

Chapter 3

Issues

3.1 As detailed in this chapter, there was a mixed response to the bill, with some submitters strongly supporting the passage of the bill¹ and others expressing strong opposition to it.²

3.2 The committee notes that a number of submitters to this inquiry raised broader concerns with the management of the Basin, implementation of the Basin Plan, and the findings of the Northern Basin Review. In particular, submitters raised a number of concerns with the content of the disallowed NBR instrument, and with a later instrument concerning SDL adjustments in the Basin Plan, passed by the Senate on 9 May 2018.³

3.3 The committee appreciates that there are many perspectives on the management of the Basin and the implementation of both the Water Act and the Basin Plan, and that the bill before the committee interacts with other legislative mechanisms currently in place to manage the resources of the Basin. The committee is also alive to the fact that the management of the Murray-Darling Basin is currently a matter of robust public debate.

3.4 However, the committee has been tasked in this instance with inquiring only into the provisions of the bill. The committee therefore has not engaged with the broader concerns around management of the Basin, with the findings of the Northern Basin Review, or with the implementation of the review's recommendations, beyond where necessary to consider the provisions of the bill.

General comments

3.5 A number of submitters did not support the intent of the bill and suggested that the bill should not be passed.

3.6 The Inland Rivers Network (IRN) objected to the bill and saw it as an erosion of the intent of the Water Act. The IRN further contended that the bill would compromise both the independence of the MDBA, and the purpose of the Water Act

1 NSW Department of Industry, *Submission 3*; National Irrigators' Council, *Submission 7*; Cotton Australia, *Submission 8*; National Farmers' Federation, *Submission 11*;

2 Mr Bob Newman, *Submission 1*; Ms Melissa Gray, *Submission 2*; Mr Robert and Ms Katharine McBride, *Submission 5*; Inland Rivers Network, *Submission 6*; National Parks Association of NSW, *Submission 9*; EDOs of Australia, *Submission 10*; River Lakes and Coorong Action Group, *Submission 12*; The Australia Institute, *Submission 14*.

3 *Journals of the Senate*, No. 96, 9 May 2018, p. 3081.

'to achieve an Environmentally Sustainable Level of Take (ESLT) through the Basin Plan'.⁴

3.7 The River Lakes and Coorong Action Group (RLCAG) expressed its general concern with the bill, arguing that it represented an 'apparent shift in the implementation of the Basin Plan away from a focus on environmental outcomes'. RLCAG argued for the implementation of the Basin Plan in full, prior to making any adjustments to that Plan, and saw the 70GL reduction of the recovery target in the northern Basin as undermining the integrity of the Basin Plan.⁵

3.8 The Australia Institute (AI) did not support the bill, arguing that there had been no public consultation on fundamental changes to the Basin Plan. It suggested that future changes to the SDLs could be inconsistent with the Water Act and could be enacted outside of the parliamentary oversight process. AI further argued that the 'actual wording of the amendment to the Basin Plan' was either ambiguous or not provided.⁶

3.9 EDOs of Australia (EDOAs) were of the view that the bill 'appears to facilitate a series of legal exceptions, including in relation to the recently disallowed' NBR instrument.⁷

3.10 The National Parks Association of NSW (NPANSW) expressed its dismay over changes to water management legislation, which it felt had undermined the original intention of the Water Act. The NPANSW contended that the bill 'further diminishes the potential to restore the health of the rivers and wetlands'. It called for the bill to be rejected due to its 'seriously adverse implications'.⁸

3.11 However, those submitters who supported the bill encouraged its swift enactment, to allow the tabling of the new instrument and therefore the implementation of the findings of the Northern Basin Review as soon as possible.

3.12 The NSW Department of Industry (NSWDI) considered the amendments to be 'critical...for the timely and realistic delivery of the Basin Plan objectives'. NSWDI went on to argue that:

There is a level of urgency for the Federal Parliament to pass this Bill to allow the Northern Basin Review amendments to be promptly restored. This will provide certainty to Basin states and communities as they prepare

4 Inland Rivers Network, *Submission 6*, p. 1.

5 River Lakes and Coorong Action Group, *Submission 12*, pp. 2-3.

6 The Australia Institute, *Submission 14*, p. 5.

7 EDOs of Australia, *Submission 10*, p. 3.

8 National Parks Association of NSW, *Submission 9*.

SDL compliant water resource plans – a key commitment under the Basin Plan and statutory instrument under the *Water Act 2007*.⁹

3.13 NSWDI went on to argue that:

The bill ensures that critical planning and management decisions informing future amendments to the Basin Plan can continue to be informed by science and data, and that the integrity of the public consultation process is maintained to best balance environmental, economic and social objectives.¹⁰

3.14 The National Irrigators' Council (NIC) supported the bill, stating that the 'outcome of the Northern Basin Review should be able to be reintroduced without being subjected to a further period of review and consultation'. The NIC expressed to the committee its concerns over the disallowance of the earlier amendment:

The disallowance caused considerable dismay to irrigation communities in the Northern Basin. Many felt that they had been let down by the Parliament, having spent many years engaged in a demanding process. Given the extensive process and the constructive engagement of communities, it would not be fair (or a reasonable use of resources) to expect the communities to be subjected to the full process again.¹¹

3.15 Cotton Australia (CA) was also in support of the bill, and viewed the tabling of the bill in parliament as an 'extremely encouraging sign' that the Basin Plan would be implemented in full. CA argued that the bill provided certainty to communities that the Basin Plan could be implemented in a 'measured manner', consistent with the intent of the Water Act.¹²

3.16 In its submission, DAWR confirmed to the committee that the new directions power of the water minister, as provided by the bill, will allow for the outcomes of a new instrument to be given effect in a 'prompt manner', as opposed to the approximately eight month timeframe required by the provisions of the Water Act. The expedited process provided by the bill:

would enable a new amendment to be prepared by the Authority and adopted by the Minister by mid-2018. Preparing a new amendment under the proposed new directions power will provide certainty to Basin States and communities, as they prepare Basin Plan compliant water resource plans by 30 June 2019.¹³

9 NSW Department of Industry, *Submission 3*, pp.3-4.

10 NSW Department of Industry, *Submission 3*, p. 5.

11 National Irrigators' Council, *Submission 7*, pp. 1-2.

12 Cotton Australia, *Submission 8*, pp. 1-2.

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

Implementation of northern Basin amendments

3.17 As was made clear in Minister Littleproud's second reading speech, the bill will allow the amendments proposed by the disallowed NBR instrument to be reintroduced to parliament, and thus – pending passage through the parliament – reduce the northern Basin recovery target from 390GL to 320GL.

3.18 The National Farmers' Federation (NFF) argued that the 70GL reduction provision was a 'key part of the Plan and should thus be implemented'. The NFF stated that:

the development of the 70 GL reduction was done through an independent consultative process and recommended to the government by the independent Murray Darling Basin Authority acting within the parameters of the Act and Plan legislation.¹⁴

3.19 CA stated that the Northern Basin Review provided for the better targeting of water acquisitions to achieve greater environmental outcomes. In light of this view, CA argued that it had:

been vocal that the amendment which was removed needed to be re-introduced into parliament for the Plan to be successfully implemented and achieve enhanced environmental outcomes while balancing the social and economic objectives. This Bill does that.¹⁵

Public consultation

3.20 It was the view of a number of submitters that the bill would remove the need for amendments to the Basin Plan to be subject to community consultation, as required by the Water Act.

3.21 Mr Bob Newman argued that the bill appeared to be 'specifically aimed at circumventing the community consultation requirements that were a key element of the Murray-Darling Basin Plan when it was initiated'. Further, Mr Newman was of the view that the bill was both unnecessary in light of existing legal processes, and 'deliberately designed to subjugate the consultation process associated with good water resource management'.¹⁶

3.22 The Ryde Hunters Hill Flora and Fauna Preservation Society suggested that the bill appeared to compromise transparent due process, and questioned whether the new instrument would be subject to another round of consultation.¹⁷

14 National Farmers' Federation, *Submission 11*.

15 Cotton Australia, *Submission 8*, p. 1.

16 Mr Bob Newman, *Submission 1*.

17 Ryde Hunters Hill Flora and Fauna Preservation Society, *Submission 4*.

3.23 Ms Melissa Gray also suggested that the bill was being used as a way to evade the community consultation requirements of the Water Act, by removing the need for the minimum one month of community consultation on an amendment instrument.¹⁸

3.24 That view was supported by the IRN, who argued that the current version of the NBR instrument (which was before parliament in 2017) had not been placed on public exhibition for a month, as required.¹⁹

3.25 AI argued that the bill would apply to any amendment, and was not restricted to addressing the disallowed NBR instrument. Therefore, AI contended that:

Any future amendment, from any future government, could be treated the same way with reduced transparency and public participation.²⁰

Consultation on disallowed instrument

3.26 It was put to the committee that the disallowed NBR instrument, as presented to the parliament in late 2017, was substantially different to the version that was subject to public consultation in 2016. This made some submitters particularly concerned about a potential lack of public consultation on forthcoming amendments, resulting from the passage of the bill.

3.27 Mr Robert and Ms Katharine McBride argued that the lack of further consultation on a new instrument was a 'direct contradiction' to government commitments to increased transparency regarding management of the Basin. The McBrides went on to state that:

The lack of further community consultation is of significant concern, given that the Instrument to be tabled varies from the consultation document release for public consultation in 2016. These changes are significant, in particular the provision for water recovered in one valley to count toward recovery requirements in another valley.²¹

3.28 It was the view of EDOA that the bill was tabled to circumvent the community consultation provisions provided for in the Water Act. The EDOA also raised concerns over the 2016 consultation on the earlier amendment instrument. The EDOA argued that the bill would:

overcome the need to place the [NBR instrument] on public exhibition for a minimum of eight weeks and for the MDBA to review and consider all submissions responding to that Instrument. This is particularly problematic

18 Ms Melissa Gray, *Submission 2*, p. 1.

19 Inland Rivers Network, *Submission 6*, p. 1.

20 The Australia Institute, *Submission 14*, p. 5.

21 Mr Robert and Ms Katharine McBride, *Submission 5*, p. 2.

as the version of the [NBR instrument] that was placed on public exhibition in late 2016 is different to the current version.²²

3.29 AI appreciated that the intent of the bill was to avoid 'repeating a consultation and submission process on an amendment that is substantially the same and has already been consulted on', and agreed that this approach was reasonable. However, AI contended that the disallowed NBR instrument contained changes that were 'never subject to a public consultation and submission process', with the changes included 'several months' after public consultation on the instrument had concluded.²³

Consultation on new instrument

3.30 While acknowledging the concerns detailed above, the committee notes that as any new amendment instrument must be the same in substance as the earlier (disallowed) amendment, the content of the new instrument should have already been subject to the required consultation process.

3.31 This view was confirmed by the EM, the water minister and by the submission of DAWR to the inquiry. In his second reading speech, Minister Littleproud stated that:

The Murray-Darling Basin Authority may not propose amendments to the previously disallowed instrument if they have not gone through the extensive consultation process under the Water Act.

...that power [to prepare a new instrument] is only available if the disallowed instrument has been through consultation requirements set out in the Water Act.

...These limitations will ensure that the integrity of the public consultation process is maintained to best balance environmental, economic and social objectives.²⁴

3.32 DAWR submitted to the committee that the bill contained safeguards to ensure that the ministerial power to direct the MDBA was not used inappropriately. DAWR argued that these limitations were:

paramount to ensure that the integrity of the consultation process conducted for the disallowed amendment is retained and that the Authority does not propose any amendments to the Basin Plan that have not been subject to the consultation already undertaken for the disallowed amendment.²⁵

22 EDOs of Australia, *Submission 10*, p. 2. The EDOs of Australia submission argues that clause 7.14A of the NBR instrument was not included in the version of the instrument placed on public exhibition as part of consultation; see p. 3.

23 The Australia Institute, *Submission 14*, pp. 6, 8.

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

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

3.33 The submission of NSWDI noted that the water minister's powers under the bill would be restricted to disallowed instruments that have been through the consultation requirements of the Water Act. NSWDI argued that this would provide 'transparency and accountability', while fostering 'community confidence that their views will be brought into the decision-making process for the planning and delivery of the Basin Plan'.²⁶

Transitional provisions and retrospectivity

3.34 Amendments to section 6.05 of the Basin Plan were proposed by the NBR instrument, which would 'change the SDLs based on where water is recovered, after any amendments to the SDLs were considered by parliament'.²⁷

3.35 The transitional provision at Schedule 10, Part 1, section 2(a) of the bill provides for a change to the definition of a 're-allocation adjustment request' (in section 6.05 of the Basin Plan) to enable a request to be made in anticipation of this provision being amended in the Basin Plan.²⁸

3.36 The EDOA raised concerns over this provision of the bill, noting that the *Legislative Instruments Act 2003* (now the *Legislation Act*²⁹), at section 12, provides that an instrument cannot apply retrospectively if it would adversely affect rights or impose liabilities. The EDOA noted that this can be overcome 'if an enabling statute (such as the Water Act) expressly authorises the inclusion of such clauses in the subordinate instrument'. The EDOA argued that the bill:

includes transitional provisions that state that a request that has already been made by a Basin State under cl. 6.05 to reallocate water recovery from one valley to another is to be expressed as having been made in 'anticipation' of this new clause. In other words, a request that has already been made – despite the fact that the [NBR instrument] was disallowed and therefore could not have authorised such a request – will be retrospectively validated.

...Assuming the Bill is being table to overcome s. 12(2) of the *Legislative Instruments Act 2003* [sic], it is possible to conclude that this is being done despite the fact that it deviates significantly from legislative norms.³⁰

3.37 AI also raised concerns with the transitional provisions, arguing that the amendments:

26 NSW Department of Industry, *Submission 3*, p. 5.

27 The Australia Institute, *Submission 14*, p. 7.

28 Explanatory Memorandum, Water Amendment Bill 2018, p. 8.

29 The *Legislative Instruments Act 2003* became incorporated into the *Legislation Act 2003* on 5 March 2016. See Australian Government Office of Parliamentary Counsel, *Instruments Handbook*, version 3.2, March 2018, pp. ii, 2.

30 EDOs of Australia, *Submission 10*, pp. 2-3.

allow for changes to SDLs based on the location of water recovery and not based on any regard to ecologically sustainable development or any science.

...[the provision] enables water recovered before the amendment is made to retrospectively count towards the SDL.³¹

3.38 The IRN was likewise concerned that the bill would give retrospective validation to 'the reallocation of water recovery from one valley to another', and that the 'provision for water recovered or 'saved' in one valley to count toward recovery requirements in another valley has no scientific basis'. The IRN was also of the view that retrospectivity was not normal legislative practice.³²

3.39 With regard to the transitional provisions more broadly, AI submitted that it was unclear whether the wording of Schedule 10, Part 1, section 2 of the bill was intended to be the 'actual wording of the new amendment or a description of the changes in the new amendment'. AI put it to the committee that:

If Schedule 10, Part 1, Division 2 (2) (a), (b) and (c) are the actual wording of the new amendment, they are ambiguous and in particular, the changes to s7.14A are very unclear.

If Schedule 10, Part 1, Division 2 (2) (a), (b) and (c) are a description of the changes, then parliament is being asked to take on faith that the new amendment is the 'same in effect' as the original amendment, without seeing the actual wording.

s6.05 and 7.14A relate to changes to the SDLs, which are fundamental to the Basin Plan. It is therefore important that the wording of the amendment changes should be unambiguous and described fully.³³

Power of the minister and independence of the MDBA

3.40 Concerns were raised in evidence over the provisions of the bill which provide the water minister with the authority to direct the MDBA to prepare an amendment to the Basin Plan.

3.41 Submitters were particularly concerned that the use of such powers had the potential to compromise the independence of the MDBA. This position was taken by the IRN, who viewed the ministerial direction powers as 'interfering with the process of preparing amendments to the Basin Plan'.³⁴

3.42 The EDOA suggested that the ministerial direction powers of the bill differ 'considerably' from the existing provisions in the Water Act that apply to Basin Plan amendment proposals. The EDOA argued that:

31 The Australia Institute, *Submission 14*, p. 7.

32 Inland Rivers Network, *Submission 6*, pp. 1-2.

33 The Australia Institute, *Submission 14*, p. 9.

34 Inland Rivers Network, *Submission 6*, p. 2.

Specifically, under the relevant provisions of the Basin Plan, it is the MDBA – not the Minister – that decides that it will prepare an amendment to the Plan. This is in keeping with its status as an independent statutory authority.³⁵

3.43 Mr and Ms McBride were in agreement with this position. They suggested that the ministerial direction powers significantly compromised the MDBA and were in direct opposition to the provisions of the Water Act which establish the independence of the MDBA.³⁶

3.44 However, some submitters thought that the bill contained suitable limitations on the water minister's powers, and allowed the minister to act appropriately in the circumstances. For example, the NFF argued that:

The Bill provides a significant failsafe to ensure there are limits to the scope where a Minister can act unilaterally to direct the Authority to prepare an amendment under the plan. The Bill provides appropriate limitations on and in what circumstances the Minister can act and appropriate time limits on how quickly the Minister needs to act, specifically only in the case of a disallowed or deemed disallowed motion. NFF regards this as appropriate, consistent with the intent of the Act, consistent with the implementation of the Plan and necessary to assure particularly northern basin communities of certainty from a measured approach to environmental and consumptive water allocations.³⁷

3.45 The EM notes that the Water Act already contains ministerial direction powers, and this new power is an extension of the existing power held by the minister to give a direction.³⁸

3.46 In its submission, DAWR highlighted other areas of the Water Act that give the water minister the authority to direct the MDBA. DAWR gave the example of section 175 of the Water Act, which allows the minister to give a direction about the performance of the Authority's functions.³⁹

Disallowance provisions

3.47 Some submitters expressed concerns to the committee about the overall need for the bill, given the existing provisions of the Legislation Act in relation to disallowable instruments. It was put to the committee that the current provisions in the

35 EDOs of Australia, *Submission 10*, p. 3.

36 Mr Robert and Ms Katharine McBride, *Submission 5*, p. 3.

37 National Farmers' Federation, *Submission 11*.

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

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

Legislation Act already allow a disallowed instrument to be reintroduced to parliament, in certain circumstances.⁴⁰

3.48 The EDOA drew attention to the provisions of the Legislation Act which already allow a legislative instrument that has been disallowed to be re-tabled in parliament. For this reason, it questioned why the bill was being used to facilitate reconsideration of the NBR instrument.⁴¹

Disallowance of new amendment instrument

3.49 The bill provides that while a new amendment to the Basin Plan made under section 49AA will be a legislative instrument, it will not be subject to disallowance.⁴²

3.50 The EDOA observed that an instrument resulting from a direction of the water minister, under the new provisions introduced by the bill, would be a non-disallowable instrument. The EDOA put it to the committee that:

By authorising the Minister to direct the MDBA by way of a non-disallowable instrument (i.e., no Parliamentary oversight) to prepare an amendment to the Basin Plan, the independence of the MDBA is significantly compromised.⁴³

3.51 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has long held the view that whenever Parliament delegates power to legislate, appropriate oversight of that power should be exercised. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which enable a minister to issue legislative instruments, with no obligation that the instrument be tabled in Parliament or subject to disallowance.⁴⁴

3.52 The EM to the bill does not offer an explanation as to why a new amendment would not be subject to disallowance or to sunseting, as expected by the Scrutiny of

40 Section 48 of the *Legislation Act 2003* provides that a legislative instrument that has been disallowed cannot be remade within six months after the day of disallowance. A legislative instrument that is the same in substance to the disallowed instrument can be introduced within that six month period, if the relevant House of Parliament approves, by resolution, the making of an instrument or provision the same in substance as the disallowed instrument.

41 EDOs of Australia, *Submission 10*, p. 2. The same view was put forward by Ms Melissa Gray, *Submission 2*, p. 1.

42 There appeared to an understanding from some submitters that the new amendment instrument would be a disallowable instrument. See, for example: National Irrigators Council, *Submission 7*; Department of Agriculture and Water Resources, *Submission 13*.

43 EDOs of Australia, *Submission 10*, p. 3.

44 Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2017*, Appendix 1, p. 45.

Bills committee.⁴⁵ The committee draws this to the attention of senators and leaves it to the Senate as a whole to consider the appropriateness of the provision.

Committee view

3.53 Concerns were raised in evidence about the consultation process for proposed amendments to the Basin Plan, via both the disallowed NBR instrument and the new amendment. The committee notes the advice provided by Minister Littleproud and by DAWR confirming that the new amendment instrument must be the same in substance as the disallowed amendment.

3.54 Therefore, any amendments proposed by the new amendment will have already been subject to the consultation requirements of the Water Act. The committee further acknowledges that this approach allows the parliament to expediently progress passage of the new amendment, which will be the same in substance as the previous instrument put before it. Where necessary, the parliament can consider the outcomes of the required consultation which occurred on the disallowed instrument.

3.55 The committee views the ministerial direction powers provided by the bill, allowing the minister to direct the MDBA to prepare an amendment, as appropriate. Not only does the Water Act already contain ministerial powers of direction, but the water minister will be directing the MDBA to prepare an amendment which will be the same in substance to the earlier disallowed instrument, and prepared under the relevant legislation. The 12-month time limit and the other restrictions placed on the ministerial direction will ensure the power is limited in scope and not open to misuse.

3.56 Overall, the bill will enact provisions in the Water Act that will only be used in limited and unique circumstances – that is, following the disallowance of a Basin Plan amendment instrument. The committee believes that this bill presents a reasonable way to progress with amendments to the Basin Plan in a timely manner and with appropriate limits on ministerial direction powers.

3.57 The committee commends the bill to the Senate.

Recommendation 1

3.58 The committee recommends that the Senate pass the Water Amendment Bill 2018.

45 Explanatory Memorandum, Water Amendment Bill 2018, p. 6; Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2017*, Appendix 1, p. 45.

Senator Barry O'Sullivan
Chair