Chapter 2

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

2.1 As mentioned in Chapter 1, submitters and witnesses raised a number of key issues regarding both the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 (the Adjustment Mechanism bill) and the Water Amendment (Water for the Environment Special Account) Bill 2012 (the Special Account bill).

2.2 Key issues relating to the Adjustment Mechanism bill are discussed in the following sections of this chapter. Key issues regarding the Special Account bill are discussed in Chapter 3.

Key issues regarding the bill

2.3 Many submitters were generally supportive of an adjustment mechanism and therefore the intent of the Adjustment Mechanism bill.[1] However, some concerns were raised about certain aspects of the bill, including:

- lack of opportunity for public participation in and consultation on the adjustment mechanism;
- lack of ministerial discretion as to whether to adopt an adjustment amendment to the Basin Plan; and
- whether such an amendment to the Basin Plan is a disallowable instrument.

Transparency and consultation

2.4 The Adjustment Mechanism bill seeks to require in the Basin Plan the inclusion of criteria for determining whether the MDBA should propose an adjustment to the long-term average sustainable diversion limit (SDL) and the amount of any adjustment (see paragraphs 23A(2)(a) and (b)).

2.5 However, several submitters were concerned that the details of the adjustment mechanism—such as these criteria—have not yet been made public.[2] For example, the NSW Irrigators' Council (NSWIC) suggested that it was 'entirely unable to provide opinion on that matter' because the Council had not yet seen the adjustment mechanism.[3] The NSWIC continued, however, that it:

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1 See for example ACF, *Submission 1*; NSW Irrigators' Council, *Submission 3*; Murray Valley Winegrowers', *Submission 10*; and NSW Office of Water, *Submission 15*.

2 See for example NSW Irrigators' Council (NSWIC), *Submission 3*, p. 2; National Irrigators' Council, *Submission 17*, p. 2; Australian Dairy Industry Council Inc. (ADIC), *Submission 8*, pp 1–2; and Victorian Farmers' Federation (VFF), *Submission 14*, p. 4.

3 NSWIC, *Submission 3*, p. 2.

> …reserves its right to support the adjustment mechanism within the Draft Plan when we become privy to it. It may be the case that we support not only that mechanism, but the legislative change to accommodate it.[4]

2.6 The National Irrigators' Council was supportive of an adjustment mechanism but, similar to the NSWIC, was:

> …concerned that Parliament would amend the Water Act to facilitate an SDL Adjustment Mechanism, when the details of the Mechanism, contained in the Basin Plan, have not been made public nor shown to stakeholders. To have confidence in the SDL Adjustment Mechanism we must understand the assumptions built into the mechanism's models, including the "Initial Conditions of Development", that may affect the extent to which works and measures lead to SDL adjustments.
>
> For this reason it is essential that the details of the SDL Adjustment Mechanism be provided to the Parliament, stakeholders and the community before the Water Act is amended.[5]

2.7 The Australian Dairy Industry Council (ADIC) argued:

> It is unacceptable that Parliament should amend the Water Act to facilitate an unknown adjustment mechanism on a "trust us" basis. The Water Minister, Tony Burke, told Parliament in his second reading speech that the amendment introduced transparency to the SDL adjustment mechanism process – this commitment should extend to providing the details of the mechanism itself so that Parliament, stakeholders and the community can make an informed judgement of the Bill's merits.[6]

2.8 Similarly, the Victorian Farmers' Federation (VFF) stated:

> It is imprudent to consent to an amendment of the Act which will enshrine the SDL Adjustment Mechanism without an understanding of what will or will not be considered within any adjustment mechanism framework.[7]

2.9 The Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) informed the committee that '[t]he adjustment mechanism bill is the bill that requires the plan to set out the criteria for those adjustments'.[8]

2.10 The committee also notes that the EM states:

> 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

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4 NSWIC, *Submission 3*, p. 2.

5 National Irrigators' Council, *Submission 17*, p. 2.

6 ADIC, *Submission 8*, pp 1–2.

7 VFF, *Submission 14*, p. 4.

8 Mr Anthony Slatyer, First Assistant Secretary, Water Reform Division, Department of Sustainability, Environment, Water, Population and Communities (SEWPaC), *Proof Committee Hansard*, 12 November 2012, p. 35.

> would then not be able to weaken the social, economic and environmental outcomes inherent in the Basin Plan.[9]

Ministerial discretion

2.11 The Adjustment Mechanism bill as originally drafted would have required the minister to adopt the recommendations of the MDBA with respect to adjusting the long-term average SDL. Various submitters opined that the minister—and not the MDBA—should have ultimate responsibility in this regard: that is, that the minister should have discretion whether or not to accept the MDBA's recommendations.[10]

2.12 Murray Irrigation argued:

> …it is entirely inappropriate that an unelected authority be charged with making changes to legislation, given the Basin Plan is a legislative instrument, which may require significant budget allocations. As it currently stands, the responsible Minister has oversight of the Basin Plan and associated budgetary implications, which is how it must remain.[11]

2.13 The NSW Office of Water shared this view and stated: 'The final responsibility for determining an SDL adjustment should be that of the Commonwealth Minister…not an independent agency'.[12]

2.14 To address the concern about ministerial discretion, the National Irrigators' Council recommended that the bill be amended so that the minister 'may' adopt the MDBA's recommendations on adjusting the SDL, rather than 'must'.[13]

Parliamentary oversight

2.15 Some submitters were concerned that proposed adjustments to the long-term average SDL would not be disallowable legislative instruments thereby circumventing the Parliament's ability to reject these adjustments.[14] As a result, various submitters called for the adjustments to be disallowable instruments. For example, the National Irrigators' Council stated:

> NIC does not support the abrogation of Ministerial and Parliamentary oversight and believe the Bill needs to be amended to ensure that the Murray Darling Basin MDBA does not have the ultimate power to accept or reject the proposed SDL Adjustments. This power must be retained by the

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

10 See for example River Lakes and Coorong Action Group, *Submission 5*, p. 2; ADIC, *Submission 8*, p. 3; Murray Irrigation, *Submission 11*, p.5; NSW Office of Water, *Submission 15*, p. 1; NFF, *Submission 16*, p. 2; and National Irrigators' Council, *Submission 17*, p. 3.

11 Murray Irrigation, *Submission 11*, p. 5.

12 NSW Office of Water, *Submission 15*, p. 1.

13 National Irrigators' Council, *Submission 17*, p. 3.

14 See for example ACF, *Submission 1*, p. 1; NSWIC, *Submission 3*, p. 3; National Irrigators' Council, *Submission 17*, p. 3; and Australian Network of Environmental Defender's Offices Inc. (ANEDO), *Submission 9*, p. 2.

> Parliament. As stated previously, stakeholders have no confidence in the MDBA to make a determination taking into account stakeholder concerns.
>
> NIC is calling for the Parliament to have a determinative role, by allowing for the disallowance of a proposed SDL Adjustment.[15]

2.16 The ACF was also concerned that 'the Bill would prevent effective…Parliamentary oversight of such adjustments…the Parliament would have no power of disallowance'[16] as was the Australian Network of Environmental Defender's Offices (ANEDO):

> The Bill…indicates that adjustment amendments adopted by the Minister will not be subject to disallowance by Parliament. Again, this is inconsistent with [the] Water Act which indicates that the Basin Plan is a legislative instrument that will be tabled before Parliament, and subject to disallowance…The Bill should be amended to provide that proposed adjustment amendments are disallowable legislative instruments.[17]

Committee comment

2.17 As outlined in Chapter 1, the Adjustment Mechanism bill was amended in the House of Representatives on 30 October 2012, after submissions had been received by the committee. In particular, the Adjustment Mechanism bill was amended to:

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

2.18 These amendments address most of the concerns raised during the course of the inquiry regarding the Adjustment Mechanism bill. Indeed, a number of witnesses expressed their support for the amendments.[18] The ACF welcomed 'the amendments passed recently by the House of Representatives'[19] as did Murray Valley Irrigators:

> We continue to support the passage of the bill. We believe the amendments in the lower house have strengthened it in that there is greater oversight and transparency in the system, particularly as it accrues to the minister of water being able to reject an adjustment if he believes that is appropriate, and the

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15 National Irrigators' Council, *Submission 17*, p. 3.

16 ACF, *Submission 1*, p. 1.

17 ANEDO, *Submission 9*, pp 4–5.

18 See Mr Jonathan La Nauze, Healthy Rivers Campaigner, ACF, *Proof Committee Hansard*, 8 November 2012, p. 19; Mr Mark McKenzie, Chief Executive Officer, Murray Valley Irrigators, *Proof Committee Hansard*, 8 November 2012, p. 23; and Ms Stefanie Schulte, Economic Policy Analyst, NSWIC, *Proof Committee Hansard*, 12 November 2012, p. 1.

19 Mr Jonathan La Nauze, Healthy Rivers Campaigner, ACF, *Proof Committee Hansard*, 8 November 2012, p. 19.

> science and the modelling does not support and adjustment to the SDL. We believe that it will go to reducing some of the political friction between parties and lobbies—environmental, irrigator and community.[20]

2.19 On the basis that the amendments to the Adjustment Mechanism bill agreed in the House of Representatives on 30 October resolve the concerns raised during this inquiry regarding transparency and consultation, ministerial discretion and parliamentary oversight, the committee recommends that the bill be passed.

Recommendation 1

2.20 The committee recommends that the Adjustment Mechanism bill as amended in the House of Representatives on 30 October 2012 be passed.

20 Mr Mark McKenzie, Chief Executive Officer, Murray Valley Irrigators, *Proof Committee Hansard*, 8 November 2012, p. 23.