

INQUIRY INTO FLOODPLAIN HARVESTING

Name: Mrs Helen Dalton MP

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Helen Dalton MP submission – Inquiry into Floodplain Harvesting

My submission to the NSW Upper House floodplain harvesting inquiry will demonstrate:

- Floodplain harvesting is currently illegal under NSW law.
- The NSW Water Minister Melinda Pavey was advised that floodplain harvesting is not permitted under current laws. However, she misled NSW Parliament on 18 June 2020 by telling the public that floodplain harvesting is “completely legal”.
- The NSW Government have acted in extremely bad faith during the process to regulate floodplain harvesting by:
 - Keeping advice on the legality of floodplain harvesting secret.
 - Favouring certain irrigator groups.
 - Excluding downstream, Indigenous and environmental groups from consultation.
 - Inappropriately influencing the supposedly independent water regulator the Natural Resource Access Regulator
 - Ignoring apparent conflicts of interest.
 - Changing the law to allow floodplain harvesting without stakeholder consultation while NSW Parliament was not sitting.
- NSW Government have not provided information to the public to show how their models simulate real flows in the river. The modelling does not measure water that flows or returns from floodplains to rivers and is unable to demonstrate the effects of floodplain harvesting on irrigation and the environment downstream.

Legality of Floodplain harvesting in NSW

Water Sharing Plans for the Namoi, Gwydir and Macquarie Rivers – legal documents that set the rules of how water is shared between irrigators and the environment – all state that floodplain harvesting in NSW is illegal.

The NSW Government have long claimed that the 1912 Water Act allows floodplain harvesting.

However, [a provision](#) in each of these three Water Sharing Plans states:

“This situation has now changed. The Murray-Darling Basin cap applies to all water diverted from inland NSW catchments and rivers... Floodplain harvesting works and water extractions also clearly fall into those activities that the Water Management Act 2000 requires to be only undertaken by way of a licence.”

In full context, the Plans state:

Section 2 Floodplain harvesting management issues

(1) The harvesting of water from floodplains reduces the amount of water reaching or returning to rivers. This decreases the amount of water available to meet downstream river health, wetland and floodplain needs and the water supply entitlements of other users.

(2) Floodplain harvesting can seriously affect the connectivity between the local floodplain, wetlands and the river, through the loss of flow volume and redirection of water flows.

(3) The Water Act 1912 provided powers to license floodplain harvesting. However this was never applied as there was generally no requirement to restrict total overall water extractions or off-allocation diversions. Harvested floodplain water has been treated as a freely available bonus to a farmer's licensed entitlement.

(4) This situation has now changed. The Murray-Darling Basin cap applies to all water diverted from inland NSW catchments and rivers. Licensed and off-allocation access has been subject to increasing restrictions. Embargoes on water licences are also in place on many areas on the coast.

(5) Floodplain harvesting works and water extractions also clearly fall into those activities that the [Water Management Act 2000](#) requires to be only undertaken by way of a licence. The Act also requires such licensing to consider the ecological functioning of floodplains.

(6) Floodplain harvesting can no longer be left outside of the State's water management and compliance system or as a source of increase in further water extractions. Given this, it is the Government's intention that floodplain harvesting works and taking of water from floodplains be licensed and managed. It will take a number of years to complete the process. However, the water sharing plans must signal the basic principles that will govern the process.

Given the NSW Government has not issued any floodplain harvesting licences, floodplain harvesting is not legal under current laws.

In providing advice to the NSW Government, NSW Government bureaucrats have indicated floodplain harvesting is illegal.

At a Cross-agency meeting on 10 January 2020, the Department of Planning, Industry and Environment's director of water programs and performance, , said: "If you don't have basic rights or an exemption, there is no ability to legally take water."

NRAR wouldn't act on policy intent therefore compliance breaches could occur. flagged in October-November 2019 this was a live issue for industry and other stakeholders and the Minister asked that a draft regulation be developed. apologised for the late circulation of the paper (copy of regulation). A brief and draft regulation are in the approval process to be sent to the Minister.

asked what level of awareness harvesters have of compliance risk? I said very high. The Project Team visited the Northern Basin early November 2019 and met with representatives from the five valleys. A representative from NRAR was also present and was very clear that NRAR would be enforcing the law.

said the action plan has implementing licencing on 1 July 2021. This is a stop measure until this date/switch on.

asked if there was a floodplain harvesting event in the interim, what are the conditions NRAR look at in terms of, if no metering/measurement arrangements, water can't be taken? I said generally yes. If you don't have basic rights or licence or an exemption, there is no ability to legally take water. The regulation would put an exemption in place while completing the licensing reform. I said out of session discussions are welcome from group members should they have further questions.

moving through approvals at the moment. Not expecting Minister to take an immediate decision.

ACTION 01.01 RWSOG members can provide feedback on the draft regulation to
17 January 2019.

by Friday

The NSW Government hid this information to the public. It was obtained through an Order of Parliament by Shooters, Fishers and Farmers Party MP Mark Banasiak.

Despite knowing this advice, NSW Water Minister Melinda Pavey told [NSW Parliament that floodplain harvesting is "completely legal"](#) in response to a question by me on 18 June 2020.

In October 2020, the NSW Government [received legal advice](#) stating, "the better view is that generally, the taking of water in the course of flood-plain harvesting, without an access licence, from an unregulated river water source that is covered by a water sharing plan would constitute an offence."

The NSW Government once again hid this advice. It was only released after lobbying from NSW Independent MP Justin Field.

It's very difficult for the public to trust the NSW Government process for regulating floodplain harvesting given they keep lying and hiding information.

NSW Government's selective consultation, favouritism and influence over regulator

The NSW Government have acted in extremely bad faith during their process to regulate floodplain harvesting.

Attachments A to F to this submission demonstrates:

1. NSW Governments favour certain groups and exclude others in consultation.
2. NSW Government inappropriately influences the supposedly independent Natural Resource Access Regulator (NRAR).

The NSW Government have often introduced new regulations regarding floodplain harvesting on a Friday without prior warning, parliamentary scrutiny or consultation.

The NSW Government have also failed to deal with apparent conflicts of interest.

The selective consultation, favouritism, lack of transparency and apparent conflict of interests in the NSW Government's process to issue licences for floodplain harvesting have been exposed in several recent emails from senior bureaucrats at the Department of Planning, Industry and Environment (DPIE).

The ICAC Report Investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the Water Management Act 2000 criticised DPIE's "preferential treatment of irrigator groups", "favouritism" and "sidelining of parties that do not represent [Northern Basin] irrigators' interests".

A DPIE email chain dated 26 November 2020, inadvertently released to the public, reveal this is all still happening (see Attachment A).

In one email, DPIE's Water Relationships Manager warns against sending a floodplain harvesting social media kit to Southern Basin organisation Murray Regional Strategy Group until he knows their background.

DPIE then excluded Murray Regional Strategy Group from the list that received the email.

In another email, a Senior Communications Officer warns against providing information to the Darling River Action Group, as they "tend not to be favourable to DPIE Water".

A further email revealed NSW Irrigations Council and NSW Farmers have regular fortnightly meetings with DPIE. There are no public records of these meetings.

By contrast, DPIE has consistently refused to meet with groups representing the Southern Basin, and in fact will not even respond to their emails.

Further DPIE emails, released through an order of NSW Parliament by Independent MLC Justin Field, provide evidence of political interference of oversight bodies and preferential treatment for select groups.

Attachment B is an email sent from a DPI official to the state's water regulator, the Natural Resource Access Regulator (NRAR), confirming an NRAR opinion piece in The Land newspaper needs approval from NSW Water Minister Melinda Pavey's office.

NRAR is supposed to be an independent oversight body free of Ministerial interference. The NRAR opinion piece itself strongly echoed the policy and campaign positions of the NSW Government.

Attachment C is an email sent from a DPIE official, suggesting the department were trying to justify the economic benefit of floodplain harvesting, on behalf of Northern Basin irrigators. Nevertheless, the email highlights a figure \$400 million, which is well below the estimated cost of floodplain harvesting to the taxpayer.

There has been no transparency from the NSW Government on the cost and benefits of floodplain harvesting licencing to the NSW taxpayer.

Attachment D is an email from a DPIE official suggesting public consultation on a new floodplain harvesting regulation would be an

“advantage” for Northern irrigators, as it would reduce the likelihood of NRAR prosecuting them for illegally taking water.

This inquiry provides an ideal opportunity for the NSW Government to be questioned over the content of these emails.

There are also question marks over the Healthy Floodplains Review Committee, which was set up by the NSW Government to provide advice and recommendations on floodplain harvesting.

The NSW Farmers Association requested their representative, Tim Duddy, be taken off the Committee, but for some reason NSW Government failed to adhere to this request for eight months.

There are also no published details of any conflicts of interests Committee members may have, including whether they or their family will benefit from the granting of floodplain harvesting licences.

Emergency works regulation (that had nothing to do with floodplain harvesting)

A key example of the NSW Government’s dishonesty and bad faith was the surprise law change it made in February 2021.

On Friday 26 February, the NSW Government published the Water Management (General) Amendment (Emergency Works Exemption) Regulation 2021.

The legislation, which became law immediately, gave landholders the right to divert overland flow water in an emergency event (such as a flood) without a water licence.

This appeared to be a sneaky backdoor way to legalise floodplain harvesting, allowing irrigators to take water during a flood for free, unlicensed and unmetered.

The NSW Government [made a similar law change in February 2020](#), causing outrage from downstream communities

Once again, this regulation was published (and made law) the day before heavy rains were forecast in the state's north-west. It was again published while NSW Parliament was not sitting.

The NSW Government claimed the legislation had nothing to do with floodplain harvesting or irrigation. They claim the purpose of the regulation is to allow councils, rail corporations etc to remove water to stop a construction site being flooded in urban areas.

However, there was nothing in the legislation that excludes irrigators.

In Budget Estimates, NSW Water Minister Melinda Pavey and her bureaucrats [confirmed that under this regulation, an irrigator could take an "unlimited" amount of water](#) in an emergency event such as a flood, ostensibly to protect infrastructure from damage.

The NSW Government has pointed to a clause in the regulation that forbids the water from being used for commercial benefit.

However, when asked in Budget Estimates how the Government could enforce this, the NSW Government said it would be up to the irrigator to self-report to the regulator (NRAR).

In summary, the regulation gives irrigators the ability to take an unlimited amount of water and provides no way to effectively police or punish the use.

There was no public consultation on the legislation beforehand. The introducing of the legislation shocked politicians and farming groups alike. NSW Parliament MPs were not informed, nor were the Environmental Defenders Office, Nature NSW or any Southern Basin farmers.

The NSW Governments needs to engage in meaningful consultation with all groups before changing laws that impact on floodplain harvesting and irrigation.

Problems with the NSW Government's floodplain harvesting plans

The NSW Government plans to regulate floodplain harvesting are undermined by the following:

- There is no information available to the public to show how the models simulate real flows in the river. The modelling does not measure water that flows or returns from floodplains to rivers and is unable to demonstrate the effects of floodplain harvesting on irrigation and the environment downstream.
- The Commonwealth Government has interpreted the Water Act 2007 and the Basin Plan in ways that allow the Basin Plan to be amended without Parliamentary review or public scrutiny,
- Quantified limits to extraction have been removed from the Basin Plan and are not included in proposed new Water Sharing Plans,
- NSW Water Sharing Plans have been decoupled from the Basin Plan,
- The volume of floodplain harvesting proposed exceeds both the Cap (1994 limits on extraction) and the limits in the NSW Water Sharing Plans,
- There is no consideration of the effects on people, communities, industries or the environment downstream.

Floodplain harvesting has never been licensed, measured, or regulated.

The NSW government claims that licensing floodplain harvesting is part of the process of bringing take within the Cap but has not been able to show how this can be done.

Metering, modelling and enforcement of floodplain harvesting extractions, and by extension all water use in the Northern Basin, is not fit for purpose.

Water management in NSW, especially in the Northern Basin, is undermined by misdirection, and poor information and lack of clarity and openness. Communities are confused and disheartened.

What needs to happen now

Before floodplain harvesting is licensed and regulated the following conditions should be met:

- The NSW Government must consult with all stakeholder groups, including Indigenous, environmental and Southern Basin stakeholders;
- Amendments to the Basin Plan to incorporate floodplain water harvesting must be subject to Parliamentary review and public scrutiny;
- Compliance with the Cap and the Sustainable Diversion Limit must be subject to robust governance, including independent review, transparent reporting and enforcement,
- NSW Water Sharing Plans must include quantified extraction limits that relate directly to the Basin Plan,
- Improvements to the measurement and estimation of water extractions must:
 - be subject to genuine independent verification;
 - meet statutory requirements;
 - include a thorough, independent analysis of downstream environmental, social and economic effects,
- Models must be improved, use better information and be able to assess downstream effects on other water users and the environment.
- Extractions must not exceed the environmentally sustainable level of take.
- Schedule E of the Murray-Darling Basin Agreement must be retained. Schedule E gives defines and gives effect to the Cap.

ATTACHMENT A

From: [REDACTED]
Sent: Thursday, 26 November 2020 10:42 AM
To: [REDACTED]; [REDACTED]
Cc: [REDACTED]
Subject: Re: Social media kit for your networks to share

Can we discuss before you send to that group. You need the background on them.

Water Relationships, Office of the Deputy and Strategic Relations

Water Group | Department of Planning, Industry and Environment

From: [REDACTED]
Sent: Thursday, 26 November 2020 10:40 AM
To: [REDACTED]; [REDACTED]
Cc: [REDACTED]; [REDACTED]
Subject: RE: Social media kit for your networks to share

There is a southern groups that SDLAM liaises with...

Murray Regional Strategy Group

[REDACTED]

I think it would be worth considering sending the pack (even if they only use the email text) a bit wider...eg to that list we pulled together for Dan about the amendment?

Director Communications, Water

ATTACHMENT B

From: <[REDACTED]>
Sent: Thursday, 26 November 2020 10:03 AM
To: <[REDACTED]>;
<[REDACTED]>
Cc: <[REDACTED]>
Subject: Re: Social media kit for your networks to share

Hi

I spoke to [REDACTED] about him distributing the social/digital content and he is happy to look after it, however it would only be a small group that would have the capability to post the social tiles and have a regular newsletter with their members. He also have regular catch ups with these groups and could raise it during the meeting.

He recommended:

1. NSW Farmers Association
2. NSW Irrigators Council
3. Murray Darling Association

These groups have broad networks across regional NSW. There are small stakeholder and water user groups, but most would not have the capability for social media tiles. There are dedicated facebook pages, eg Darling River Action Group, but those groups with such facebook pages tend not to be favourable to DPIE Water.

He said most people hear about the event from either 1) local adverts (both press and radio), 2) local associations (local divisions of NSW Irrigators and NSW Farmers, and 3) word of mouth.

Let me know if you're happy for him to proceed with sending this out to the above contacts.

Thanks,

Senior Communications Officer

ATTACHMENT C

From: [REDACTED]
Sent: Tuesday, 24 November 2020 5:38 PM
To: [REDACTED];
[REDACTED]
Cc: [REDACTED]
Subject: Re: Social media kit for your networks to share

Hi

No worries, I'll chat to [REDACTED] tomorrow.

I don't think it'd go to all recipients on that stakeholder list - he usually passes it on to key industry groups like Irrigators Council and Farmers Association and then raises it at his fortnightly meeting with them.

I'll ask him to send over a list of stakeholders he'd recommend we pass this on to and we can add any other key groups that are missing.

Thanks,

Senior Communications Officer

ATTACHMENT D

RE: The Land OpEd

From: [REDACTED]
To: [REDACTED]
Date: Mon, 12 Oct 2020 00:59:07 +0000
Attachments: Land OpEd FINAL - GS Questions.docx (20.48 kB)

Hi ladies,

A couple of questions in comments in the attached – can you please review and advise?

And re [REDACTED]'s response – happy to discuss with yourselves and Grant her advice that MO would need to approve an NRAR op-ed.

Cheers,

Communications Manager Metro Water & NRAR

[REDACTED]
From: [REDACTED]
Sent: Monday, 12 October 2020 9:52 AM
To: [REDACTED]

Subject: The Land OpEd

Hi all,

Please see attached final copy of The Land OpEd to be pitched today after approval. I have actioned all feedback but [REDACTED], please give it a read and let me know of any further changes as this is my first OpEd so am still learning the ropes.

Here are the two statements I referred to for the OpEd:

ATTACHMENT E

From: [REDACTED]
Sent: Tuesday, 27 October 2020 3:43 PM
To:
Cc:
Subject: RE: FPH oped
Attachments: DRAFT OPED FPH regulation disallowance.docx

Hi

See attached for your review. Please note [REDACTED]'s comments for clarity.

I haven't been able to get jobs or economic output figures beyond the \$400M for the North. But [REDACTED] at the Land has contacted NRAR (see email from 5 mins ago) and we could weave info about metering requirements into this if you think it will help dampen the north/south debate.

Give me a call if you want to discuss.

Thanks

ATTACHMENT F

From: [REDACTED]
Sent: Friday, 9 October 2020 8:55 AM
To: [REDACTED]
Subject: FPH brief

H

I just had a quick skim through the FPH brief in CM9.

I'd suggest it's worth noting in the brief that an advantage of publicly consulting on a new regulation is that this is something that NRAR would likely consider when exercising its regulatory discretion (eg if they consider a work to be unlawful, they would be unlikely to seek its removal if it was clear it will imminently become lawful).

Also, do [REDACTED] have specific advice from PCO about what types of regs would likely fall foul of the "substantially the same" test? Eg from the brief it would appear that something like an excluded work provision would not be allowed, but how different does it need to be? Eg sunset clause, restricted volume, reporting to NRAR etc. I'm sure you've considered this but if specific advice is available that would be helpful.

Regards