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Select Committee on Floodplain Harvesting

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Misinformation cannot be left uncorrected

Dear Committee,

NSWIC would like to respond to misinformation and erroneous claims being submitted to this Inquiry. While stakeholders hold diverse views on how best to manage our precious water resources, the debate should be grounded in fact and scientific, technical and expert advice, rather than unsubstantiated claims based on no (or disputed) evidence.

For the sake of public confidence in parliamentary processes, it is important that the Committee does not accept erroneous claims on face value but investigates transparently and robustly. At a minimum, such claims should be referred to the relevant authorities for a 'right of reply'. Any stakeholder contributing to this Inquiry should have no problem with their claims being fact checked.

Falsely constructed narratives designed to obfuscate and delay this long overdue public interest reform only serve to undermine public confidence. It is frustrating to hear some groups complaining about the adverse impacts of floodplain harvesting (FPH) and demanding extraction stay with sustainable limits, while simultaneously running interference with the very policy that seeks to address those issues.

Similarly, it is frustrating to hear complaints that "*NSW has failed to require the installation of accurate and non-tamper proof meters*"[1] for floodplain harvesting, when again, this issue would have been addressed already had the regulations not been disallowed.

We trust the Committee will make factual, evidence-based, constructive and informed findings and recommendations to progress this long overdue reform. In this letter, we provide some case studies warranting critical analysis by the Committee.

Case Study: Supplementary submission by Southern Riverina Irrigators (SRI), 2 November 2021

Misinformation

Example 1:

> "*It is premature for NSW to continue with the current proposed volumes for floodplain harvesting when it exceeds the legal limits of the Basin Plan and Water Act 2007*"[2].

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

There is **no credible evidence to suggest NSW intends to regulate floodplain harvesting in excess of legal limits**. To the contrary, all available evidence from the authorities indicates that the FPH reform's intent, and fundamental objective, is to regulate FPH consistently with the legal limits, including the SDLs as required under the Murray-Darling Basin Plan.

The MDBA is responsible for assessing the Basin States' compliance with legal limits. Inputting better data into the BDL/SDL formula set out in Schedule 2 of the Basin Plan is part of the MDBA's assessment of Water Resources Plans. There is no evidence to suggest NSW is not following the due process. Notably, other States followed the same process, with BDLs/SDLs in some of their valleys changed in their Water Resources Plans to reflect better information on baseline diversions.

While current floodplain harvesting levels mean total water take in some valleys is exceeding legal limits – the **entire point of this reform is to correct that situation**. No one (not the affected industry, nor the Government) is suggesting that FPH be licensed at current extraction levels. The proposed policy, accepted by industry, will reduce FPH by up to a third so that total water take is within legal limits allowed under the Basin Plan.

Example 2:

> *"Despite this key difference, NSW intends to provide floodplain harvesters with a licenced volume which matches the volume estimated to have been taken without a licence by landholders in any year between 1993 and 1999."*[3]

> *"The Basin Plan contemplated up to 46.2GL for northern NSW valleys. This figure is far short of the newly proposed 346GL with a 500% carryover entitlement."*[4]

We are not aware of a proposal to license 346GL of floodplain harvesting. It is certainly not the NSW Government proposal. Authorities have indicated a far lower volume, including IPART in its recent pricing determination which indicated just 259GL will be licensed.[5]

The statements above also suggest there is a separate volumetric limit for FPH for the purposes of compliance with Water Sharing and Basin Plan limits. As many stakeholders and authorities have made clear to the Committee already, the limits are on total take across all forms of water; there is no such thing as a limit for each form of water separately.

Example 3:

> *"In other words, the Water Act 2007 (Cth) is not a vehicle for NSW and the MDBA to change volumes in the Basin Plan at their own behest, without proper parameters and scrutiny. Furthermore, if NSW makes available water determinations allowing licence holders to take volumes of water that exceed legal limits, it is breaching Federal legislation."*

There is **no evidence** to suggest NSW will make Available Water Determinations (AWDs) that exceed legal limits. To the contrary, there is ample evidence NSW makes AWDs compliant with legal limits. An example is the recent reduction to supplementary water licence AWDs in two northern valleys to ensure compliance with the total limit, in the absence of regulation to reduce FPH.

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[3] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf
[4] https://www.parliament.nsw.gov.au/lcdocs/submissions/76500/Southern%20Riverina%20Irrigators.pdf
[5] Final-report-Review-of-prices-for-the-Water-Administration-Ministerial-Corporation-September-2021.PDF (nsw.gov.au)

We remind the Committee that the entire purpose of the Healthy Floodplains Project is to provide a mechanism for government (and governments into the future) to limit floodplain harvesting so total take across all water sources is within these limits. Without these regulations progressing, and without licences, the Government has no means to even make an AWD for floodplain harvesting, put any limits on it, nor enforce any limits.

Example 4:

"If NSW adopts a position that unauthorised and unlawful floodplain harvested water take is permissible…"

Again, that is not the position of the NSW Government, nor is anyone advocating that it should be. Strict eligibility criteria are in place. Those who cannot meet the criteria are simply not eligible. This will result in some works no longer being able to floodplain harvest (once the regulations progress and licences are required). We have not encountered any stakeholder advocating for unauthorised, unlawful or ineligible works to be included – nor are we aware of any Government intent to do so. This is simply fearmongering.

Example 5:

"*It could also lead to increased diversions in southern NSW valleys should NSW adopt a consistent approach*".

To the contrary. The Healthy Floodplains Project is a state-wide policy. When implemented in other valleys in later phases, if assessments find that a growth in floodplain harvesting poses risk to compliance with overall valley extraction limits, those valleys too will face cutbacks no different to those in the northern Basin under the proposed regulations.

Example 6:

"In comparison, general security licence holders within the same northern NSW valleys have suffered erosion of reliability and risk further adverse impacts from over extraction by floodplain harvesters. Diversions must stay within legal limits for each valley. Consequently, other licence holders losing access to volumes of water in order to accommodate illegal floodplain harvesters, is a highly inequitable situation."

It is correct that other water users (*supplementary* water licence holders) in the Border Rivers and Gwydir valleys are inequitably being impacted because the Government is left with no mechanism to cut back floodplain harvesting. **This is all the more reason for this reform** so that floodplain harvesting can be reduced instead.

The only reason supplementary water can be cut back, but floodplain harvesting cannot (at present), is because supplementary water is already on a licence and floodplain harvesting is not. If floodplain harvesting were licensed, Government could then control how much floodwater could be taken and cut access back through AWDs, if needed.

It was widely acknowledged earlier this year when the reduced Available Water Determinations for supplementary water licence holders in the Border Rivers and Gwydir valleys were issued, that the cutback was the result of the floodplain harvesting regulations being disallowed. If Parliament, and other stakeholders want this equity issued resolved, then an FPH licensing regime needs to be put in place.

Misinterpretation of legal advice

NSWIC also has serious concerns about the interpretation of legal advice, particularly advice provided by Mr Bret Walker, SC. We recommend the Committee base its assessment on the primary evidence presented by Mr Walker in the advice commissioned by the Committee, and his evidence from the hearing, and not the novel interpretation of such advice by third parties.

Mr Walker made the legality of FPH explicitly clear to this Committee, that (emphasis added):

> *"The circumstances that have obtained for generations are, it turns out, circumstances under which the take of water through floodplain harvesting should be considered (not merely "could be considered") a legal activity."*

Mr Walker also has made clear through statements at the hearing that:

> *"You have got to pinch yourself to remember that it was in 2004 that by an intergovernmental agreement for the so-called national water initiative it was accepted that there needed to be, among other things, a close attention to floodplain harvesting. It was agreed in that that the States, including New South Wales, would implement such matters by 2011. That is 10 years ago. The things that were required to be implemented certainly included the recording, that is the study and description; the licensing, that is the regulation by control with limits; and a robust compliance and monitoring system, and none of that has happened. My comment is: How terrible, what a great shame and **I do wish you would hurry up**."*[6]

It is difficult to see how this could possibly be interpreted to suggest that FPH is still somehow illegal, or as a reason to further delay the reform. This should put to rest the legality arguments and allow the Parliament to get on with this reform as a matter of urgency.

NSWIC encourages the Committee to make its determinations based on the actual primary source, rather than increasingly convoluted legal arguments to the contrary. Examples are below.

Example 1: Cap

SRI say (screenshot)[7]:

When asked by Mark Banasiak if the legislative requirement to limit surface level diversions to take as of 30 June 1994 – and if floodplain harvesting was not permitted, can it now be included, Walker SC responded:

> The short answer is no…
>
> The fact is, "dubious legality" and that is far as one can sensibly put it, with respect to some or all floodplain harvesting activities, is not at all addressed as the Cap was negotiated as a concept.

[6] 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

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

Mr Walker actually said, in response to Mr Searle (Mr Banasiak did not ask a question of that kind):

> **The Hon. ADAM SEARLE:** Under the basin plan there is this notion of the cap; that is the legislative requirement to limit surface water extractions to the level of development as at 1 July 1994. Floodplain harvesting was not expressly approved in New South Wales and was not subject to any licensing. Does it follow then that whatever take is being taken through floodplain harvesting does not fall within that legislated cap?
>
> **Mr WALKER:** The short answer is I do not know. If I may put that a bit more sharply, and that is a sorry reflection on the political notion and use of the cap. The fact is that dubious legality, and that is as far as I think one can sensibly put it, with respect to some or all floodplain harvesting activities is not at all addressed, as you have made very clear, Mr Searle. It is not at all addressed in the way in which the cap was negotiated as a concept, let alone understood administratively in terms of volumes. I myself think it is far too neat—and probably wrong—an approach to say that no floodplain harvesting activities should ever have been regarded as contributing to the historical usage which constituted the cap.

Mr Walker has been misquoted as saying "*the short answer is no*", when he actually said "*the short answer is I do not know*" – a materially different answer. In the times of copy/paste, and with both the transcript and the video recording publicly available online, it is difficult to see this as a simple error.

Example 2: Legality

SRI states:

"NSW have completely misrepresented the opinion provided by Walker SC because a failure to enliven an offence provision does not equate to a positive legal right to take water."

"Mr Walker SC noted floodplain harvesting is not an offence under the WMA, however he gave evidence to the Inquiry it is indirectly an offence under the 1912 Act to floodplain harvest where a "work" is utilised without an appropriate licence or permit to use the water for irrigation."[8]

Rather, what Mr Walker actually said was[9]:

> There is an indirect possibility of an effect on the use of so-called works which could give rise in a relatively indirect fashion to the possibility of offences having been committed with respect to what we would call floodplain harvesting—that is, offences with respect to the 1912 Act. However, that will depend entirely upon a case-by-case factual determination of the use of works—and I stress the use of works. Where works can be lawfully used, there will be a very important question as to whether what I will call an incidental or intermittent use in terms of flood would amount to an offence. That is not a matter that I can possibly advise on in the absence of particular facts. It needs to be understood that the 1912 Act is, in my view, both obscure and indirect in any possible effect it may have upon historical floodplain harvesting.
>
> **The CHAIR:** Thank you, Mr Walker. We will go straight to questions from the Opposition.

Simply, Mr Walker actually says, "*that is not a matter that I can possibly advise on in the absence of particular facts*", and at best, this scenario is described as an "*indirect possibility*" (a much more uncertain response than what has been interpreted by SRI).

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

[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

This is also not consistent with the statement by Mr Walker that "*floodplain harvesting should be considered (not merely "could be considered") a legal activity*".

SRI makes a comparison to "off allocation" take by its members, but this is not an equivalent, nor a comparable scenario.

Example 3: Case by case

SRI states that:

> *"Whilst Walker SC concluded there may have been instances where it was lawful to floodplain harvest, he also clarified it was not possible to fully explore the legality of the practice without having the specific facts and circumstances of each case, indicating a need for a case-by-case analysis."*[10]

Mr Walker appears to be simply referring to a standard legal practice of needing to deal with the material facts of a particular case. His statement is therefore inconsistent with the recommendation of SRI to delay reducing, licensing and metering FPH until further 'case by case analysis' is conducted. We note:

(1) An intensive case by case analysis has already been completed on an individual farm scale for every, single, eligible, farmer, such as through the farm validation process; and,
(2) An additional (and duplicated) process would significantly further delay regulation of FPH, inconsistent with Mr Walker's sentiment: "*I do wish you would hurry up*".

We urge the Committee to base its assessment on the primary evidence presented by Mr Walker in the advice the committee commissioned (including at the hearing), and not novel interpretations by third parties.

Conclusion

We trust the Committee appropriately investigates all evidence provided to ensure the integrity of the Inquiry and its processes. The ultimate question for the Committee is simple – do you want floodplain harvesting reduced, licensed and metered, or not? We do.

Yours sincerely,

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