

Inquiry into Water Amendment Bill 2018 Submission

Proposed changes to the Water Act reduce accountability, parliamentary oversight and facilitate changes to the Murray Darling Basin Plan that are based on political convenience rather than science. The bill should not be passed.

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Summary

The Rural and Regional Affairs and Transport Legislation Committee is running an inquiry into the *Water Amendment Bill 2018*. The Bill should not be passed as:

- there has been no public consultation on fundamental changes to the Basin Plan;
- future changes to the Sustainable Diversion Limits (SDLs) can be inconsistent with the Water Act;
- future changes to the SDLs can be made outside the parliamentary process; and
- the actual wording of the Amendment to the Basin Plan are ambiguous or not provided.

The Bill has two aims:

- to make changes to the Water Act to allow any amendment to the Basin Plan that has been previously disallowed, to be re-tabled without requiring the consultation provisions under the Water Act; and
- to ensure that changes to a new amendment are the 'same in effect' as the previously disallowed Northern Basin amendment.

The Northern Basin amendment included fundamental changes to the way that SDLs are set. These changes were not available for public consultation or submission. If passed, this Bill will allow those changes to be made without any public or parliamentary scrutiny.

We believe that the s6.05 provisions in the Basin Plan that allow the SDL's to change to reflect water recovered are in contradiction to the Water Act because the changes may be based on the location of willing sellers, rather than the legislated principles of ecologically sustainable development or scientific knowledge.

An example of this is the 2017 purchase of water in the Warrego Valley, which under the Northern Basin Review amendment would reduce water recovery obligations in the Condamine Balonne or the Queensland Border Rivers. This purchase has since been referred to the Australian National Audit Office.

The Authority and States have just finalised changes to 'cap factors', which will change the book value of the Commonwealth's water licences. The proposed changes to s6.05 and s7.14A will allow governments to swap SDLs between valleys based on the new cap factors.

We are also concerned about any changes to SDLs that can be made outside the parliamentary process. Our report *It's not the science, it's how you use it....* explains this and the cap factors in more detail.¹

The Bill describes changes to the Northern Basin amendment that are the 'same in effect' as that amendment. However, the wording is unclear and the parliamentarians cannot see the exact amendment wording to determine whether the changes are in fact, the 'same in effect'.

¹ Slattery and Campbell, (2018), *It's not the science, it's how you use it...*,
<http://www.tai.org.au/content/its-not-science-its-how-you-use-it>

Introduction

The Australia Institute welcomes the opportunity to make a submission to the Rural and Regional Affairs and Transport Legislation Committee's inquiry into the *Water Amendment Bill 2018*. The Bill should not be passed as:

- there has been no public consultation on fundamental changes to the Basin Plan
- future changes to the Sustainable Diversion Limits (SDLs) can be inconsistent with the Water Act
- future changes to the SDLs can be made outside the parliamentary process; and
- the actual wording of the Amendment to the Basin Plan are ambiguous or not provided.

The *Basin Plan Amendment Instrument 2017 (No. 1)*, better known as the Northern Basin amendment, was tabled in parliament in November 2017. If successful, that would have increased the sustainable diversion limits (SDLs) and decreased the water recovered for the environment by 70 GL in the Northern Basin. That amendment was disallowed by the Senate in February 2018.

A second amendment, the *Basin Plan Amendment (SDL Adjustments) Instrument 2017*, was tabled in parliament in December 2017, to increase the SDLs and reduce environmental water by 605 GL in the Southern Basin. A disallowance motion in the Senate failed in May 2018, when federal Labor voted with the government to not support the disallowance.

The Bill provides for the Minister to direct the Authority to prepare an amendment of the Basin Plan, if an earlier amendment had been disallowed under s42(1) or (2) of the *Legislation Act 2003*. The new amendment must be the "same in effect" as the disallowed amendment. This Bill does not require the Authority to comply with the Water Act's consultation requirements on the new amendment.²

This Bill applies to any amendment and is not restricted to *Basin Plan Amendment Instrument 2017 (No. 1)*. Any future amendment, from any future government, could be treated the same way with reduced transparency and public participation.

² Ss46 – 48, Water Act (2007); S42, Legislation Act (2003)

The Bill also describes three changes to the Northern Basin amendment that will be the ‘same in effect’ as that amendment.

NO CONSULTATION ON FUNDAMENTAL BASIN PLAN CHANGES

The Bill provides for the Minister to direct the Authority to prepare an amendment of the Basin Plan, if an earlier amendment had been disallowed under s42(1) or (2) of the *Legislation Act 2003*. The new amendment must be the “same in effect” as the disallowed amendment. This Bill does not require the Authority to comply with the Water Act’s consultation requirements on the new amendment.

We appreciate the intent of this Bill to avoid repeating a consultation and submission process on an amendment that is substantially the same and has already been consulted on. We agree that this is reasonable, if the consultation process on the original amendment was genuine and transparent.

However, the Northern Basin amendment included important changes that were never subject to a public consultation and submission process. They were added to the amendment after the public consultation and submission process was finalised. The Northern Basin amendment included changes that allow the States and the Authority to change the SDLs for a valley based on the location of water recovery (s6.05 and s7.14A). This is a fundamental change to the way that SDLs are set. The public should have had the opportunity to be consulted on these changes.

We have serious concerns about these changes, which we explain in this paper.

FUTUTRE CHANGES TO THE SDLS CAN BE INCONSISTENT WITH THE WATER ACT

The Bill includes ‘Transitional Provisions’ which enable three changes to the *Basin Plan Amendment Instrument 2017 (No. 1)* that would be deemed to be the “same in effect” as the original (disallowed). These are outlined in Schedule 10, Part 1, Division 2 (2), which states:

For the purposes of (and without limiting) that section, including in the amendment one or more of the following changes does not prevent the amendment from being the same in effect as the Basin Plan Amendment Instrument 2017 (No. 1):

- a) *An additional requirement in the definition of **re-allocation adjustment request** in section 6.05 (as substituted by the amendment) of the Basin Plan that a request made before that substitution should be expressed to be made in anticipation of that substitution;*
- b) *An additional requirement in subsection 6.05(13) (as substituted by the amendment) of the Basin Plan that requires the Authority to publish on its website variations to the SDL resource unit shared reduction amounts for SDL resource units in the relevant zones;*
- c) *A change to section 7.14A (as inserted by the amendment) to reflect that the initial adjustments proposed in 2017 (as required by section 7.10 of the Basin Plan) have already occurred.*

The *Basin Plan Amendment Instrument 2017 (No. 1)* includes provisions under s6.05 to change the SDLs based on where water is recovered, after any amendments to the SDLs were considered by parliament. The ‘transitional provisions’ in Schedule 10, are additional provisions to the original amendment changes to s6.05 and s7.14A. This is problematic for two reasons.

Firstly, the Water Act says that when developing the Basin Plan (and therefore the SDLs), the Authority and the Water Minister **must** *take into account the principles of ecologically sustainable development; and act on the basis of best available scientific knowledge.*³ The changes in *Basin Plan Amendment Instrument 2017 (No. 1)* s6.05 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. We believe that this is contrary to the s21(4) requirements under the Water Act.

The current government policy is to purchase water from willing sellers. Changing SDLs to reflect past water purchases will result in SDLs that are not based on ecologically sustainable development or scientific knowledge. This amendment would therefore make the Basin Plan inconsistent with its enabling legislation, the Water Act.

Secondly, Schedule 10, Division 2 (2) (a) enables water recovered before the amendment is made to retrospectively count towards the SDL. This seems to be a provision to ensure the purchase of water in the Warrego valley in July 2017 will count towards the SDL.

³ S21(4)(a) and (b) Water Act 2007

In July 2017, the Commonwealth purchased 10.6 GL of water in the Warrego valley, in anticipation of the *Basin Plan Amendment Instrument 2017 (No. 1)* being passed.⁴ The purchase was not based on any consideration of principles of ecologically sustainable development or scientific knowledge, but simply where there was a willing seller – perhaps not surprising given the price paid for the water was more than double that of a similar, earlier purchase.⁵ This purchase has since been referred to the Australian National Audit Office.⁶

The Authority and States have just finalised changes to ‘cap factors’, which will change the book value of the Commonwealth’s water licences. The proposed changes to s6.05 and s7.14A will allow governments to swap SDLs between valleys based on the new cap factors. That is, the cap factors can restate how much water has been recovered in a valley and any subsequent shortfall or excess can be ‘swapped’ to a different valley.

It should be noted that the original amendments for s6.05 and s7.14A described in *Basin Plan Amendment Instrument 2017 (No. 1)* were not subject to the public consultation and submission process. Those amendments were inserted several months after the submission process finished.⁶

FUTURE CHANGES TO THE SDLS CAN BE MADE OUTSIDE THE PARLIAMENTARY PROCESS

Schedule 10, Division 2 (2) (a) and (c) of the proposed Bill will allow the SDLs to be changed outside any parliamentary amendment process. Parliament has been presented changes to the SDLs via recent amendments to the Basin Plan. The ‘transitional provisions’ enable SDLs to be changed after parliament has considered SDL changes in the tabled amendments.

This amendment ensures that the SDLs can be adjusted retrospectively to account for such purchases, rather than the intended SDL being tabled in parliament when the amendment was made. The Warrego purchase was intended to count towards the Queensland shared water recovery target in lieu of recovering water in the Border

⁴ Orders for Production of Documents no. 579, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F59682649-2fa2-43b1-955f-ae16caecef45%22>

⁵ Slattery and Campbell, (2018), *Moving Targets*, <http://www.tai.org.au/content/moving-targets-barnaby-joyce-warrego-valley-buybacks-and-amendments-murray-darling-basin>

⁶ Patrick et al (2018) *Allegations concerning the Murray-Darling Basin Plan*,

Rivers.⁷ The changes to s6.05 appear to be an attempt to ensure that the Warrego purchase can lawfully count retrospectively towards the Queensland shared water recovery target, in a non-transparent way. However, the Warrego purchase was made 8 months before the *Basin Plan Amendment Instrument 2017 (No. 1)* was debated in the Senate. The intended revised SDL was known to government before the Northern Basin amendment was tabled in parliament and parliamentarians should have been made aware of this.

ACTUAL WORDING OF AMENDMENTS ARE AMBIGUOUS OR NOT PROVIDED

It is unclear whether Schedule 10, Part 1, Division 2 (2) (a), (b) and (c) are intended to be the actual wording of the new amendment or a description of the changes in the new amendment.

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. This would allow parliamentarians and the public to see what the proposed changes are, and whether they are, in fact, the "same in effect" as the original amendment.

⁷ Slattery and Campbell, (2018), *Moving Targets*, <http://www.tai.org.au/content/moving-targets-barnaby-joyce-warrego-valley-buybacks-and-amendments-murray-darling-basin>

Conclusion

The Bill allows the re-introduction of the Northern Basin amendment without consultation. The Northern Basin amendment included fundamental changes to the way SDLs are set in the Basin Plan, which have never been made available for public consultation or a submission process. It is contrary to principles of transparency and public accountability for such significant changes to be made without any public consultation.

The Bill allows SDLs to be changed to reflect prior water purchases. This is in contradiction of the Water Act 2007, which requires SDLs to be based on principles of ecologically sustainable development and scientific knowledge.

The Bill allows changes to the SDLs that are outside any amendment process and therefore, parliamentary oversight. This Bill is attempting to provide a mechanism to ensure that water recovered in the Warrego Valley can adjust the SDL targets in other Queensland valleys. It is a complex and non-transparent way to adjust the SDLs, even though the government knows that there is a quantifiable intention to adjust the SDLs for the Warrego purchase.

The Bill describes changes to the *Basin Plan Amendment Instrument 2017 (No. 1)*, but the wording of those changed amendments have not been provided, or they are unclear. That means that there are amendments to the Basin Plan that parliamentarians will not even see before the amendment is made. Parliamentarians do not have enough information to assess whether the proposed amendments are the “same in effect” as the *Basin Plan Amendment Instrument 2017 (No. 1)*.

The Australia Institute recommends that the *Water Amendment Bill 2018* is not passed in its current form.

Appendix A: s42 *Legislation Act* 2003

Disallowance of legislative instruments

1) If:

- a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
- b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

Note: See also subsection 45(1).

2) If:

- a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
- b) at the end of 15 sitting days of that House after the giving of that notice of motion:
 - i. the notice has not been withdrawn and the motion has not been called on; or
 - ii. the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;

the instrument or provision specified in the motion is then taken to have been disallowed and ceases at that time to have effect.

Note: See also subsection 45(1).

3) If:

- a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

- b) before the end of 15 sitting days of that House after the giving of that notice of motion, the House of Representatives is dissolved or expires, or the Parliament is prorogued; and
- c) at the time of the dissolution, expiry or prorogation, as the case may be:
 - i. the notice has not been withdrawn and the motion has not been called on; or
 - ii. the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;

the legislative instrument is taken, for the purposes of subsections (1) and (2), to have been laid before the first-mentioned House on the first sitting day of that first-mentioned House after the dissolution, expiry or prorogation, as the case may be.