

Chapter 2

Key provisions

2.1 The bill, which contains one schedule of amendments, will insert a new section 49AA into subsection F of Division 1 of Part 2 of the Water Act, and make related amendments to other sections of the Water Act to give effect to the new section.

2.2 If passed, the provisions of the bill will allow the water minister to remake the NBR instrument. The Department of Agriculture and Water Resources (DAWR) noted that the disallowed NBR instrument amended the Basin Plan to implement changes arising from:

- the Northern Basin Review of SDLs;
- three groundwater reviews and a need for other technical groundwater amendments;
- the Australian Government response to the 2014 Water Act review; and
- a need for other technical amendments.¹

Amendment of the Basin Plan

Schedule 1 - new section 49AA

2.3 Item 2 of Schedule 1 of the bill inserts section 49AA in to the Water Act. According to the EM, this new section will 'provide an expedited process to remake a disallowed Basin Plan amendment', known as an 'earlier amendment'. Under this section, the Commonwealth Water Minister (water minister) will have authority to direct the MDBA to prepare an amendment to the Basin Plan, that will be the same in effect as an earlier amendment to the Basin Plan that has been disallowed by either House of the Parliament.²

2.4 Proposed subsection 49AA(1) gives the authority for the water minister to make the direction to the MDBA, with certain limitations. The limitations are that:

- the amendment must be the same in effect as the earlier, disallowed amendment;
- the earlier amendment was prepared in accordance with the detailed consultation requirements under Part 2 of the Water Act;³

1 Department of Agriculture and Water Resources, *Submission 13*, p. 2.

2 Explanatory Memorandum, Water Amendment Bill 2018, p. 5.

3 These requirements were described in Chapter 1.

- the direction to the MDBA is given within a 12 month period, beginning on the day that the earlier amendment was disallowed (or taken to be disallowed); and
- the earlier amendment must not have been one that was previously adopted under section 49AA.⁴

2.5 With regard to the last point, the EM states that if the water minister does not adopt an amendment, the minister could re-direct the MDBA to 'propose a further iteration of the amendment, provided that the direction was given within the same 12 month period'.⁵

2.6 The EM argues that the limitations listed above will:

...operate so that the [MDBA] cannot prepare an amendment that introduces new provisions that will deliver a different outcome to the earlier amendment that has not been subject to the extensive consultation process under the Water Act. There is also a 12 month limitation to ensure the previous consultation on the earlier amendment is relevant and valid.⁶

2.7 In its submission to the inquiry, DAWR reiterated this position, stating that the MDBA may not propose changes to the disallowed instrument that have not previously been subject to the detailed process (including extensive consultation) set out in sections 45 to 48 of the Water Act. This also ensures that the MDBA 'cannot include any new or different amendments, as these would not achieve the same effect as the disallowed amendment'.⁷

2.8 In his second reading speech, Minister Littleproud also made clear that the ministerial direction powers would only apply to disallowed instruments that were prepared under subdivision F of Division 1 of Part 2 of the Water Act. The new power provided by the bill may not necessarily apply if an amendment to adjust SDLs, made under section 23A and 23B of the Water Act, was disallowed.⁸

Other provisions

2.9 Under proposed subsection 49AA(2), the MDBA must comply with a direction made under subsection (1) by the water minister. The MDBA must prepare the amendment and give it to the water minister as soon as practicable.

4 Explanatory Memorandum, Water Amendment Bill 2018, pp. 5-6.

5 Explanatory Memorandum, Water Amendment Bill 2018, p. 6.

6 Explanatory Memorandum, Water Amendment Bill 2018, p. 6.

7 Department of Agriculture and Water Resources, *Submission 13*, pp. 1-2.

8 The Hon David Littleproud MP, Minister for Agriculture and Water Resources, *House of Representatives Proof Hansard*, 10 May 2018, p. 7.

2.10 Once the amendment is received by the water minister, subsection 49AA(3) provides that the minister must either adopt the amendment, in writing, or give notice to the MDBA of a decision not to adopt the amendment.

2.11 Subsection 49AA(4) is a clarifying provision, stating that sections 46 to 48 of the Water Act do not apply to a Basin Plan amendment that has been prepared, or prepared and adopted, under new section 49AA. These sections of the Water Act relate to consultations by the MDBA in preparing a Basin Plan amendment, the MDBA seeking submissions and comments on the proposed amendment, and ministerial adoption of the proposed Basin Plan amendment.

2.12 Subsection 49AA(6) also acts as a clarifying provision. This subsection provides that 'certain types of changes in an amendment will not be prevented from being taken to be the same in effect as a disallowed amendment'. The EM goes on to state that:

The clarification provided in subsection 49AA(6) is not intended to limit the kinds of amendments that will be the same in effect. Rather, this clarification is provided to remove any doubt about whether these kinds of amendments would be the same in effect.⁹

2.13 Subsection 49AA(6) details the changes that would not prevent an amendment being taken to be the same in effect as a disallowed amendment, including:

- a change that is required because another amendment to the Basin Plan has commenced after the commencement of the earlier amendment (for example, the Basin Plan Amendment (SDL Adjustments) Instrument 2017 which commenced in law after the commencement of the earlier amendment);
- a change that is required because a requirement under the Basin Plan has already occurred, or been met, after the commencement of the earlier amendment (for example, the 2017 SDL adjustment determination occurring in December 2017 after the commencement of the earlier amendment); and
- a change that causes the amendment to commence later than the earlier amendment (a change in commencement dates).¹⁰

2.14 Minor or non-substantive amendments would also not prevent the amendment from being the same in effect as the earlier disallowed amendment.¹¹

2.15 The bill also ensures that the water minister cannot delegate the functions of section 49AA to anyone else, and therefore the new directions power can only ever be exercised by the water minister (items 4 and 5 of the bill).¹²

9 Explanatory Memorandum, Water Amendment Bill 2018, p. 6.

10 Water Amendment Bill 2018, Item 2, subsection 49AA(6); Explanatory Memorandum, Water Amendment Bill 2018, pp. 6-7.

11 Explanatory Memorandum, Water Amendment Bill 2018, p. 6.

Transitional provisions – new Schedule 10

2.16 Item 7 of the bill inserts a new Schedule 10 into the Water Act, for transitional provisions relating to amendments made by Schedule 1 of the bill.

2.17 The transitional provisions state that any amendments made by Schedule 1 of the bill 'apply whether the earlier amendment of the Basin Plan was disallowed (or taken to have been disallowed)' under the relevant sections of the Legislation Act, before, at or after the commencement of that schedule.¹³ As noted by the EM, this means that any amendments made by Schedule 1 – being new section 49AA – 'apply regardless of when a previous amendment has been disallowed before [Schedule 10] has commenced in law'.¹⁴

2.18 Item 7 of the bill relates directly to the instrument disallowed on 14 February 2018 by the Senate, the NBR instrument (Basin Plan Amendment Instrument 2017 (No. 1)). The transitional provisions are to apply if the water minister gives a direction to the MDBA to prepare an amendment of the Basin Plan that is the same in effect as the NBR instrument.

2.19 The new subsection 2(2) of Part 1 of Schedule 10 sets out transitional provisions relating to the preparation of an amendment of the Basin Plan that is the same in effect as the disallowed NBR instrument. As detailed by the EM, subsection 2(2) states that one or more of the following changes does not prevent the amendment from being the same in effect as the disallowed amendment:

- a change to the definition of *re-allocation adjustment request* to enable a request to be made in anticipation of this provision being amended in the Basin Plan;
- a change in subsection 6.05(13) of the Basin Plan to provide that the MDBA must publish variations to the SDL resource unit shared reduction amounts on its website, even when there has not been an initial re-allocation adjustment requirement; and
- a change to section 7.14A of the Basin Plan that will reflect that the 2017 SDL adjustments have already occurred.¹⁵

Disallowance and sunseting

2.20 New subsection 49AA(5) proposed by the bill states that a direction made under subsection 49AA(1) is a legislative instrument. However, it is not subject to

12 Explanatory Memorandum, Water Amendment Bill 2018, p. 7.

13 Water Amendment Bill 2018, Item 7 – Schedule 10, Part 1, subsection 1.

14 Explanatory Memorandum, Water Amendment Bill 2018, p. 7.

15 Water Amendment Bill 2018, Item 7 – Schedule 10, Part 1, subsection 2; Explanatory Memorandum, Water Amendment Bill 2018, pp. 7-8.

section 42 of the *Legislation Act 2003* (Legislation Act), relating to disallowance, nor is it subject to the sunset provisions of the Legislation Act. The EM notes that:

Subsection 49AA(5) provides that a direction made under subsection 49AA(1) is a legislative instrument. However this direction is not a disallowable legislative instrument required under the *Legislation Act 2003* to be tabled in Parliament. The direction is also not subject to the sunset provisions for legislative instruments detailed in Part 4 of Chapter 3 of the *Legislation Act 2003*.¹⁶

