Supplementary Submission No 20a

INQUIRY INTO IMPACT AND IMPLEMENTATION OF THE WATER MANAGEMENT (GENERAL) AMENDMENT (EXEMPTIONS FOR FLOODPLAIN HARVESTING) REGULATION 2020

Organisation: Southern Riverina Irrigators

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SRI supplementary submission to the NSW Regulation Review Committee for the Impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

The following submissions are in addition to the initial submission of SRI to this Committee and are in part, in response to the matters which other stakeholders have raised to the Committee.

In the submission of Border Rivers and Fibre they note that some of the unapproved applications that are being relied upon by irrigators date back 30 years. This is an unbelievable statement, because the Committee is being asked to allow a Regulation to permit, without any review or supervision, any number of applications that date back as far as thirty years (possibly further – does anyone know?).

This is akin to me applying to NSW for a job 30 years ago (or at any time since) and assuming that even if NSW didn't approve (nor reject) my application, I was employed. This is a very warped logic. The onus is on the applicant to make sure that they have their application approved or denied before they commence the works or taking water. We all get busy in our day to day lives, but to allow 30 years to pass by appears excessive and only underlines the importance of why this issue needs urgent attention, not urgent relief via the Regulation.

If NSW is to accept these applications as being legitimate then it is, in effect, endorsing a policy or culture of "it is easier to seek forgiveness later, than ask for permission now" (**Forgiveness Later Policy**). It is unclear how far the Forgiveness Later Policy would extend and if irrigators in other parts of the Basin would therefore be legally permitted to act in such a manner by virtue of this precedent.

In its submission, Cotton Australia also emphasises the position of SRI. If 200GL of rainfall occurs in a valley, and only 150GL makes it into the river system, we must account for the other 50GL.

If we are to believe Minister Pavey, and we have no reason to disagree with her,

> "*Works used for floodplain harvesting have historically been designed to maximise the capture of floodplain water, not prevent or exclude it.*"

NSW admits that there has been a doubling of the number of dams in NSW since 2010. There has also been a corresponding dramatic reduction of inflows into the system. SRI estimates a two thirds annual reduction of water flows at Wilcannia over the past twenty years as opposed to the twenty years that preceded the year 2000. This is a significant amount which requires further and proper investigation.

Following the logic of Cotton Australia, the Government and the relevant stakeholders should be united together to address this issue. If not, the vision and premise of the entire Basin Plan will disappear. It cannot succeed whilst there is large scale and unmonitored water extractions. In the submissions of Naomi Water, the MDBA and Gwydir Valley Irrigators Association Inc (**GVIA**), they appear to support this premise.

The submission of the GVIA supports the position of SRI because it acknowledges that the licencing of FPH will, inter alia:

1. Protect the environment and users;
2. Restrict growth and improve flows (presumably because licencing would significantly reduce the quantity of extractions – as there is no other way to improve flows); and
3. Give communities confidence that not only water volumes but floodplain works will be monitored, with all farms on the floodplain (not only irrigation farms) will have their works inspected to ensure they are compliant to current regulations.

It is worthwhile noting that the Regulation is not required to achieve the above outcomes sought by GVIA (which is consistent with the objectives of other key stakeholders in the northern basin).

In the event that FPH licencing can be resolved promptly, GVIA has not identified why the Regulation is necessary, over and above an acknowledgement that water left laying on a property after a large scale rainfall event should be permitted to use. Even this exemption leaves a large scope available for exploitation and substitution of water classification that is of great concern to SRI.

To date, FPH has been based upon estimates. There is no incentive to provide an accurate estimate because the value of the commodity is so significant. To put it in other words, **this is why the Australian Tax Office does not ask people to estimate their incomes**. Without oversight and

accountability on this point – the rest of the system is being put at risk because there is a significant incentive to underestimate.

Most taxpayers may be gobsmacked by the prospect that the success of a $13 billion investment in the Basin Plan is being left up to, what is in effect, an 'honesty policy' without oversight or accountability – even if NSW deems this to be an "interim measure".

The definition of Passive Take

In the *Temporary Water Restriction (Northern Basin) (Floodplain Harvesting) Order 2020* (**Order**) a new type of "take" was introduced and it was defined as "passive take".

The definition of passive take in the Order was (at 3(b)):

> (b) the take of water by a water management work that cannot be reasonably prevented from taking water due to the nature of the work (passive take).
>
> **Note:** For example, this order does not apply to passive take by on-farm storages, dams, and open channels.
>
> (hereinafter referred to as the **First PT Definition**)

This definition was clarified further in the NSW Northern Basin temporary water restrictions factsheet of 24 February 2020, which stated:

> *Once overland flow on a property has ceased, any water remaining in supply channels and surge areas is considered 'passive take' and this water can be moved into on-farm storage. The decision to not restrict 'passive take' in these orders recognises that water that remains in on-farm irrigation infrastructure after overland flow has ceased will no longer contribute to river flows. We encourage landholders to keep detailed records of any 'passive take' that is transferred to on farm storages.*
>
> (hereinafter referred to as the **Second PT Definition**)

The First PT Definition, especially in light of Minister Pavey's submissions, is extremely broad and of great concern to SRI.

The Second PT Definition is, in our view, a reference to what would have been recovered from rainfall runoff (**RR**) harvesting. For clarity, it would be beneficial if the department could direct us (and the Review Committee) to previous uses of the phrase "passive take" so that its intentions on how it is to be interpreted can be best understood.

The NSW Factsheet: Estimating rainfall run-off and harvesting in the NSW Murray–Darling Basin (August 2019) (the **Factsheet**), provides a definition and parameters for what it considers to be acceptable amounts of RR based upon valley annual rainfalls and land mass.

Furthermore, the Minister's submission is that:

> *"The s.324 Order restricting Floodplain harvesting in the Northern Basin **could not have been** practically achieved **without** the temporary exemption being put in place."*

It is difficult to follow how the objectives of the Order could NOT have been achieved without the Regulation. Certainly, SRI understands that the Order assisted with the mechanics of bringing FPH under the WMA, if only for the purposes of greenlighting them without review (note: the improper reliance upon s400 of the WMA to grant the Regulation is dealt with in SRI's initial submission). However, the objectives of the Order could still have been achieved if NSW clarified that the practice of FPH without a valid/current works approval or licence is illegal – or the extent to which NSW had been advised or had independently determined, prior to the Regulation, that FPH was illegal. Especially in circumstances where legitimate passive take could be defined as per the Second PT Definition provided that it was limited and monitored in accordance with the RR parameters as per the Factsheet.

Therefore, the Regulation was not necessary, or urgent, or beyond the need for proper public consultation.

As we are all aware, there has been a significant amount of land forming works and modifications that have occurred since 1994 on a large number of properties in the northern basin. Whether or

not these works were done with the intention of capturing more water, it would appear that much more water is now being "passively" captured. Indeed, Minister Pavey acknowledges as much in her submission:

> *Works used for floodplain harvesting have historically been designed to maximise the capture of floodplain water, not prevent or exclude it. Without water supply approvals in place (existing approvals are for flood works only),* ***there is no way to condition these works so that they do not take water****. Recognising this, the intent of these restrictions was to prevent floodplain harvesting where it was both possible and practical to do so. The temporary exemption provides legal clarity about the taking of floodplain harvesting through passive take setups.*

In light of the above, it may also assist the Committee if Minister Pavey clarifies which definition of passive take she is referring to in the above quote (and confirm which definition will be adopted by NSW going forward) – the First PT Definition or the Second PT Definition.

It is also the position of SRI that the definitions and classifications used by NSW may disproportionately prejudice irrigators with legitimate and sanctioned FPH operations pre-1994 who could therefore have their future FPH licenced extraction amounts unfairly reduced by these subsequent developments. In such circumstances, the legal basis for reliance by NSW upon a 2008 "line in the sand" may be open to dispute.

Calculating the additional passive and/or active take from FPH

Whilst many millions of dollars have already been spent on metering projects, it is clear that for many (and we do note, not all), of these storages, the surplus water that arrives from these large rainfall events will be comprised of:

1. Water taken pursuant to a supplementary water access licence (which is limited in quantity by the water access licence);
2. Water from RR (which is limited to the land size and average annual rainfall); and
3. Anything surplus to this is floodplain harvested water and/or from a bore.

Using this approach, it seems possible for NRAR to assess how much extra water (beyond what NSW deems is ordinary modelled RR) is being captured due to the land-forming that Minister Pavey acknowledges prevents irrigators from being able to reject inflows. It also follows that RR for each valley would be subtracted from the total amount available for FPH licencing.

Given that the aim of the Cap and the Basin Plan is to return the levels of extractions back to those of 1994 levels of development, it is entirely appropriate that all of the increased extractions (ie. > 94 levels – either active or passive) are returned to the rivers/environment. This was the explicit intention of all relevant Governments throughout the Cap setting (and Basin Plan implementation) process.

It is a deeply perverse outcome if those who have received taxpayer funds to undertake land-forming on their properties, to benefit from the additional water that these works allow them to capture/retain. Water is money after all, and this would result in a perpetual benefit/subsidy to a lucky few at the expense of everyone else within the Basin.

MDBA's submissions

If NSW contend that the Regulation will not have any impact on water users, this is in direct contradiction to the submission to this Committee by the MDBA.

Borrowing from the MDBA's submission (at its second last paragraph):

> *Regarding the impact that the Regulation might have on water users,* ***it would be substantial <u>if</u> the reform agenda is not completed <u>in a timely manner</u>*** *and the above requirements are not included in the interim water resource plans. It should be stressed that the Regulation and the current draft water resource plans that do not include full regulation of floodplain harvesting should be temporary and repealed or amended when the reform agenda is complete.*

Floodplain harvesting has been highlighted by NSW as an area requiring urgent review since at least the State Water Management Outcomes Plan circa 2000 or even dating back to the agreement to the Cap in 1995. Even the infamous 2008 "line in the sand" is now a distant twelve years ago. SRI therefore contends that the MDBA submission confirms that the Regulation will have a substantial

impact on water users because NSW has demonstrated that it cannot implement anything with respect to FPH in a timely manner.

SRI submit that if NSW believe that they can deliver the reform agenda in a timely manner, than they should not be concerned that the Regulation will be disallowed, and it should be focused on the reform agenda.

We note however, that if FPH is authorised to occur on an unlimited basis (as the Regulation proposes), what incentive is there for northern irrigators to agree (in a timely manner) to a licencing arrangement and WSP's which - if limited to the current 210GL which is set out in the Basin Plan – would be drastically less than what is being taken today?

Especially in circumstances where it is unclear how NSW plan to deal with the consequence of those new developments/operations which harvest large amounts of passive take that would effectively acquire (for no cost) the legitimate entitlements of irrigators that pre-date the Cap and who would consequently be unjustly dealt with if they are forced to relinquish their rights on a pro-rata basis to these new developments.

Minister Pavey's views

Minister Pavey says that the "*Regulation provides clarity that certain water users in NSW can undertake floodplain harvesting legally using eligible works until implementation of the Policy is complete*."

In the circumstances, it is appropriate for Minister Pavey to address what exactly required clarity – or what was unclear prior to the Regulation - and furthermore, what advices has she received from the Crown Solicitor with respect to the legality of FPH. Why have these advices not been incorporated into the Minister's submissions? In the interests of transparency and good governance, on what basis would these advices be withheld?

Furthermore, the Minister's claim that "the exemption is a holding pattern only, **effectively halting the potential for future growth in FPH**" supports the submission of SRI for a disallowance of the Regulation. This is because the only way to limit future growth in FPH is to NOT provide exemptions to allow FPH to occur unchecked and unsupervised.

If the Minister is concerned of the possibility of future growth in FPH can she clarify what is the basis for those concerns and how does allowing FPH to occur in circumstances where it was previously not legally permitted, address those concerns?

NRAR

NRAR was introduced to monitor compliance by irrigators with water licence conditions and given that there have been no FPH licences issued, more relevantly their role is to also monitor the compliance of works which could degrade a water source or impact other water users.

In her submission, the Minister refers to how the Regulation will actually assist NRAR, however, to date we have not seen what is the position of NRAR and in the circumstances, it would be quite relevant for them to explain that should the Regulation be disallowed, what position they would take, and why.

Conclusion

SRI submits that the best way to bring this matter to a prompt conclusion is to disallow the Regulation and encourage the stakeholders to finalise and appropriately monitor the FPH licencing process in a transparent and orderly manner that complies with existing rules and regulations already in place that all other NSW irrigators must also comply with, so that all water users have trust and confidence in the system.

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