LEGISLATIVE COUNCIL OF NEW SOUTH WALES

SELECT COMMITTEE ON FLOODPLAIN HARVESTING

Legality of Floodplain Harvesting Practices

OPINION

I am asked to advise the Select Committee on matters concerning the legality, or lawfulness, of practices generally described as floodplain harvesting. The particular questions I am asked are set out in the letter dated 9th August 2021 from the Hon. Cate Faehrmann MLC, Committee Chair, to the Clerk of the Parliaments. I adopt that letter's numbering in supplying the answers below.

2 Generally, I note the context in which my advice is sought, namely the Government's floodplain harvesting policy and the disallowed *Water Management (General) Amendment (Floodplain) Harvesting) Regulation 2020*. This opinion does not deal with the merits of any aspects of the Policy, let alone the no doubt important political questions arising from disallowance of the Regulation. Further, it is of course basic that neither the Policy nor a disallowed Regulation alters the law.

3 Thus, the answer to Question 1 simply turns on the pre-existing effect of sec 60A of the *Water Management Act 2000* (NSW) (**WMA**), which is a penal provision – ie one that creates and provides for the criminal punishment of an offence. Its terms are to be construed sensibly and in context, but recognising that real uncertainties are usually to be resolved in favour of a putative accused person. That so-called rule of lenity is not really a rule, but rather one of the various canons of interpretations more or less useful to the task of understanding a statutory provision. It has not played a role of much significance in my present advice.

4 The offence under sec 60A WMA involves the essential element that a person takes water "from a water source to which [Part 2 of Chapter 3] applies". That depends on the operation of sec 55A WMA, which provides for such applications by means of a proclamation to that effect. It appears that no apt proclamation has included as a water source for the purposes of Part 2 of Chapter 3 (and thus the offence provision within it of sec 60A) a description that would encompass the source of water that could be regarded as

possibly taken by means of so-called floodplain harvesting. "So-called" because it is not a term of art, or defined within WMA.

5 There have been many sec 55A proclamations – I have not examined any. Rather, I understand from the advice of the Department of Planning Industry and Environment, that was attached to the Chair's letter to the Clerk, that fairly common forms have been used. I treat, as did the DPIE, as a useful representative form a 2004 gazettal that defined the relevant regulated water source as "that between the banks of all rivers" – and that, for good measure, expressly stated that, effectively, the source did not include "water on land adjacent to this water source".

6 Even an elementary understanding of the essence of floodplain harvesting must conclude that land between river banks is not sensibly part of a floodplain, which would usually be defined by land inundated from time to time over and beyond river banks. Understood in that way, as I advise a court would do, water on a floodplain is on land "adjacent to" the area between river banks, by definition. And it does not cease to be so simply because it may on occasion extend very far from those banks: obviously, the water flows so far because the topography permits that flow – and adjacency will be seen in that functional or hydrological close connexion.

7 It follows that no offence against sec 60A WMA is committed by floodplain harvesting with respect to the taking of such water in valleys for which the form of sec 55A applications discussed in 5 and 6 above has been proclaimed by gazettal.

8 According to the DPIE advice, a different form of sec 55A proclamation has been used in the case of unregulated water sources. A representative form gazetted in 2012 includes "all water...occurring naturally on the surface of the ground". As a matter of ordinary English, that phrase plainly includes water on a floodplain. In context, the explicit addition of "all water...in rivers, lakes and wetlands" seems if anything to put beyond doubt the inclusion of floodplain water within the opening phrase – it being difficult to think of any other major kind of water occurring naturally on the surface of the ground other than water on a floodplain, apart from the explicit additions of rivers, lakes and wetlands.

9 Another element of the sec 60A offences is the absence of, or contravention of, a relevant access licence. The categories of access licences provided by sec 57 WMA include "floodplain harvesting (regulated river)" and "floodplain harvesting (unregulated river)".

However, the representative form of sec 55A proclamation for the unregulated water sources, noted in 8 above, applies to all categories of access licences other than floodplain harvesting access licences. That is, the provisions of Part 2 Chapter 3 WMA do not apply to floodplain harvesting access licences.

10 What does that mean, in the presently critical context of such water being taken without anyone having such a licence? In my opinion, given the history, it prevents these offence provisions applying to conduct that would be an offence because of a lack of (or, in theory, a contravention of) a floodplain harvesting access licence. That history, of course, must include the long-held, and probably correct, government view that activities before WMA commenced, eg those governable by the repealed *Water Act 1912* (NSW), in the nature of floodplain harvesting, were unregulated in the sense that they were no unlawful.

11 It follows that the sec 60A WMA offences do not presently apply in the case of unregulated rivers (to borrow the statutory label) where the sec 55A proclamation was in the representative form. I appreciate that this analysis concludes oppositely from the DPIE advice briefed to me. Simply, I strongly favour the view that previously apparently lawful conduct did not cease to be so by the absence of a para 57(1)(kl) or (k2) access licence, when sec 60A did not apply to those categories of licence.

12 For the same reasons that explain my answer to Question 1, the answer to Question 2 is "No". It was not an offence, in cases governed by the representative proclamations discussed above, to carry out floodplain harvesting without a water access licence, specifically without a floodplain harvesting access licence.

13 The answer to Question 3 is "none at all". Unless and until a policy becomes law, it cannot, and therefore will not, have any effect on the legality of floodplain harvesting. Undoubtedly, effectuation of such a policy could well involve, most usefully if I may say so, close consideration of the availability, issue and terms of floodplain access licences, especially by means of appropriate regulations and water sharing plans. But the policy merits of those legislative choices are outside my brief.

14 It is no longer meaningful to regard the repealed *Water Act 1912* as a source of law in relation to floodplain harvesting. In this sense, Question 4 asks an impossible question, or at least a fatally anachronistic one. On the other hand, consideration of the previous regime, before WMA, may marginally inform the interpretive approach to the offence provisions of

WMA, as I have discussed some aspects of them in 11 above. That said, it remains obscure, to put it mildly, whether the *Water Act 1912* said anything at all, let alone in terms of criminal offences, about floodplain harvesting. That prompts two observations. First, obscure (or frankly invisible) statutory provisions are not the stuff of criminal offence imposition. Second, it could not be clearer that generations of governmental attitudes to floodplain harvesting, while the *Water Act 1912* governed, were uniformly to the effect that it was not an unlawful activity.

15 It follows that the proper answer to Question 4 is "Yes, it appears floodplain harvesting was a not unlawful (ie was a lawful) activity while the *Water Act 1912* governed the position.

16 Question 5 concerns floodplain harvesting works constructed without approval. Is such conduct an offence under sec 91B WMA? I proceed by treating the works in question as, primarily, what sec 91B calls "a water supply work", a term defined in WMA's Dictionary to include, amongst other things, a work such as a dam for the purpose of capturing water, any work such as a bank that could have the effect of diverting water flowing to or from a water source (such as a river), or any work such as a weir that could have the effect of impounding water in a water source. These are definitions that are very likely, in my opinion, to encompass many of the works that are commonly used to harvest water from floodplains.

17 Answering Question 5 therefore requires consideration of whether sec 91B WMA applies to such works in connexion with floodplain harvesting. That depends on the operation of sec 88A WMA. Again, there are many proclamations made for this purpose. Fortunately, according to the DPIE advice in my brief, the regulated 2004 and unregulated 2012 representative proclamations (see 5 and 8 above) address the application of Part 3 of Chapter 3 (in which sec 91B is found) in terms essentially the same as the application of Part 2 of Chapter 3, discussed above. For the same reasons, adapted to the concepts of constructing or using such water supply works, as I have explained above, in my opinion it follows that the construction of so-called floodplain harvesting works without approval is not an offence under sec 91B WMA.

18 In the upshot, the answer to Question 6 is straightforward. 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. That is, of course, not the same as suggesting that this is a desirable state of affairs – but that is a question of policy for legislators.

19 In the advice given above, particularly concerning the answer to Question 1, my conclusions did not turn on the arguably limited notion of what is involved in a prohibited taking of water within the meaning of sec 60A WMA. I am familiar with the lawyers' talking point of "passive taking" – but I do not regard it as a useful oxymoron, or at all in the interpretation of these penal provisions. In particular, I doubt whether any case of activity by which floodwaters are shown to be have been used (in any factual sense) could be other than a relevant taking.

20 Floodwaters in nature flow, percolate, soak and evaporate. If they be in natural depressions, they may persist longer than on more elevated ground. All this is ponderously obvious. It leads to these observations. First, any conduct by which the natural modes of dissipation of floodwater are interrupted or even prevented, in order to use the water for farming or grazing, will amount to a taking. Equally, the removal or diversion of naturally pooled and relatively persisting floodwaters for such productive use will be, in my opinion, plainly a relevant taking. It does not require artificial works, let alone elaborate ones, for this to be so. It all depends on highly particular facts, on the ground and in the water.

21 I would therefore, respectfully, deprecate any continued worry about the idea of "passive taking" as a problem of the applicable criminal law.

22 There are four parts to Question 7. As to the first, the words of para 3 of the *Harvestable Rights Order – Eastern and Central Division* (**HRO**) gazetted under sec 54 WMA on 16th March 2006 are, in my opinion, to be read collectively. That is, the landholder's right to capture 10% of the average regional rain water run-off is limited to that 10%, regardless of how many dams, if more than one, are used to effect such capture. There is no other way sensibly to understand this exercise of power under sec 54 WMA, given the objects and evident purpose of WMA.

23 Sub-question 7(a) asks about the HRO's Schedule 2 and its exemption of dams – in relation to the storage being located on minor streams. The exemption is from para 3, which permits activity by way of dam capture where the dam or dams "are located on 'minor streams'". Clearly, exemption from the effect of para 3 is largely so as to remove the 10% run-off volumetric limit. The provisions of para 6 of the HRO, that pick up Schedule 2,

therefore exempt dams on minor streams (only) from that 10% limit, depending on them falling within one or other of the cases specified in Schedule 2.

24 The answer to Sub-question 7(b) appears to involve item 3 of Schedule 2. (It may be that item 4 parallels the concern about contamination.) Be that as it may, in my opinion, the word "solely" in item 3 of Schedule 2 limits the nature of the water lawfully captured in such a dam to the character of "Drainage and/or effluent". Only if, and to the extent that, rainfall run-off is properly so described (as I imagine in some circumstances it may well be) can it fall within this aspect of the exemption from para 3 of the HRO.

25 The same reasoning applies to the answer to Sub-question 7(c): "No". There is nothing "unrestricted" about this position – it relates "solely" to "drainage and/or effluent".

26 Question 8, it must be said, pushes at the limits of counsel's advice to the Select Committee as part of the Legislative Council's processes. Policy, I hope, will never be the specialized reserve of lawyers. Although I do have strong policy views, some of which can be gauged by reading my report as the Commissioner for the South Australian Murray-Darling Basin Royal Commission. So my lawyer's response to the large question – "How best can the practice of Floodplain Harvesting be legislated" – is to advise clarity, justice and workability.

27 My policy views, which the Select Committee, I think, does not seek in a paying legal brief, are rather more detailed. A starting point, yet crucial, is the need for real, testable and publicised descriptions of the actual nature and extent of the practice. It would profitably turn a special focus on the c1994 witching hour of the Cap. It must involve serious, continuing and adaptable consideration of environmental values and indigenous interests. And, of course, stringently monitored measurement. I apologise for the preaching tone, but the subject-matter very obviously transcends the language of lawyers' law.

28 If I have misunderstood the intended ambit of Question 8, I am very willing to correct that when I give evidence, as I understand has been arranged, to the Select Committee.

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15th September 2021 Bret Walker