Supplementary Submission No 149a

INQUIRY INTO FLOODPLAIN HARVESTING

Organisation: Southern Riverina Irrigators

Date Received: 2 November 2021

Supplementary submission to the Select Committee on Floodplain Harvesting

SRI wishes to take the opportunity to address some further points to the Inquiry which arose from the evidence given by Bret Walker SC and the curious interpretation by NSW and some stakeholders to it.

Legality of the Amendment of the BDL / SDL

The position of NSW DPIE (and MDBA) and can be summarised as:

> the BDL can be increased to reflect changes in "best available information" and therefore the SDL can be increased by a proportionate volume to reflect this better "accounting".
>
> And
>
> The BDL can be increased by the amount of water estimated to have been taken by landholders in excess of any licensed entitlement, as at 1 July 1994 and the total volume of these unlicensed diversions should be included within Cap *and* the SDL.

In evidence to the Upper House Parliamentary Inquiry of Floodplain Harvesting, Walker SC made it clear that this interpretation is defective:

> If it means that the SDL floats around by reason of better intelligence being found, then that is simply wrong. The law stipulates otherwise concerning the adjustment of an SDL.

Under compulsion by this Committee, we have enclosed a joint Memorandum of Advice of Bret Walker SC and Sebastian Hartford Davis dated 24 September 2021 and therefore do not waive any right to claim legal professional privilege with respect to it or any related documents. In this Advice, Walker SC states the above position adopted by the MDBA (and consequently NSW) is "unlawful" and is open to be challenged.

Relevantly, the advice of Walker SC concludes:

> A State licensing regime that was inconsistent with (because it purported unlawfully to increase, or assumed an unlawful increase) the SDL established in the Basin Plan would arguably be inconsistent with the Basin Plan under s 109 of the Constitution.
> …
>
> We also note that, by s 34(1) of the *Water Act*, the MDBA, and other agencies of the Commonwealth must perform their functions, and exercise their powers, consistently with, and in a manner that gives effect to, the Basin Plan. Section 35(1) of the Act prohibits "an agency of a Basin State" (which would include DPIE) doing an act in relation to Basin water resources if the act is inconsistent with the Basin Plan, or fail to do an act in relation to Basin water resources if the failure to that act is inconsistent with the Basin Plan. To amend the SDL inconsistently with the Basin Plan would infringe this prohibition.

In other words, the *Water Act 2007* (Cth) is not a vehicle for NSW and the MDBA to change volumes in the Basin Plan as 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.

> **Recommendation: Prior to licensing a volume of water for floodplain harvesting, NSW (and the MDBA) comply with the mechanism for the adjustment of the SDL as set out in the *Water Act 2007*.**

Evidence to the Inquiry by Bret Walker SC

Bret Walker SC was asked by the Committee to provide an opinion relating to floodplain harvesting as an "offence" under the *Water Management Act 2000* (NSW) (**WMA**).

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.

Walker SC also highlighted it is unlawful to take the Crown's property without a legal right or authorisation – something which floodplain harvesters have almost always done.

In contrast, on 30 June 1994 the SRI members who took "off allocation" water (ie. water that was taken without being linked to – or deducted from - a licensed entitlement) were permitted to do so by NSW, using NSW Government infrastructure, facilitated by NSW Government employees and this take was metered.

Despite this key difference, NSW intend 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. As we note below, if this allowance is applied to other NSW valleys there will likely be significant increases in other licensed volumes and diversions.

Case by case analysis required

At the commencement of his evidence to the Upper House Inquiry on Friday, 24 September 2021, Mr Walker SC said he wished to update his opinion to the Inquiry with respect to one point concerning the continuing effect of areas regulated by the 1912 Act. He declared:

> The one other thing I should add—I do not know whether it will come up in an answer to a question—but I have benefitted greatly from a discussion with a colleague, Mr Tim Horne, concerning the continuing effect in the areas still regulated by the 1912 Act. I probably have made an assumption in the way I have written my opinion. The assumption being that I was

> asked to address those matters that are regulated by the provisions that I was asked to address of the Water Management Act and thus understood the questions about the 1912 Act to be, as it were, inquiring about a possible overlap. There are of course areas where the Water Management Act does not reach, so to speak, and the 1912 Act has continued effect. However, I should make it clear that the 1912 Act does not in terms—I stress in terms—address floodplain harvesting.
>
> 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.

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.

Mr Horne, a solicitor representing SRI, raised with Walker SC the requirement in section 21B(1)(a) of the 1912 Act for a licence to be held if water obtained from a work was to be used for irrigation purposes. Walker SC noted in these circumstances it is indirectly an offence of the 1912 Act to take water from flood works for the purpose of irrigation. He explained to the Committee:

> As I tried to explain in the opening statement, it is not possible without having facts of particular cases and circumstances fully to explore the legality of what I will call floodplain harvesting over, say, the last 100 years in light of the 1912 Act because the 1912 Act does not in terms address the question of floodplain harvesting.
>
> If it affects it, it does so indirectly by addressing the question of the use of works for which licences and permits are required.
>
> It gives rise to the question whether it follows that every time one's permitted rainfall run-off dam happens to be filled as well by floodwaters through floodplain flows as opposed to simple rainfall run-off, that your subsequent resort to that water as a farmer or grazier is floodplain harvesting of a kind which is beyond the use for which the dam was constructed. That will be a factual question to which it is not obvious to me at all that there will be a simple yes or no answer consistently, regardless of individual circumstances.

If there was no right or authorisation to take water, irrespective of whether or not it was an offence under the relevant legislation, it is not within the legal limit to the total volume of water that can be taken under the auspices of the *Water Act* 2007 (Cth) and the *Basin Plan* 2012 (Cth).

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 has been said by NSW the volume of water lawfully taken via floodplain harvesting has not been well understood and new estimates correct this deficiency. SRI agrees that it has not been well understood and is cynical of the reasons provided for this lack of understanding (ie. difficulty to accurately measure because NSW has failed to require the installation of accurate and non-tamper proof meters). The enormous financial benefit to those who have taken advantage of this lack of understanding is significant.

SRI does not agree with the current estimates of NSW for the volume of water lawfully diverted on 30 June 1994. NSW are using rainfall runoff estimates as floodplain harvesting volumes whilst at the same time, proposing to exempt rainfall runoff from requiring a licence. Consequently, we challenge the conclusion of NSW its current "Cap scenario" model retrospectively justifies the total volume of water which may have been diverted for floodplain harvesting as of 30 June 1994.

Without transparently conducting the case-by-case analysis recommended by Walker SC, in order to assesses the structures and lawfulness of volumes claimed, NSW will over allocate licences. This is in direct conflict with the objects of the Water Act 2007 which specifically include:

> to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused

Recommendation: A case by case analysis be completed for the structures and volumes for legal and authorised floodplain harvesting as of 30 June 1994 and after adjusting for increases in rainfall runoff capture over the past 27 years, this be included as the legal limit for floodplain harvesting.

The effect of the Cap

The Cap[1] limits the total volume of water for extraction to, amongst other things:

> the rules for allocating water and for operating water management systems

on 30 June 1994.

[1] As referred to in Schedule E of the Murray Darling Basin Agreement, which itself is located at Schedule 1 of the *Water Act 2007*

Even if floodplain harvesting was not an offence under the 1912 Act, there is little doubt the take of water via a work without a licence or permit was, and remains, unlawful and does not come within the legal limit of the Cap.

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.

As we have noted above, no volume of water was lawfully permitted to be floodplain harvested where a flood work without an associated licence was involved. Whilst Walker SC opined that perhaps *some* floodplain harvesting may have been legal, he did not contend this meant all FPH was legal and within Cap:

> 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.

Some floodplain harvesting may come within the Cap and could be made available for licensing. 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.

When addressing whether or not floodplain harvesting water has been allowed by NSW to be freely accessible to all, as if it were common property, Walker SC emphatically declared:

> I myself think floodplain harvesting being treated as an aspect of the commons that is a public resource that anyone can help themselves to as they like, is absurd and totally at odds with the intergovernmental agreements that culminate with the Basin Plan.

Despite this absurdity and the dubious legality of the practice, we understand the view of the Minister is that water taken unlawfully via floodplain harvesting was a freely available and an uncapped public resource. We implore the Minister for Water to heed the warnings of Walker SC because any misstep could paralyse water management in northern NSW for a significant period should the MDBA be forced to intervene. It could also lead to increased diversions in southern NSW valleys should NSW adopt a consistent approach.

The urgency by NSW to rubber stamp nonsensical volumes of water for floodplain harvesting (whilst also exempting rainfall runoff which has always been estimated to be a significantly greater form of take than FPH) defies common sense and good practice. There should be an embargo on all water

extractions by floodplain harvesting until such time as this matter is resolved to the satisfaction of all parties, including the MDBA.

When questioned if the Government of New South Wales wanted to put in place a licensing arrangement for floodplain harvesting that had the effect of allowing the take to exceed the Cap, Walker SC responded:

> It would be unlawful and can lead to action under the Commonwealth Water Act, which ultimately would remove from the State its regulation through water sharing plans, water regulation plans and water resource plans—control over matters within the State. That would be, I would have thought in Federal terms, a very bad outcome. It could also lead to more direct legal consequences, such as injunctions. Yes, it would be unlawful.

Southern Riverina Irrigators have already flagged their intention to take action against the government and given their members current involvement in an action against the MDBA and it will take its grievances to the independent umpire - the judicial system. There is nothing in the evidence of Walker SC to dissuade SRI of such a course of action.

Compensation to impacted licence holders

The question was put to Walker SC by Mark Banasiak as to whether or not Part 8 works approvals, would constitute a property right? Even if they were not a licence.

Walker SC was very direct in his response:

> I am aware of historical material—by which I mean what bureaucrats et cetera thought they were doing—which would actually strongly support what you have asked me to consider; that there was this unfortunate analogy drawn between the permissions, formal or informal, under the Water Act and property.
>
> As a lawyer, I regard that as very sloppy thinking and very unfortunate, but, if I may say so, a forgivable notion—that is, such permissions are plainly valuable. We, as humans in society, tend to regard things which are valuable as property. That is not always true, obviously. So I think you are absolutely right. There has been a cultural tradition rather than a legal one that has seen these things as property.
>
> One of the difficulties about seeing it as property is it then tends to excite people's indignation about it being taken away without compensation. That is very unfortunate because, as you all know better than anyone, so-called water rights are always adjustable according to whether it has rained or not.

When pressed on whether this could trigger compensation, Walker SC was even more direct.

> No. That Parliament would have to provide for that. Parliament could provide for that, but there is no existing right of that kind.

SRI members who held groundwater licences have first-hand experience of this legal principle in action. These members had 67% of their water taken from them by NSW in 2008 for little to no compensation. In contrast to the benevolent position NSW has adopted with its policies around floodplain harvesting, NSW fought against Murray Valley groundwater licence-holders for several years and all the way to the High Court of Australia.

No compensation is triggered if available water determinations to floodplain harvesting licences are limited, however, it is difficult to envision a reduced allocation to FPH licences in a flood. Additionally, in drought years where there is very little water availability, we query on what basis NSW would allocate water to FPH licences (such that they could enliven their "carryover").

If NSW makes an allocation to FPH licenses, it would be contrary to the water sharing priorities in section 58 of the WMA. SRI is sceptical that NSW would continually allocate 100% entitlement to FPH licences over dry years (for the purposes of them being allowed to carry it over) and then reduce the allocation to them in a wet year by way of an available water determination. Alternatively, if there is a suggestion that lower available water determinations would be made to these licences in dry years (when it is expected that no water entitlement could be used), we question why a carryover system exists at all. In other words, the concept of "carryover" in drought years and reduced available water determinations when other licences are also taking water extractions - adds an unnecessary complex layer to water management that is potentially catastrophic. If a flood is a one in five year event, and water managers allow significant over extraction in the first two flood events, it will be approximately 15 years before the floodplains and associated eco-systems receive the volumes of water the Basin Plan envisioned. In the Barwon Darling there is no precedent for making available water determinations to reduce supplementary entitlement. It has occurred in two northern NSW valleys as an acknowledgement of the unlawful over extraction by FPH with no licence or entitlement, and in the water year which followed a significant wet year (with storages filled and no requirement for further supplementary water). It is inevitable that if there has been an over-allocation of licences for this form of take, the water sharing plans will need to be re-worked and licences cancelled.

Should NSW subsequently determine it wishes to correct an overallocation of FPH licences and amend water sharing plans, it will trigger compensation to floodplain harvesters. It is an extremely inequitable process to reward those who never obtained a licence or legal right to floodplain harvest with a compensable property right, when other irrigators who held valid legal licences (such as Murray Valley groundwater) received nothing for the loss of theirs.

Recommendation: One set of laws and practices for all water users in NSW. Consequently, no compensation for a reduction in floodplain harvesting licence volumes by NSW

OR

a review be conducted into the compensation applicable to all other licence holders who have lost access to volumes of water (ie. groundwater or off-allocation) due to changes in Government policy or environmental flow/allocation rules since 1 July 1994.

Can NSW extricate itself from the Basin Plan

Walker SC was unequivocal in his view that:

> States don't get a choice as to whether they comply with applicable Commonwealth legislation. They are bound.

NSW must conform and would be taking a huge risk by ignoring the legal framework and requirements it must operate within.

Misinterpretation of the WMA by NSW

This is not the first instance where NSW have been found to be mistaken in its approach to water management in NSW.

In November 2020, ICAC was extremely critical of NSW and the DPIE for misinterpreting the WMA to favour northern NSW irrigator interests. Ultimately it was unable to find this was for "*corrupt or otherwise improper*" reasons – however it did find:

> "this approach was motivated by a misguided effort to redress a perceived imbalance caused by the Basin Plan's prioritisation of the environment's needs, which has had adverse effects on irrigators and their communities. It was directed to protecting as much as possible the existing entitlements of productive water users from any further reduction or adverse socio-economic effects that may be occasioned by the state's obligations to implement the Basin Plan requirements in each of the water resource plan areas in NSW falling within the Basin".

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. Such a course of action risks the Federal Minister being compelled to utilise the "step-in power" in the Water Act 2007 to direct the MDBA to take over the preparation and administration of the water resource plans. This would be a disastrous result for NSW and reflect poorly upon the Department.

Recommendation: NSW should make a declaration no floodplain harvesting is permitted to occur until such time as the legal basis for the proposed volumes is clarified.

Setting a new precedent

In 1992, SRI members accessed off allocation water until the end of February and this is estimated to have been greater than 1,000GL.

In other words, the first nine months of the water year SRI members took free water in excess to their licences because the Murray River was flooding. Thirty years ago (even fifty years ago), meters were compulsory in the Murray Valley (unlike in northern NSW valleys where they are less common). Consequently, there are accurate records of the volumes of water taken off allocation by NSW Murray Valley irrigators.

The new precedent being set by NSW with its floodplain harvesting licensing reforms, is that the BDL can now be increased by the volume of water that can be proven to be taken without a licence or entitlement on 30 June 1994 (this, by definition also includes off allocation water). The position of NSW is that the volume of this increase can also be licensed for extraction because the SDL can be increased by the same proportion.

If NSW adopts a position that unauthorised and unlawful floodplain harvested water take is permissible and all proven off-allocation water take is not, then this will reinforce the perception of SRI members that the application of rules, policies and laws in northern NSW valleys is vastly different to how they are applied to southern NSW valleys.

In 1994 the amount of off-allocation water taken in footprint was over 400GL. In 1996 NSW issued Murray Irrigation Limited (**MIL**) on behalf of its 2,200 shareholders, a supplementary licence of 222,000ML in recognition of the more than 1,000GL MIL was taking off allocation when the Murray River was flooding (or in other words, what MIL was floodplain harvesting).

The baseline diversion limit in the Basin Plan 2012 refers to the amount of water that was able to be taken under State water management law on 1 July 2009.

The *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2003* governed diversions in the Murray Valley on 1 July 2009 and refers to the volume of supplementary water take as an "estimate" (namely, 250,000ML). This estimate is significantly less than what can be proven to have been taken off allocation on 30 June 1994. Because SRI members have not previously sought an update to the "estimate" this does not mean that this option is not available to them.

Therefore, if NSW set a precedent that it can adjust the BDL to include unlawful floodplain harvesting take (which it estimates was occurring on 30 June 1994), this supports the argument that that the "estimate" for supplementary water take in the Murray Valley can also now be reviewed and adjusted to reflect the better information that SRI and MIL will present. This would ensure that

the supplementary estimate will more accurately reflects the volume of water that was being taken off-allocation in the Murray Valley prior to 30 June 1994 as a supplementary allocation.

In other words, if NSW sets the precedent of increasing the BDL (and consequently the SDL) by a volume that that represents the volume of water that was being taken without a legal right or licence on or before 30 June 1994, then SRI members will demand that the same principle is applied to the Murray Valley and the MIL supplementary licence should be increased significantly.

Northern NSW irrigators have been given the opportunity to expand their storages from less than 600GL in 1994 to more than 1,400GL in 2021. The Committee has heard that this is due to better efficiencies and farm planning – and to disregard the advantage that it has also been extremely helpful to take more water during wet periods without a legal right or licence.

Consequently, if the same policies and interpretation of the Cap applies to all of NSW, irrigators in the Murray Valley may seek to optimise their farming operations (ie. build more storage capacity) to capture more of this supplementary water when the Murray River is in flood. SRI members could use the same "playbook" of northern NSW irrigators to try and confuse politicians that "we are only taking it when it floods so there is no impact on downstream – trust us".

As this Committee will appreciate, this approach undermines the good intentions of 3 decades of water reform in the Murray Darling basin. Water reforms that the current Minister for Water has now proclaims to be a "stuff up" (see below front page article of the Daily Telegraph newspaper on 28 October 2021).


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EXCLUSIVE

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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Daily Telegraph BUSH SUMMIT 2021

If the Minister for Water intends to re-write the rules to accommodate northern NSW irrigator interests, then the precedent will be set for the same to occur in southern NSW.

Summary

When we look at the Murray Darling Basin and everything numerous Governments and authorities have tried to accomplish over the past 27 years, it is obvious the Basin we see today is quite different to the one that existed in 1994. In 1994 it was recognised should action not be taken to limit the volume of extractions, the Basin would suffer dire consequences – such as those we are seeing today. There is no evidence to show that the Basin Plan has been a success or has achieved its desired outcomes. Yet already, the Minister for Water is looking to relax the rules for northern NSW valleys.

Since 1994, we have seen the impacts of climate change and on farm developments, powerful land-forming machinery, laser levelling and satellite precision technology which enables landholders to retain and store greater volumes of water flowing onto, or across properties, than ever before. The imposition of the Cap and consequent reforms has led to reductions in availability and less access to water for all other licence holders (except for floodplain harvesters who have continued to expand their storages and volumes of water take). Against this backdrop, rewarding landholders for expanding their unlawful practice of floodplain harvesting well beyond lawful limits is highly inequitable to all other water users in the Basin.

Southern Riverina Irrigators
2 November 2021

JOINT MEMORANDUM OF ADVICE

A INTRODUCTION

1. Our instructing solicitors act for Southern Riverina Irrigators Incorporated (**SRI**).

2. SRI has engaged Slattery Johnson to prepare a report dated July 2021 entitled "Licensing floodplain harvesting in Northern NSW: analysis and implications". Sections 3.5 and 3.6 of the report indicate that the MDBA is intending to increase the baseline diversion limits (**BDLs**) and sustainable diversion limits (**SDLs**) without making an amendment to the Basin Plan 2012 (Cth). This based upon an argument that the BDLs can be increased with changes in "best available information", and the SDLs can therefore change because there is a fixed statutory relationship between the BDLs and SDLs.

3. In our opinion, this is unlawful. The BDLs and the SDLs (being volumes calculated in accordance with the formulae in the Basin Plan) cannot be adjusted otherwise than by following the prescribed processes for amendment in the Water Act and Basin Plan.

4. To the extent that the NSW Department of Planning, Industry and Environment (**DPIE**), by regulation or other legislative instrument, purports to license floodplain harvesting inconsistently with the SDLS as currently calculated, then that regulation may be vulnerable to challenge on the basis of inconsistency under s 109 of the Constitution (Cth) with the Basin Plan or the *Water Act 2007* (Cth). Further, to the extent the proposed regime is implemented by amendment to a water management plan under the *Water Management Act 2000* (NSW), it can be challenged in the Land and Environment Court within 3 months of being promulgated. Alternatively, a decision by the Federal Minister to accredit a water resource plan could be challenged in the Federal Court.

B AMENDMENT OF THE BDL / SDL

5. The Basin Plan establishes a careful regime for amendments.

6. First, subdivision F of the Water Act (entitled "Amendment of Basin Plan") imposes various requirements, including that the amendment should be given to the Minister for adoption (s 45), and that the MDBA must consult with various parties including the

Basin States (s 46(1)), from whom it must seek submissions (s 47(3)). The Minister must consider the amendment, and either adopt or give suggestions to the MBA in relation to the amendment (s 48(1)).

7. Second, the SDLs can be specifically "adjusted" by the MDBA under s 23A of the Water Act, and Chapter 7 of the Basin Plan, without preparing an amendment to the Basin Plan under Subdivision F (s 23A(3)(a)). This requires compliance with ss 23A-23B of the Water Act, and Ch 7 Pt 2 of the Basin Plan. In particular, the MDBA must seek and consider advice from the Basin Officials Committee (s 23A(2)(c), invite and consider submissions from the public (s 23A(2)(d)), issue a notice complying with s 23B(2)-(3), and provide the notice to the Minister for adoption (s 23B(5)).

8. There are important limitations on the ability to propose a "relevant SDL adjustment" under these provisions, including that:

   (a) it must still "reflect an environmentally sustainable level of take" (s 23A(3)(b)); and

   (b) the overall "total Basin adjustment" cannot be "more than 5%" (s 23A(4)).

9. Plainly, and with immaterial exceptions,[1] these are not requirements that can be overridden or ignored. The careful scheme of the legislation is that amendments to the SDL are to be made, and are only to be made, either by amendments under subdivision F or by the process and subject to the limitations in ss 23A-23B of the Water Act and Ch 7 Pt 2 of the Basin Plan.

C PROBLEMS WITH THE MDBA'S POSITION

10. The Basin Plan is a legislative instrument made under s 33(1) of the *Water Act*. It must be construed "so as not to exceed"[2] the power of the MDBA to make it under the Water Act, ie so as to preserve its validity. The Basin Plan must also be construed in

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1 Section 49(1) of the Water Act and reg 2.03 of the *Water Regulations 2008* (Cth) provide for the correction of clerical and other non-substantive matters, such as errors in spelling (r 2.03(2)(a)) or cross-referencing (r 2.02(2)(j)). Regulation 2.03(4) provides that it applies only to an amendment that "does not alter: (a) rights or obligations provided for by the Basin Plan; or (b) the substance of the Basin Plan". For an amendment to be made in this way, the Ministerial Council must certify in writing that the amendment does not alter any of the things listed in subreg (4) (r 2.03(5)). In relation to changes of this kind, the provisions of ss 46-48 do not apply.

2 *Legislation Act 2003* (Cth), s 13(1)(c).

accordance with ordinary principles of statutory construction, including requiring that it be placed in its proper statutory context.[3]

11. In our opinion, for reasons developed below, the MDBA's position is not legally correct.

12. ***First***, the specific provisions made in the Water Act and the Basin Plan for "adjustment" of the SDLs require a conclusion that the SDLs are not ambulatory figures that can be expected to be updated from time to time (without amendment) as new information comes to light. This is by application of what is known as the "*Anthony Hordern* principle",[4] namely that conditions and restrictions on a power cannot be overridden or circumvented by recourse to another more general expression in the same instrument. The principle was summarised by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[5] as follows:

> "[I]t must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."

13. Here, there are two relevant powers: a power to amend the Basin Plan, and a power to adjust the SDLs, subject to specific conditions and restrictions (eg s 23A of the Water Act). Those conditions and restrictions are not to be circumvented by the back-door method of manipulating one of the integers to the formula for calculating the SDL. There is no other method identified in the Basin Plan or the Water Act for modifying those controls.

14. It is true that the SDL is permitted by the Water Act to be specified as a formula or other method (s 23(2)(b)), rather than as a quantity of water per year (cf s 23(2)(a)). As we develop below, the Basin Plan has adopted a formula. But the formula must still "be used to <u>calculate a quantity</u> of water per year" (s 23(2)(b)). That must be done at a point in time, on the basis of best available information *at that time*. Afterwards, in our opinion, the mechanism for amendment or adjustment must be complied with.

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3 Eg *Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCAFC 163, [45].

4 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7.

5 (2006) 228 CLR 566, [59].

15. ***Second***, it would be inconsistent with other dimensions of the statutory scheme to treat the SDLs and BDLs as ambulatory and the subject of ad hoc changes.

16. What the Water Act seeks to achieve through the SDLs is a "limit" on historical levels of take, which is environmentally sustainable (s 20(b) of the Water Act; s 5.05 of the Basin Plan). In the provisions concerning the BDL, the Basin Plan requires the calculation of a "baseline limit of take" (s 1.07), which is a "limit on the quantity of water than can be taken" (Sch 3, item 10). Inherent in the idea of a "limit" is that it will not be exceeded. Inherent in the requirement of a limit that is "environmentally sustainable" is that the limit cannot be increased or decreased on a basis (eg increased level of historical take) that would, with reference to the requirement of environmental sustainability, be arbitrary.

17. The notion that the "environmentally sustainable" limit on take could be *increased* by recourse to changed historical data would contradict the dynamic of s 21(2)(a)(i) of the Water Act, which relevantly provides that the Basin Plan must be prepared having regard to the fact that the historical use of Basin water resources "has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity". Section 21(2)(a)(ii) provides that Basin water resources "require, as a result, special measures to manage their use to conserve biodiversity". The SDL is one such measure: it establishes an environmentally sustainable limit on take. It would not be consistent with these provisions to construe the Basin Plan as tolerating ad hoc *increases* to the SDL merely because of new historical take data, unless that also produced a corresponding increase in the deductions used to calculate the SDL.

18. As a matter of language, in order for a "limit" on what "may be taken" to have the effect required by s 20(b) of the Water Act, it should not be construed as something capable of being adjusted from time to time by shifts in data, without a formal amendment. As noted above, there is nothing in the Basin Plan which, in terms, permits this "limit" to be altered from time to time except by the formal adjustment process.

19. ***Third,*** the MDBA's view must be avoided[6] because it would otherwise arguably result in the SDL formula in the Basin Plan being inconsistent with the requirement in s 23(1) that the SDL "must reflect an environmentally sustainable level of take. The formula by which the SDLs are calculated under the Basin Plan depends fundamentally on the level of the BDL, in that the SDL is calculated by subtraction and addition from the BDL

6 *Legislation Act 2003* (Cth), s 13(1)(c).

(as the "baseline").[7] For its part, the BDL is essentially an annualised average of the historical take.[8] In other words, the Basin Plan works backwards from historical take in order to reach the statutorily mandated environmentally sustainable level of take.

20. In our opinion, this is conceptually permissible *only* if the deductions from the BDL are sensitive to that which was environmentally excessive about the BDL. If there is no relation between the SDL-deductions and the BDL, and the BDL is adjusted upwards, then the formula is not apt to produce an environmentally sustainable outcome. In relation to the other integers of the formula for calculating the SDL:

    (a) the ***local reduction amount*** is a fixed amount, for certain areas only (for Gwydir, 42 GL per year);[9]

    (b) the ***SDL resource unit shared reduction amount*** is a fixed amount, distributed in accordance with s 6.05 of the Basin Plan. For the northern Basin New South Wales zone (which contains Gwydir), it is fixed at 24 GL per year (s 6.05(3)(b)), allocated between the areas including Gwydir rateably in proportion to their BDLs;

    (c) the ***SDL adjustment amount*** is an amount calculated in accordance with Sch 6A to the Basin Plan.[10] It is expected to vary between water accounting periods, and is flexible to the acquisition of water access entitlements and water efficiency measures, but not to any increase in the BDL.

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7 Section 6.04(3) provides that the long-term average SDL for each area is set out in column 2 of the table in Sch 2. Taking the Gwydir area as an example, item 10 of Sch 2 provides that the SDL is "the BDL minus 42 GL per year (local reduction amount) minus the SDL resource unit shared reduction amount plus the SDL adjustment amount." As with all other resource areas, the SDL is calculated by subtractions and additions from the BDL.

8 Section 1.07 of the Basin Plan defines the BDL as "the baseline limit of take", being "the quantity of water calculated in accordance with column 2 of the table in Schedule 3 for that SDL resource unit". The formula for calculating BDL varies across items. To take the example of Gwydir, item 10 of Sch 3 provides that the BDL is the sum of various integers, including relevantly: "the long-term annual average limit on the quantity of water that can be taken from regulated rivers and by floodplain harvesting" calculated by taking an annualised average of "the quantity of water that would have been taken by those forms of take for each year of the historical climate conditions under State water management law as at 30 June 2009".

9 The ***local reduction amount*** is defined in s 1.07 to mean: (a) "the quantity of water identified in column 2 of Schedule 2 as the local reduction amount for [an SDL resource unit]; or (b) if no amount is identified—zero".

10 Section 6.05A defines the "SDL adjustment amount" as the amount, in GL per year, calculated in accordance with Schedule 6A for the water accounting period".

21. The dynamic of the SDL formula is that it operates by making *fixed* subtractions from the historical level of take. If the formula is rationally capable of satisfying the requirement of s 23, that can only be because the integers of the formula produce a sufficient subtraction from the starting point (the BDL) to qualify the outcome as one which is environmentally sustainable. This is because the relationship between historical take (the BDL) and environmentally sustainable take (the SDL) is inherently antagonistic, and probably diametrically inverse: from the perspective of the environment, the less water taken the better. The whole scheme of the *Water Act* and the Basin Plan is that *historical take* is not sustainable and must be the subject of quantitative controls to procure sustainable environmental outcomes.

22. To illustrate the point, let it be assumed that the SDL presently complies with s 23 (if it does not comply with s 23, then it could hardly be *increased* in the manner postulated). If the DPIE or the MDBA were able to *increase* the SDL, simply by supplying new historical data so as to increase the BDL, then the integers in the calculation would no longer rationally connect the BDL to that which (one assumes, to procure compliance with s 23) had been determined as the *environmentally sustainable* level of take. It appears to us that such an action would falsify the assumed compliance with s 23, because it would demonstrate a lack of any objective or rational relationship between the SDL and the requirement of an environmentally sustainable quantitative control. If the SDL could be increased by the accident of new historical data, without any corresponding adjustment in other integers to balance out the increased BDL (and none seem to us to achieve this effect), then it must follow that the new output of the SDL formula would be a result contrary to the directive in s 23(1), which requires that the SDL "must reflect an environmentally sustainable level of take".

23. The BDL, which is not a concept that appears in the Water Act, is being put to a purpose (calculating the SDL) which is the subject of specific statutory proscription by the Water Act. Accordingly, the BDL's role in the formula for calculating the SDL will only be legally valid to the extent that it operates to produce the statutorily mandated outcome for the SDL. That is, it must operate so as to produce a "limit on take", which is "environmentally sustainable". It could not, consistently with the Water Act, operate otherwise than as a "limit", or in a way that was not "environmentally sustainable". For these reasons, in our opinion, it should not be interpreted as a figure able to be adjusted by States from time to time, without amending the Basin Plan, because this would otherwise produce the result (in the calculation of the SDL formula) that the SDL would no longer be taken to reflect the "environmentally sustainable level of take".

24. As we understand it, the MDBA will defend its view upon the basis of s 21(4)(b) of the Water Act, which requires that, in exercising its relevant powers and performing its relevant functions, the MDBA must "act on the basis of the best available scientific knowledge and socio-economic analysis". In our opinion, this is not a mandate to override the conceptual features of the SDLs we have emphasised above. The requirement to use best available knowledge speaks to the point in time at which the relevant function is being exercised. One of the functions of the MDBA under that Division (s 19(3)) is to prepare a Basin Plan and give it to the Minister for adoption. When preparing the Basin Plan, the MDBA is required to act on the basis of the "best available scientific knowledge". Likewise, when considering an amendment to the Basin Plan eg under Subdivision F, the MDBA must act on the basis of the "best available scientific knowledge" at that time. The "best available scientific knowledge" may have changed in the meantime, and the effect of s 21(4)(b) is that the MDBA is required to bring the latest available knowledge to bear on its functions. But this does not authorise interim, ad hoc adjustments to the SDLs otherwise than in accordance with the careful scheme described above. In other words, s 24(4)(b) does not override the mechanisms for amendment.

D CONCLUSIONS

25. A State licensing regime that was inconsistent with (because it purported unlawfully to increase, or assumed an unlawful increase) the SDL established in the Basin Plan would arguably be inconsistent with the Basin Plan under s 109 of the Constitution.

26. Section 109 provides that, where a "law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." The terms "law of a State" and "law of the Commonwealth" in s 109 of the *Constitution* include a regulation made under a statute.[11] Accordingly, the terms would embrace an inconsistency between a State regulation or legislative instrument and the Basin Plan.

27. We also note that, by s 34(1) of the *Water Act*, the MDBA, and other agencies of the Commonwealth must perform their functions, and exercise their powers, consistently with, and in a manner that gives effect to, the Basin Plan. Section 35(1) of the Act

11 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, [38] (the Court).

prohibits “an agency of a Basin State” (which would include DPIE[12]) doing an act in relation to Basin water resources if the act is inconsistent with the Basin Plan, or fail to do an act in relation to Basin water resources if the failure to that act is inconsistent with the Basin Plan. To amend the SDL inconsistently with the Basin Plan would infringe this prohibition.

24 SEPTEMBER 2021

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12 By s 4 of the *Water Act*, a Minister of the Crown for the State, or a Department of State for the State is included in the definition of “agency of a State”.