttachmentA_Main.pdf (accessed 22 October 2012).

15 Recommendation 3, House of Representatives Standing Committee on Regional Australia, *Certain matters relating to the proposed Murray-Darling Basin plan*, July 2012, p. 6.

16 House of Representatives Standing Committee on Regional Australia, *Certain matters relating to the proposed Murray-Darling Basin plan*, July 2012, p. 4.

17 Senate Standing Committees on Rural and Regional Affairs and Transport, *Second Interim Report: the Basin Plan*, 3 October 2012, p. 21.

> …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.[18]

1.24 The Special Accounts bill has also been referred to the House of Representatives Standing Committee on Regional Australia for inquiry and report. That committee has called for submissions by 15 November 2012 and will be holding a public hearing on 20 November 2012.

Overview of the bills

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

1.25 The Adjustment Mechanism bill seeks to amend the Water Act to provide a mechanism to adjust the long-term average SDLs under the Basin Plan 'without invoking the formal Basin Plan amendment process'.[19] To achieve this, the bill would insert proposed new sections 23A and 23B into the Water Act to set out the process and conditions for adjustments to the SDL.

Proposed process for adjustments to the SDL

1.26 Proposed subsection 23A(1) would provide that, under the Basin Plan, the MDBA may propose an adjustment to an SDL for the water resources of a 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.[20]

1.27 Proposed section 23B sets out the following process by which SDLs would be adjusted:

- the MDBA must give a notice of the proposed adjustment(s) to the minister, which must include certain information (as set out in subsections 23B(2) and (3));
- at the same, the MDBA must also prepare an amendment to the Basin Plan giving effect to the proposed adjustments (see subsection 23B(5));
- as soon as practicable after receiving the proposed amendment, the minister must consider the amendment and may either:
  - adopt the amendment in writing; or
  - give the MDBA notice that the minister has decided not to adopt the amendment (new subsection 23B(6), as amended).

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18 House of Representatives Standing Committee on Regional Australia, *Advisory Report on the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012*, October 2012, p. 5.

19 Explanatory Memorandum, Adjustment Mechanism bill, p. 2.

20 See also Explanatory Memorandum, Adjustment Mechanism bill, p. 6.

1.28 Once the minister adopted an SDL adjustment amendment, the amendment would be required to be registered on the Federal Register of Legislative Instruments (FRLI) and tabled in both houses of Parliament.[21] Initially, the bill was put forward with a subsection 33(2A) which proposed that the amendment would be a non-disallowable legislative instrument under the *Legislative Instruments Act 2003*. However, this section was amended by the House of Representatives on 30 October 2012 to make the amendment a disallowable instrument.

Proposed conditions on adjustments to the SDL

1.29 The Adjustment Mechanism bill would impose the following conditions on adjustments to the SDL:

- the MDBA must seek and consider advice from the Basin Officials Committee before proposing an adjustment to the SDL;[22]
- the MDBA must invite members of the public to make submissions on the proposed adjustment and provide a reasonable amount of time for those submissions to be made and considered;[23]
- the adjustment to the total basin SDL must be no more than plus or minus 5 per cent;[24]
- the SDL must still reflect an 'environmentally sustainable level of take'[25] for the Basin water resources, or part of those water resources.[26]
- the Basin Plan must include criteria for determining whether the MDBA should propose an adjustment and the amount of adjustment.[27] The EM states that:

  > 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.[28]

1.30 The EM also states that:

> It is expected that the criteria to be included in the Basin Plan will include stakeholder consultation requirements.[29]

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21 Explanatory Memorandum, Adjustment Mechanism bill, p. 8.

22 Paragraph 23A(2)(c), EM, p. 6.

23 Proposed paragraph 23A(2)(d). This paragraph was inserted in amendments in the House of Representatives on 30 October 2012.

24 Proposed subsection 23A(4), EM pp 5-6.

25 As defined in s. 4 of the Water Act.

26 Section 23, EM pp 2 and 6.

27 Proposed paragraphs 23A(2)(a) and (b).

28 Explanatory Memorandum, Adjustment Mechanism bill, p. 2.

29 Explanatory Memorandum, Adjustment Mechanism bill, p. 3.

1.31 As discussed earlier, the Adjustment Mechanism bill proposes to amend the Water Act to provide a mechanism to adjust the long-term average SDLs under the Basin Plan 'without invoking the formal Basin Plan amendment process'.[30] The EM states that an SDL adjustment mechanism 'has been sought by all Basin governments' as well as stakeholders.[31]

1.32 The summary of the Adjustment Mechanism bill above incorporates the amendments in the House of Representatives on 30 October 2012. However, it is worth noting that the Adjustment Mechanism bill was amended in three key ways:

- to require that the public be consulted and their submissions considered before the MDBA proposes an adjustment;
- to provide the relevant minister with a discretion as to whether or not to adopt an amendment proposed by the MDBA; and
- to ensure that an amendment to the Basin Plan to adjust the SDL is a disallowable legislative instrument.[32]

Water Amendment (Water for the Environment Special Account) Bill 2012

1.33 The Special Account bill gives effect to the Prime Minister's announcement of 26 October 2012 to provide $1.77 billion to fund projects to acquire an additional 450GL of water above the 2750GL benchmark in the Basin Plan.[33]

1.34 The Special Account bill would amend the Water Act to establish the Water for the Environment Special Account pursuant to section 21 of the *Financial Management and Accountability Act 1997*. The bill would appropriate $1.775 billion over a 10-year period from the 2014–15 financial year to the special account.[34]

1.35 The bill specifies the nature of amounts that would be credited to the account, the purposes for which amounts would be debited from the account and would require annual performance based reporting on the achievements of the account.[35]

1.36 The Special Account bill is designed to complement the Adjustment Mechanism bill in that it would allow funds to be dedicated to projects and programs to decrease the long-term average SDL. According to the EM, the Special Account bill would 'enable water to be recovered and constraints to be removed without negatively impacting on the wellbeing of communities in the Basin'.

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30 Explanatory Memorandum, Adjustment Mechanism bill, p. 2.

31 Explanatory Memorandum, Adjustment Mechanism bill, p. 3.

32 *House of Representatives Hansard*, 30 October 2012, pp 96-97.

33 Prime Minister and Minister for the Environment, *Returning the Murray-Darling Basin to Health*, media release dated 26 October 2012, http://www.pm.gov.au/press-office/returning-murray-darling-basin-health (accessed 30 October 2012).

34 Explanatory Memorandum, Water Amendment (Water for the Environment Special Account) Bill 2012 (Special Account bill), p. 3.

35 Explanatory Memorandum, Special Account bill, p. 2.

Key provisions

1.37 The Special Account bill would insert a new part 2AA into the Water Act. Proposed subsection 86AA(1) provides that the object of part 2AA would be to enhance the environmental outcomes that can be achieved by the Basin Plan by protecting and restoring the environmental assets of the Murray-Darling Basin and protecting biodiversity dependent on the Basin water resources so as to give effect to relevant international agreements. Proposed subsection 86AA(2) sets out examples of how environmental assets of the Murray-Darling Basin may be protected and restored, and includes:

(a) increasing the flow of water through barrages to the Coorong;

(b) increasing the average depth of water in the Lower Lakes;

(c) reducing the average salinity levels in the Coorong and Lower Lakes;

(d) increasing the average depth of water at the mouth of the River Murray;

(e) flushing salt from the water resources of the Murray-Darling Basin to reduce the average salinity levels of the Basin;

(f) allowing for environmental watering of floodplains of the River Murray System;

(g) providing flows of water over the banks of rivers and streams to improve connections between water-dependent ecosystems in the River Murray System.

1.38 Proposed section 86AD sets out the purposes of the Water for the Environment Special Account. In summary, payments from the special account would be made if the aim was to further the object of part 2AA by:

- improving the water efficiency of the infrastructure that uses Basin water resources for irrigation;
- improving the water efficiency of any other infrastructure that stores, delivers or drains Basin water resources for the primary purpose of providing water for irrigation;
- improving or modifying infrastructure (including bridges and roads) that constrains the delivery of environmental water to the environmental assets of the Murray-Darling Basin in order to ease or remove those constraints;
- increasing the capacity in dams and storages to increase the capacity to deliver environmental water to the environmental assets of the Murray-Darling Basin;
- entering agreements to acquire an interest in land (including easements) to facilitate environmental watering of the environmental assets of the Murray-Darling Basin; and
- improving the rules, policies, practices and procedures in relation to the use and management of the Basin water resources.

1.39 Proposed paragraph 86AD(2)(b) provides that amounts standing to credit of the Account could be debited for the purpose of purchasing water access rights which

relate to Basin water resources for the purpose of furthering the object of the new part 2AA.

1.40 Proposed paragraph 86AD(2)(c) provides that amounts standing to credit of the account could be debited for the purposes of making any other payments in relation to projects whose aim is to further the object of the new part 2AA; or to address any detrimental social or economic impact on the wellbeing of any community in the Murray-Darling Basin that is associated with a project or purchase using funds from the special account.[36]

1.41 Proposed section 86AE makes clear that water access rights acquired by the Commonwealth with amounts debited from the Water for the Environment Special Account would form part of the Commonwealth environmental water holding.[37] The Commonwealth Environmental Water Holder must manage the holdings in accordance with sections 105 and 106 of the Water Act.

1.42 Proposed new section 86AG inserts a table which sets out the amount to be credited to the special account each financial year.

1.43 Proposed section 86AI requires an annual report to be given to the minister each financial year and that the minister must table the annual report in Parliament.

Key issues regarding the bills

1.44 Submitters and witnesses raised a number of key issues regarding the bills, including:

- transparency and consultation, in particular relating to the availability of certain key documents;
- ministerial discretion and parliamentary oversight under the Adjustment Mechanism bill;
- whether and how the object of part 2AA of the Special Account bill might be achieved;
- the purposes for which payments could be made from the Water for the Special Account.

1.45 Some of the key issues regarding the Adjustment Mechanism bill are discussed in greater detail in Chapter 2, while those pertaining to the Special Account bill are discussed in Chapter 3.

36 Explanatory Memorandum, Special Account bill, pp 8-9.

37 As defined by section 108 of the Water Act.