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Select Committee on Floodplain Harvesting

23 November 2021

NSWIC Response to Joint Memorandum of Advice for SRI

Dear Committee,

This letter is in response to the *Joint Memorandum of Advice* provided for Southern Riverina Irrigators (SRI) and sent to this Committee via an appendix to a supplementary submission.[1]

It is important to note that the contents of this *Joint Memorandum of Advice* are highly contested, as this advice contradicts legal interpretations by both State and Commonwealth authorities. Adherence to this advice would require NSW to walk away from agreed Commonwealth processes and commitments to implement the Murray-Darling Basin Plan, with significant environmental and socio-economic consequences.

The *Joint Memorandum of Advice* is consistent with recommendations by Mr Walker in the South Australian Royal Commission. Notably, not even the South Australian Government adopted Mr Walker's recommendations, due to what they would mean for multijurisdictional cooperation on the Basin Plan.

If the Committee wishes to pursue the matters raised in this *Joint Memorandum of Advice,* we recommend that the Committee:

(1) Seeks secondary **independent legal opinion** owing to how contested this opinion is, and it being paid for by an interested party.
(2) Remembers the **scope of this Inquiry** does not extend to Commonwealth processes for determining Commonwealth sustainable diversion limits (nor can it).
(3) Fully explores the **ramifications** of adhering to such advice, which would entail:
    i. NSW exiting from agreed multijurisdictional arrangements, processes and commitments to implement the Basin Plan;
    ii. Severe socio-economic impacts for NSW Basin communities, as adhering to the advice would lead to lowering diversion limits in all NSW Basin valleys, including in the southern Basin; and,
    iii. Environmental impacts – such as those outlined by the SA Government in its response to the Royal Commission, stating it would "undermine achievement of real environmental outcomes".

The *Joint Memorandum of Advice* states, "*to the extent that the NSW Department of Planning, Industry and Environment (DPIE), by regulation or other legislative instrument, purports to license floodplain harvesting inconsistently with the SDLS as currently calculated, then that regulation may be vulnerable to challenge…*".

[1] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf

However, **there is no credible evidence to suggest that NSW is intending to regulate FPH inconsistently with the SDLs**, and as such, the extent of that perceived inconsistency is zero. To the contrary, significant evidence is available from relevant State and Commonwealth authorities to indicate that the intent, and fundamental **objective of the FPH reform, is to regulate FPH consistently with the SDLs**, as required under the Basin Plan.

For example, DPIE-Water says:

> *"Floodplain harvesting will be licensed such that overall surface water take will be within legal limits. In valleys where floodplain harvesting has caused legal limits to be exceeded, licensed entitlements will reduce take."*[2]

The Policy itself says:

> *"Floodplain harvesting licence share components and water account rules in water sharing plans will be determined so that over the long term, total water extractions comply with the LTAAEL [Long-Term Annual Average Extraction Limit]."*[3]

The *Joint Memorandum of Advice* relies upon an assumption that NSW is proposing to regulate FPH inconsistently with the SDLs – or at current levels – which is simply not the case. For example, while SRI indicates in its submission that it believes 346GL will be licensed, this is inconsistent with what authorities have indicated, including IPART in its pricing determination which indicated 259GL to be licensed.[4]

If such proposals had any validity, then why would we have farmers seriously concerned about their business and livelihoods after seeing for themselves draft licences that will significantly cut back their water access?

We note that Mr Walker rightly acknowledges that:

> *"The whole scheme of the Water Act and the Basin Plan is that historical take is not sustainable and must be the subject of quantitative controls to procure sustainable environmental outcomes."*[5]

We emphasise that the entire point of this reform is to do just that, to recognise that (as the *Joint Memorandum of Advice* says) FPH at present levels "*is not sustainable and must be the subject of quantitative controls to procure sustainable environmental outcomes*"[6]. The only quantitative control available under the NSW Water Management Act 2000 is a volumetrically limited licence, which gives government (and governments into the future) the ability to determine how much water each farmer can use.

We are highly concerned that the fundamental assumption underpinning claims that FPH licensing will be above legal limits, is based on a report by Slattery & Johnson (commissioned by SRI and others) titled "*Licensing floodplain harvesting in Northern NSW: analysis and implications*". This report is cited, and underpins assumptions made, in the *Joint Memorandum of Advice*.

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[2] https://www.industry.nsw.gov.au/__data/assets/pdf_file/0009/404667/overview-of-legal-limits.pdf
[3] https://www.industry.nsw.gov.au/__data/assets/pdf_file/0017/143441/NSW-Floodplain-harvesting-policy.pdf
[4] Final-report-Review-of-prices-for-the-Water-Administration-Ministerial-Corporation-September-2021.PDF (nsw.gov.au)
[5] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf
[6] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf

This report has been highly contested, including by State and Commonwealth authorities and agencies, and has not been the subject of independent peer-review. It would be remiss to accept the contents of this report as fact, given it has not undergone any independent scrutiny, contradicts official information, and is generally considered to be highly erroneous.

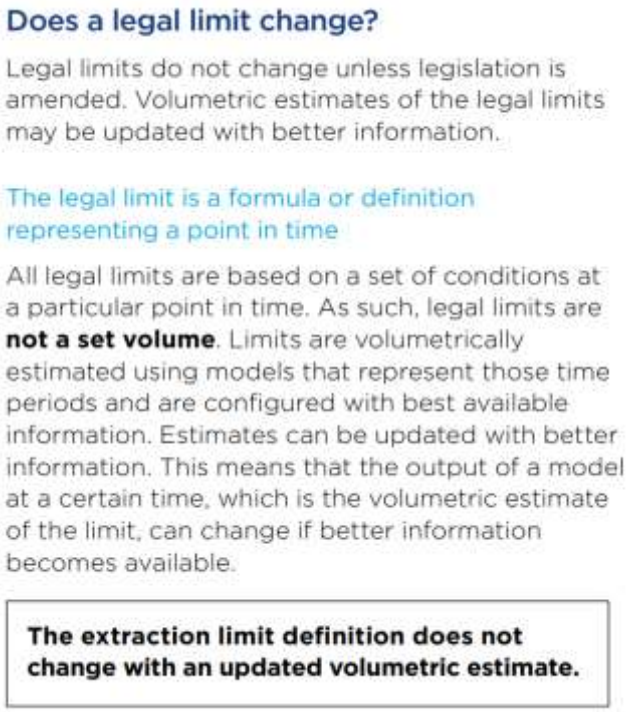
It is particularly concerning that the *Joint Memorandum of Advice* refers to this report in point 2 of its introduction, suggesting it has been relied upon as an assumption underpinning the advice. It would be appropriate for the Committee to seek a response from the relevant authorities on that report before accepting any of the matters it raises as fact, or any components of legal advice that rely upon that report.

We would like to raise several specific matters on the *Joint Memorandum of Advice*.

1) Changing limits

It is a misunderstanding that the Healthy Floodplains project will involve 'changing' diversion limits. The NSW DPIE-Water has published a fact sheet to clarify this confusion.[7]

This fact sheet says:



Does a legal limit change?

Legal limits do not change unless legislation is amended. Volumetric estimates of the legal limits may be updated with better information.

The legal limit is a formula or definition representing a point in time

All legal limits are based on a set of conditions at a particular point in time. As such, legal limits are **not a set volume**. Limits are volumetrically estimated using models that represent those time periods and are configured with best available information. Estimates can be updated with better information. This means that the output of a model at a certain time, which is the volumetric estimate of the limit, can change if better information becomes available.

The extraction limit definition does not change with an updated volumetric estimate.

To put it simply – **limits are a definition/formula** – and the Healthy Floodplains Project **does not involve changing that definition or formula.** Simply, the project has produced **better data** to put into that **same definition/formula**.

Given the significant investment by NSW over the last decade to improve the data quality on FPH, with multiple assessments, surveys, investigations, etc – such data improvements cannot reasonably be described as '*ad hoc*', nor an '*accident of new historical data*'[8]. Now this updated scientific information is available and verified, following peer review, it would be bizarre for NSW not to use it, and to instead rely on outdated data that is known to be inaccurate.

[7] https://www.industry.nsw.gov.au/__data/assets/pdf_file/0009/404667/overview-of-legal-limits.pdf
[8] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf

We note from the hearing transcript the statement by Mr Walker that *"If it means that the SDL floats around by reason of better intelligence being found, then that is simply wrong… If it means that we should always be alert to getting better information, including about the past, I completely agree."*[9]

It is our understanding that the scenario faced is certainly the latter: we have now seen an entire planned program of work with significant investment over multiple governments dedicated to 'getting better information' on FPH – which is a vastly different scenario to a limit simply *floating* in any *ad hoc* or *accidental* fashion.

2) Adjusting limits

The *Joint Memorandum of Advice* appears to confuse 'SDL adjustments' such as under the SDL Adjustment Mechanism (SDLAM) for the southern Basin (whereby the volume of water recovery itself may be reduced or increased), with 'SDL updates' such as what is occurring for the Healthy Floodplains Project where better data is simply being put into the same BDL/SDL formula set out in Schedule 2 of the Basin Plan.

The key difference is that the FPH reform does not change the volume of water recovery required in the Basin Plan. Inputting better data into the BDL/SDL formula is part of the MDBA's assessment of Water Resources Plans. There is no evidence to suggest NSW is not following the due process, and notably, the same process is being followed by other States whose BDLs/SDLs in some valleys have already been changed in their Water Resources Plans to reflect better information on baseline diversions. We recommend that the Committee ask DPIE-Water and the MDBA to explain the due process, and how it has/is followed.

The SDLAM, detailed in Chapter 7 of the Basin Plan, involves projects that achieve equivalent or better environmental outcomes offsetting the need for 605GL of water recovery. This reduces the Basin Plan's 2680GL water recovery target, increases SDLs in southern valleys, and mitigates the need for further buybacks. This has no relation to the FPH reform in NSW. However, we are gravely concerned that the *Joint Memorandum of Advice* could be used to challenge the SDLAM in the southern Basin, whose communities stand to lose the most should this lead to more water being recovered from the irrigation pool.

3) FPH included in limits

We note on the matter of FPH being included within existing limits, that DPIE-Water has addressed this matter (below), to confirm that water taken from the floodplain has always been acknowledged in all the various limits – Cap, LTAAELs and SDLs.[10] This is not new.

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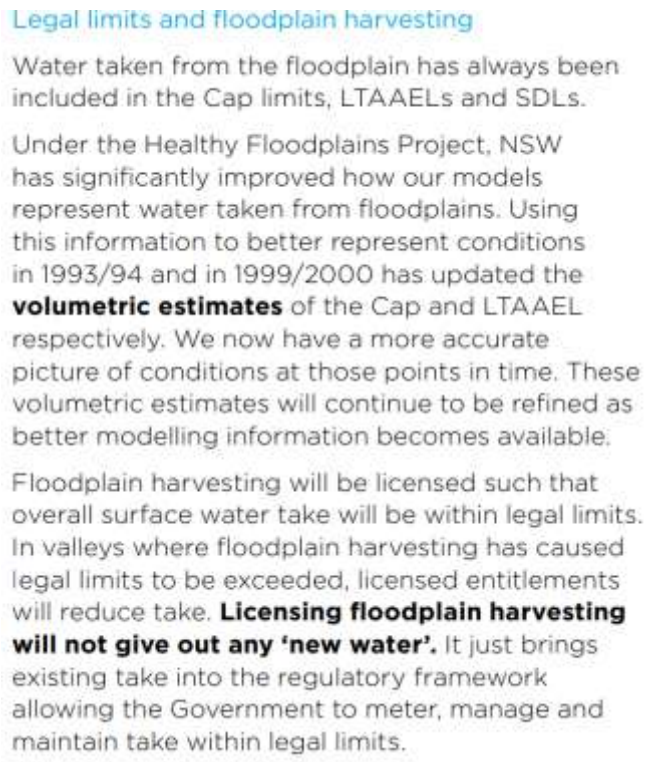
[9] https://www.parliament.nsw.gov.au/lcdocs/transcripts/2685/Transcript%20-%20Select%20Committee%20-%20Inquiry%20into%20Floodplain%20Harvesting%20-%2024%20September%202021%20-%20Virtual%20%20-%20UNCORRECTED.pdf

[10] https://www.industry.nsw.gov.au/__data/assets/pdf_file/0009/404667/overview-of-legal-limits.pdf



Legal limits and floodplain harvesting

Water taken from the floodplain has always been included in the Cap limits, LTAAELs and SDLs.

Under the Healthy Floodplains Project, NSW has significantly improved how our models represent water taken from floodplains. Using this information to better represent conditions in 1993/94 and in 1999/2000 has updated the **volumetric estimates** of the Cap and LTAAEL respectively. We now have a more accurate picture of conditions at those points in time. These volumetric estimates will continue to be refined as better modelling information becomes available.

Floodplain harvesting will be licensed such that overall surface water take will be within legal limits. In valleys where floodplain harvesting has caused legal limits to be exceeded, licensed entitlements will reduce take. **Licensing floodplain harvesting will not give out any 'new water'.** It just brings existing take into the regulatory framework allowing the Government to meter, manage and maintain take within legal limits.

4) Environmentally sustainable level of take

We note the comments in the advice that suggest resetting the Basin Plan's legal limits (the Environmentally Sustainable Level of Take (ESLT) and SDLs). However, even the South Australian Government, in response to the SA Royal Commission call to reset SDLs, said:

> *"Accordingly,* ***new determinations of the ESLTs and SDLs or significant changes to either the Water Act or the Basin Plan before the Basin Plan review in 2026 are not supported****. South Australia supports new determinations at the* ***appropriate time, in 2026 as agreed by all jurisdictions****. Significant changes at this stage would impede implementation,* ***undermine achievement of real environmental outcomes*** *and cause uncertainty for businesses and communities across the Basin."*[11]
>
> *"The South Australian Government is committed to continuing a bipartisan and collaborative approach to securing the future of this critical resource while the current Basin Plan is implemented to deliver a healthy, thriving river system. Failure will be catastrophic for our State and our Nation.* ***This matter is too important to allow petty disputes and delays to derail the return of water to the system****."*[12]
>
> *"The Royal Commission report also recommended going back to the drawing board and resetting core elements of the Basin Plan, including the ESLT and Sustainable Diversion Limits (SDL). While* ***the South Australia Government does not consider these recommendations helpful in the short-term, as***

[11] SA Government response to the SA Royal Commission: https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission [P 11].
[12] SA Government response to the SA Royal Commission: https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission [P 1].

> ***they will slow water recovery down**, we will use them to inform our planning for the Basin Plan review in 2026."*[13]

The South Australian Government instead proposed to: *"Provide the best science available to the MDBA for new determinations of the Environmentally Sustainable Level of Take and Sustainable Diversion Limits in 2026."*[14]

Some stakeholders, including Mr Walker via the SA Royal Commission, have asserted the Basin Plan's SDLs, based on a 2680GL water recovery target, fall short of an ESLT. Anyone wishing to pursue lower diversion limits would at the very least need to go through the correct due process with the other Basin States and the Commonwealth to review the Basin Plan. The time and place to look at SDLs is the Basin Plan review written into legislation for 2026. This is an **agreed multi-jurisdictional process**, and **not one in which NSW can unliterally target just one form of take** in some river valleys and not others.

The ramification of adopting the notions in the *Joint Memorandum of Advice* would result in NSW walking away from the agreed due processes which Basin States agreed to in 2012, and going it alone in resetting water recovery volumes and therefore diversion limits in all its valleys. Aside from all the numerous major problems that causes, that is well beyond the scope of a reform intended only to reduce, license and measure one form of water take within overall diversion limits – in just five valleys.

NSWIC notes the South Australian Royal Commission's recommendation 1, saying:

> *"New determinations of the ESLTs, and SDLs for both surface water and groundwater that reflect those ESLTs, should be carried out promptly… be made on the basis of a proper construction of the Water Act, **rather than using a triple bottom line approach**."*[15]

We further note from the SA Government response, that *"the Royal Commission suggested that, under its proposal to revise the ESLTs and SDLs, **additional water recovery would be required** and that this should be purchased through buybacks"*[16].

Abandoning a triple bottom line approach to setting water recovery targets and SDLs would be devastating for our industry and Basin communities across NSW. The devastating impact of buybacks for Basin communities has been highlighted in the recent Sefton Inquiry.

We note that while the Basin Plan requires an *environmentally sustainable level of take,* it is also required as an objective "*to optimise social, economic and environmental outcomes arising from the use of Basin water resources in the national interest*". Mr Walker states that "*from the perspective of the environment, the less water taken the better*"[17], but as a human society, we do need water diversions to meet needs including town water supply, stock and domestic, and the production of food and fibre.

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[13] SA Government response to the SA Royal Commission: https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission [foreword].
[14] SA Government response to the SA Royal Commission: https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission [P 11].
[15] https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission
[16] SA Government response to the SA Royal Commission: https://www.environment.sa.gov.au/topics/river-murray-new/basin-plan/murray-darling-basin-commission [P 15].
[17] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf

We reiterate, reducing, licensing and metering FPH **is not about setting, nor changing, the legal limits of water take**. It is simply about making FPH comply with these existing limits. **This reform to FPH in NSW does not have the scope, remit, or authority to change those Commonwealth limits, and that is not the intention.**

Conclusion

The Basin Plan has had negative socioeconomic impacts on our irrigation communities, particularly in the southern Basin. There is certainly a need to do better and fix issues recognised in more than 40 reviews of the Basin Plan but hijacking the FPH reform for just five valleys in one State is not the pathway to that end.

Discussions on the **Commonwealth SDLs** can be had in the context of the 2026 Basin Plan review through the agreed multijurisdictional processes. It is not possible[18] nor desirable for NSW to adjust these Commonwealth limits unilaterally, targeting only one form of water take, in just five of its river valleys. The FPH licensing reform is a critical step to NSW meeting its Basin Plan obligations. It should not be treated as an opportunity for NSW to walk away from Commonwealth processes agreed to by all Basin States and blow up the Plan for everyone.

Yours sincerely,

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[18] Without NSW walking away from or blowing up the Plan.