Responses to Questions on Notice of Select Committee on Floodplain Harvesting

1. **Is there a legal basis for increasing the BDL and SDL to create new floodplain harvesting entitlements if FPH was not part of the legal frameworks at 94 (Cap) or 2009 (BDL)?**

The short answer is, no.

There is no legal basis to include unauthorised floodplain harvested water within the Cap or BDL. Only the volume of water which was being taken pursuant to a right or authorisation of NSW as at 30 June 1994 is within the Cap (as defined in the *Water Act* 2007 (Cth)).

The practice of floodplain harvesting was an offence in 1994 if a structure was used (without an exemption). Where no structure was used (or some other basic landholder right was applied to the take of water) it was possible to floodplain harvest water. This meant that the vast majority of water which was floodplain harvested (and now intended to be licensed by NSW) on 30 June 1994 was not taken lawfully.

The BDL in the *Basin Plan* 2012 (Cth) is limited to the volume of water that was being taken pursuant to a right or authorisation of NSW (ie. permitted under state water management law) as of 1 July 2009. On 1 July 2009, there was no legal right to floodplain harvest in NSW – unless it was done pursuant to another licence or authorisation.

Section 341 of the WMA made the practice of FPH an offence until it was repealed on 1 January 2009. This offence provision was reinserted into the WMA as section 60A in Part 2 of Chapter 3. Consequently, from 2000 until 1 January 2009, it was an offence to floodplain harvest in NSW with a corporation facing a fine up to $275,000 per instance and $132,000 for each day that it continued to floodplain harvest without a licence.

The change to the WMA on 1 January 2009 gave a protection to floodplain harvesters from prosecution under the WMA for this offence – however, it did not give landholders a positive legal right to take water.

If the intention of the Parliament of NSW was to give a blanket exemption to the take of water by floodplain harvesting then it is expected this would have been articulated. For example, NSW expressed this intention when it gazetted the *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020* (**FPH Exemption Regulation**). If floodplain harvesting was lawful without a licence or other authorisation, NSW would have had no necessity to introduce the FPH Exemption Regulation. Furthermore, the contention that NSW allowed an unlimited form water take to occur with no oversight or regulation is in direct conflict with decades

of intergovernmental agreements and public declarations to protect and restore the environment and Murray Darling Basin.

Consequently, whilst floodplain harvesting was not an offence on 1 July 2009, the majority of water being taken via this practice was not taken lawfully. It is this unlawful volume that has no legal basis to be considered as part of the BDL.

2. **Is it your understanding that the BDL and SDL are linked to each other or separate independently calculated volumes?**

The BDL and SDL are not directly linked. The only relevance that each figure has to the other, is that it is accepted that the SDL is less than the BDL.

The limits are calculated separately and independent to one another. This is because the BDL refers to an amount of water calculated to have been taken under state water management law as of 1 July 2009. Conversely, the SDL refers to the environmentally sustainable level of take.

Consequently, an increase to the BDL does not automatically create an increase to the SDL because they are not directly correlated.

3. **Will the Emergency Works Exemption allow for the diversion of overland flow without a licence?**

Yes. The Emergency Works Exemption (**EWE**) permits the building of structures and/or taking of water without a licence or approval.

a. **Is there anything in the emergency works regulation that would prevent an individual from storing water captured under the regulation indefinitely?**

No. There is no provision within the EWE which prevents an individual from storing water indefinitely. There is no guidance or rules around dewatering following a self-determined emergency event. Consequently, if the rainfall runoff exemption is introduced, water collected pursuant to the EWE may be released into tailwater drains at a subsequent date and would be non-discernible with other rainfall runoff which can legally be reticulated into storages without being attributed to a licence.

The justification used by NRAR in its EWE factsheet is that *it is in their interest to remove as much water as possible, as quickly as possible:*

> There is no limit on the volume of water that can be removed. It is expected that the minimum volume possible will be removed in order to fix the emergency situation. This acknowledges that emergency stations and dewatering activities cause delays and costs to corporations, councils and businesses. It is in their interest to remove as much water as possible, as quickly as possible.

As the Committee is well aware, the art of floodplain harvesting has been developed because it is in the interest of the landholder *to keep* (not remove) as much water for as long as possible. There is no disincentive to go against the NRAR "expectation".

Importantly, NRAR was created to enforce compliance. Not to simply expect compliance. The following is from their website:

> NRAR was created to change the water compliance landscape in NSW. We are here to ensure that water laws are enforced so that communities and the environment get their fair share of our state's precious water resources.
>
> We serve the people of NSW. As a community owned resource, we need to ensure the NSW community has confidence their water is used lawfully and is shared according to agreed plans.
>
> To build this confidence, we have put boots on the ground all over NSW - initially to take stock of the situation and build our understanding of the compliance landscape, and more recently to assist water users on their pathway to compliance and penalise those who wilfully break the law.

Importantly, even in the event that a landholder abuses the EWE and fails to meet NRAR's expectations, NRAR have minimal coercive options to encourage the landholder to adjust their practices and the public may once again be forced to wait for a 4 Corners episode (such as "Pumped") to motivate the Government to take some action.

b. Could an individual store water under this regulation and then apply it to a water entitlement in a later water year?

Yes. There is no requirement to apply water collected under the EWE to a licensed entitlement in the water year that it is collected. There is also no requirement to meter this form of take and as such, NRAR is restricted in taking action against a landholder for misreporting the volume.

c. Would this allow an individual to use the reg to capture water they otherwise would have not been able to under their current entitlements?

Yes. The EWE provides an incentive to capture additional water in flood events (which in most circumstances would satisfy the definition of an emergency) and hold this water until such time as the landholder can determine:

i. if they should add it into their storages; or
ii. simply allow it to evaporate (ie. to leave it on a part of the property as a form of "pre-irrigation").

It is worthwhile noting that 1ML of water can produce between $600 to $1,200 in profit to a landholder. Accessing an additional 100ML of water could provide a conservative benefit of $60,000 (to $120,000). An extra 1,000ML may boost a landholders profits by $600,000 (to $1.2 million). There is no reason for a landholder to release water taken under the EWE for no benefit, whereas

there is a large incentive to retain it – even if it is just to convert it to a licenced entitlement in a subsequent water year if there is low water availability.

4. The 500% carryover would allow up to 1,729 gigalitres of water to be extracted by floodplain harvesting in a single year, does this conflict with the sustainable diversion limit?

This volume conflicts with the current sustainable diversion limit (**SDL**). It is not permitted under the current SDL which is why NSW propose to amend the SDL in order to provide for the ability to licence this form of take whilst having minimal effect on other licences.

Water that spreads out onto a floodplain, even if it does not return to rivers and estuaries has an important environmental benefit. The contention that this water was somehow "lost" to the system and should therefore be licensed for extraction by landholders directly conflicts with the premise that the sustainable diversion limit is the "environmentally sustainable level of take".

5. How would the licencing of floodplain harvesting volumes over the existing limits impact on planned environment water?

By licensing the proposed volume of water for floodplain harvesting take, more water will be required to be recovered in northern NSW valleys (and other parts of the Murray Darling Basin) for the protection and recuperation of the floodplain ecosystems and also for the ongoing contributions of the Darling Baaka River to environmental endeavours at the end of the Murray Darling Basin.

The southern basin has already supplied 85% of the water recovered for the environment in the Murray Darling Basin. The system has constraints which mean that it is not physically possible to move the current amount of PEW to the key sites identified at the bottom of the system. As a consequence, the environment will be negatively impacted.

6. In light of Mr Walker's evidence on Friday 24 September, do you think NRAR should police current floodplain harvesting extractions until licences are granted?

Mr Walkers SC was unequivocal – water taken in NSW without a licence or right, is unlawful. He referred to the "Australian system" whereby water is controlled by the people for the people. To take this resource absent any right, is theft. It is theft from the Crown, the people and from the environment.

If NSW genuinely wishes to address the outcomes of the ICAC inquiry into complaints of systemic non-compliance with the WMA including errors in proper water administration and the long list of criticisms from other stakeholders within the Murray Darling Basin, it must communicate that no floodplain harvesting can occur until such time as a solution is found. To allow FPH to continue unabated is a poor reflection on the willingness of NSW to achieve positive outcomes from this long and difficult process of water reform in NSW and Australia.

The lack of willingness by DPIE to commit northern NSW irrigators to the same level of restrictions imposed upon their southern counterparts is made clear by Minister Pavey in the recent headline "We stuffed up water policy for the bush". This is a form of buyer's remorse that leaves southern NSW valleys paying the price for petulant landholders in northern NSW who are unwilling to contribute to the Basin Plan if it means they are adversely impacted.

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EXCLUSIVE

Melinda Pave promises to lear from past mistake in the Meninde Lakes. Picture Richard Dobso

Minister: We stuffed up water policy for the bush

DAM FOOLS

CLARE ARMSTRONG

NSW has rejected a decade of pressure to conserve water in the Murray Darling Basin at all costs, slamming the state of the plan as "environmental vandalism".

In a dramatic move to end the bitter water wars, NSW Water Minister Melinda Pavey told The Daily Telegraph governments got it wrong in 2012 when they carved up the river system and demanded savings in places where it "just wasn't possible" to do so.

"Locals told us from the start this was wrong and they were right," she said. Ms Pavey vowed to learn from past mistakes, committing to work with locals to develop alternate ways for NSW to meet its water saving targets, instead of imposing plans developed by city bureaucrats.

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7. During the hearing, the committee received evidence that suggested the SRI had sought and received legal advice from Mr Bret Walker SC.

a. Is this correct?

SRI sought the opinion of Bret Walker SC on various matters relating the issues before the Committee.

b. Is the advice in written form?

Some of the advices received are in written form.

i. If so, are you able to provide that advice to the committee?

Please find the relevant advice enclosed herewith. SRI notes that this advice was provided to the Committee under compulsion and this is not a waiver of legal professional privilege that it may wish to exercise with respect to any litigation in the future.