



Australian Network of Environmental  
Defender's Offices Inc

## **Submission - Senate Standing Committee on Environment and Communications: Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment) Bill 2012**

**October 2012**

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

ANEDO welcomes the opportunity to provide comment on the Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012 (**the Bill**). Our comments are intended to build on our submission of 16 April 2012 to the Murray-Darling Basin Authority (**MDBA or Authority**) regarding the Proposed Basin Plan, as well as EDO NSW's submission of 23 July 2012 to the MDBA concerning the Murray-Darling Basin Ministerial Council s43A notice.

## Summary of Recommendations

ANEDO recommends the following amendments to the Bill:

1. The adjustment mechanism should be reconceptualised as a tool to update long-term average sustainable diversion limits (**SDLs**) on the basis of best available science. This would enable climate change modelling, which is continually evolving, to be incorporated into the Basin Plan.
2. The MDBA should be required to provide the Minister with a statement explaining how the adjusted SDLs will reflect an environmentally sustainable level of take (**ESLT**).
3. The Minister should be empowered to refer the adjustment amendment to the CSIRO for review if he or she has reason to believe that it does not reflect an ESLT. Depending on the CSIRO's findings, the Minister may adopt the amendment, or return it to the MDBA with a request for appropriate modifications. If the MDBA chooses to ignore the Minister's suggestions, it must publish a statement on its website outlining the MDBA's reasons for doing so.
4. The proposed adjustment amendments should be disallowable legislative instruments.
5. The Authority should be required to make publically available on their website any proposed adjustment to SDLs, and all documentation relied upon by it in proposing that specific adjustment.
6. The public should be provided with at least six weeks to make submissions in respect of proposed adjustments to SDLs, which the Authority are bound to take in to account when making a final decision on the adjustment.

## Background: Requirements of the Water Act

Under the Proposed Basin Plan, Basin-wide diversions will be reduced by 2,750 GL/year.<sup>1</sup> ANEDO submits that a reduction figure of this order does not comply with the requirements of the Water Act.<sup>2</sup> This will in turn impact on the validity of the adjustment mechanism proposed in the Bill.

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<sup>1</sup> Proposed Basin Plan (August 2012).

<sup>2</sup> See, for example, EDO (Victoria) Ltd, Legal analysis of the Proposed Murray-Darling Basin Plan, 2 April 2012 <http://www.edovic.org.au/law-reform/submissions-and-issues-papers/murray-darling-basin-plan>

The Water Act unequivocally states that the SDLs for Basin water resources must reflect an ESLT.<sup>3</sup> An ESLT for a water resource is the level of take which, if exceeded, would compromise any one of the following components of that water resource: its key environmental assets; key ecosystem functions; productive base; or key environmental outcomes.<sup>4</sup>

The Water Act further provides that the Basin Plan must be based on best available science,<sup>5</sup> and implement the ‘relevant international agreements’, which include the Ramsar Convention and Convention on Biological Diversity.<sup>6</sup> Establishing SDLs that reflect an ESLT is arguably the only means of properly giving effect to these treaties.

The wording of the Water Act clearly reflects this logic, indicating that the Authority may only seek to optimise socio-economic outcomes *after* the ESLT and corresponding SDLs have been determined in accordance with the Act.<sup>7</sup>

However, and as argued in ANEDO’s submission of 16 April, the Authority has deviated from the methodology outlined in the Water Act and based the ESLT on a mix of socio-economic, environmental and operational factors.<sup>8</sup> This analysis was recently corroborated by a Senate Committee report entitled ‘Management of the Murray-Darling Basin’ (**Senate Committee Report**). Specifically,

*The Committee is of the view that the 2750 GL/y figure may have been determined by the MDBA as a trade-off between the ecological targets and the socio-economic impacts of the Basin Plan.<sup>9</sup>*

In summary, the SDL reduction figure of 2,750 GL/year does not reflect an ESLT and is not based on best available science.<sup>10</sup> Thus it does not accord with the requirements of the Water Act. This finding will inform ANEDO’s analysis of the Bill, in particular the ‘adjustment mechanism’ contained therein.

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<sup>3</sup> Water Act, s. 23 (1).

<sup>4</sup> Water Act, s. 4 (definitions).

<sup>5</sup> Water Act, s. 21 (4) (b).

<sup>6</sup> Water Act, ss. 3 (b) (objects); 21 (1) (general basis on which Basin Plan to be developed).

<sup>7</sup> See Water Act, s. 23 (1) (SDLs). Furthermore, optimisation of socio-economic factors is only mentioned twice in the Water Act, and in both instances in non-operational sections: Water Act, ss. 3 (c) (objects); 20 (d) (Purpose of Basin Plan). Furthermore, the Act’s objects make it clear that optimisation of social, economic and environmental outcomes is subject to proper implementation of the ‘relevant international agreements’: Water Act, s. 3 (b).

<sup>8</sup> ANEDO, Submission: Proposed Murray-Darling Basin Plan, 16 April 2012, p. 11. [http://www.edo.org.au/policy/120416mdbdraft\\_plan.pdf](http://www.edo.org.au/policy/120416mdbdraft_plan.pdf)

<sup>9</sup> Senate Rural and Regional Affairs and Transport References Committee, Management of the Murray-Darling Basin, *Second Interim Report: the Basin Plan*, p. 32.

<sup>10</sup> Young WJ et al, *Science Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray-Darling Basin: A Report to the Murray-Darling Basin Authority from the CSIRO Water for a Healthy Country Flagship*, 2011. See also MDBA, *Guide to the proposed Basin Plan*, Volume 1, Overview, 8 October 2010, pp. 125–128.

## Methodology for Proposing Adjustments

The Bill proposes to introduce an adjustment mechanism that will enable Basin-wide SDLs to be modified by up to 5% of the ‘Basin reference limit’.<sup>11</sup>

The Bill indicates that SDL adjustments will be based on unspecified ‘criteria’ to be included in the Basin Plan.<sup>12</sup> Despite the Bill’s silence, Minister Burke indicated in his second reading speech that the

*‘criteria to be specified in the Basin Plan will reflect the intention of all basin governments that the mechanism must operate on a non-detriment basis. The adjustments would not be able to weaken the social, economic or environmental outcomes inherent in the Basin Plan.’<sup>13</sup>*

Minister Burke then went on to discuss the ‘efficiency measures’ and ‘supply measures’ that would enable the adjustment mechanism to operate on a non-detriment basis.<sup>14</sup> We may deduce that these measures – which are intended to neutralise socio-economic impacts – will form the ‘criteria’ to be included in the Basin Plan. This assumption is reinforced by the latest version of the Proposed Basin Plan, which explicitly provides for an adjustment mechanism based on ‘efficiency measures’ and ‘supply measures.’<sup>15</sup>

The Bill further provides that the adjusted SDL must reflect an ESLT.<sup>16</sup> ANEDO submits that this will be impossible for two key reasons.

First, the adjustments will be based on the aforementioned criteria which have been developed to maintain consumptive use (that is, to avoid further socio-economic impacts). This is clearly inconsistent with the definition of an ESLT contained in the Water Act. To reiterate, an ESLT is an uncompromised calculation of what is required to maintain key environmental assets, key ecosystem functions and so on. It may not factor in socio-economic considerations. Thus it cannot be calculated on the basis of ‘efficiency measures’ and ‘supply measures.’

Second, assuming the ‘reference limit’ of 2,750 GL/year is retained in the final Basin Plan, the Authority may use this mechanism to modify the reduction in SDLs to a minimum of approximately 2,200 GL/year. Based on the information presented above, this could not possibly reflect an ESLT. Nor would it be based on best available science, including the latest climate change modelling.

ANEDO does not support an adjustment mechanism that further undermines the Water Act, fails to properly implement the relevant international agreements and compromises key environmental assets and ecosystem functions across the Basin.

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<sup>11</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, s. 23A (5).

<sup>12</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, s. 23A (2) (a).

<sup>13</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, Second Reading Speech, Thursday 20 September 2012, p. 2.

<sup>14</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, Second Reading Speech, Thursday 20 September 2012, p. 3.

<sup>15</sup> Proposed Basin Plan (August 2012), Chapter 6, Part 3, ‘Adjustment of Reduction Amount.’

<sup>16</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, s. 23A (3) (b).

**Recommendation:**

1. The Bill should be amended to reconceptualise the adjustment mechanism as a tool to update SDLs on the basis of best available science. This would enable climate change modelling, which is continually evolving, to be incorporated into the Basin Plan.

**Ministerial Discretion and Non-Disallowable Instrument**

The Water Act provides the Minister with discretion to adopt the Proposed Basin Plan prepared by the MDBA, or to request modifications before reconsidering it for adoption.<sup>17</sup> The Bill removes this discretion, requiring the Minister to adopt the SDL adjustment(s) proposed by the MDBA without question.<sup>18</sup>

ANEDO supports an independent, expert-based MDBA and submits that ideally the setting of the SDL will be done based on scientific evidence and free to the greatest extent possible from political interference. However, and as indicated in the Senate Committee Report, the SDLs contained in the Proposed Basin Plan do not reflect an ESLT, as required under the Water Act. Rather, it is arguable that the SDLs developed by the Authority constitute a ‘trade-off’ between socio-economic and environmental prerogatives. ANEDO therefore submits that the Minister should be empowered in certain circumstances to return the adjustment amendment to the MDBA with suggested changes.

The Bill also indicates that adjustment amendments adopted by the Minister will not be subject to disallowance by Parliament.<sup>19</sup> Again, this is inconsistent with Water Act which indicates that the Basin Plan is a legislative instrument<sup>20</sup> that will be tabled before Parliament,<sup>21</sup> and be subject to disallowance.<sup>22</sup>

**Recommendations:**

1. The Bill should be amended to require the MDBA to provide the Minister with a statement explaining how the adjusted SDLs will reflect an ESLT.
2. The Bill should be amended to provide the Minister with a clear discretion to refer the adjustment amendment to the CSIRO for review if he or she has reason to believe that it does not reflect an ESLT. Depending on the CSIRO’s findings, the Minister may adopt the amendment, or return it to the MDBA with a request for appropriate modifications. If the MDBA chooses to ignore the Minister’s suggestions, it must publish a statement on its website outlining the MDBA’s reasons for doing so.

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<sup>17</sup> Water Act, s. 44.

<sup>18</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, s. 23B (6).

<sup>19</sup> Water Amendment (Long-Term Average Sustainable Diversion Limit Adjustment) Bill 2012, s.33 (2A).

<sup>20</sup> Water Act, s. 33. This section expressly provides that the Basin Plan is a legislative instrument.

<sup>21</sup> Water Act, s. 44 (7).

<sup>22</sup> Minister Burke in the Second Reading speech stated: “Under the Water Act, I am advised, the Basin Plan itself is a disallowable instrument, and parliament will have the opportunity by that means to consider the precise elements of the SDL adjustment mechanism that will be written into the Basin Plan”; 20<sup>th</sup> September 2012.

3. The Bill should be amended to provide that proposed adjustment amendments are disallowable legislative instruments.

## **Public Participation**

The Water Act provides for the Authority to engage in extensive public consultation for the purposes of creating, amending or reviewing the Basin Plan.<sup>23</sup> ANEDO strongly supports these provisions on the basis that they allow stakeholders and the broader community to participate in one of the most important public policy processes in Australia.

We are therefore concerned that the Bill does not allow for the community to comment on what would constitute significant amendments to the operation of the Basin Plan.

### **Recommendations:**

1. The Bill should be amended to require the Authority to make publically available on their website any proposed adjustment to SDLs, and all documentation relied upon by it in proposing that specific adjustment.
2. The Bill should be amended to provide the public with at least six weeks to make submissions in respect of proposed adjustments to SDLs, which the Authority are bound to take in to account when making a final decision on the adjustment.

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<sup>23</sup> Water Act, ss.43 (Proposed Basin Plan), 47 (amendment), 51 (review).