REPORT ON PROCEEDINGS BEFORE

REGULATION COMMITTEE

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

CORRECTED

Virtual hearing via videoconference on Thursday 2 July 2020

The Committee met at 10:00

PRESENT

The Hon. Mick Veitch (Chair)

The Hon. Robert Borsak
The Hon. Greg Donnelly
Ms Cate Faehrmann
The Hon. Scott Farlow
The Hon. Sam Farraway
Mr Justin Field

The CHAIR: Good morning, everyone. Welcome to the hearing of the Regulation Committee inquiry into the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020. This inquiry is examining the impact and implementation of the regulation. I acknowledge the Gadigal people who are the traditional custodians of this land. I also pay respect to Elders past and present of the Eora nation and I extend that respect to other Aboriginals present. Today we will hear from the NSW Irrigators' Council along with representatives from a number of regional peak bodies and environmental organisations. We will also hear from the Minister for Water, Property and Housing as well as from Government witnesses from the Department of Planning, Industry and Environment.

Before we commence I will make some brief comments about the procedures for today's hearing. Like so many others, we have needed to adapt in the face of COVID-19 health measures. The hearings for this inquiry will be conducted via videoconferencing. This enables the work of the Committee to continue without compromising the health and safety of members, witnesses and staff. This is new territory for upper House inquiries, so I ask for everyone's patience and forbearance through any technical difficulties that we may encounter throughout the day. If participants lose their internet connection and are disconnected from the virtual hearing, they are asked to rejoin the hearing by using the link provided by the Committee secretariat. We also have some witnesses appearing by teleconference due to internet issues in their area.

Today's hearing is being broadcast live via the Parliament's website. A transcript of the hearing will be placed on the Committee's website when it becomes available. All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances witnesses are advised that they can take a question on notice and provide an answer within 14 days. Finally, could everyone please make sure they mute their microphones when they are not speaking to assist with things going much smoother.

JIM IAN CUSH, Chair, New South Wales Irrigators' Council, sworn and examined

CHRISTINE FREAK, Acting Policy Manager, New South Wales Irrigators' Council, affirmed and examined

CLAIRE MILLER, Interim Chief Executive Officer, New South Wales Irrigators' Council, affirmed and examined

The CHAIR: I welcome our first witnesses. Would you like to make a short opening statement?

Mr CUSH: Thank you for having us. I will keep it very brief. My understanding of this exemption amendment is that it was a procedural matter required to allow the progress of the Healthy Floodplains project. With the exemption in place it allowed the 324 to happen back in February. It really has nothing to do with the amendment, but I will hand over to Ms Freak to carry on.

Ms FREAK: The exemption regulation is an administrative and procedural interim measure in order to better manage floodplain harvesting. It is a critical part of transitioning from the Water Act 1912 to the Water Management Act 2000, which is our contemporary legislative framework. This transition allows for floodplain harvesting to be better managed by Government. It allows for future growth to be controlled and it also allows the floodplain harvesting to be brought under the sustainable diversion limits imposed by the Basin Plan. Making floodplain harvesting subject to a licensing framework is critical for downstream communities to have confidence that floodplain harvesting is managed appropriately and sustainably. It is also important for those on floodplains to have certainty around their access arrangements.

We support the licensing of floodplain harvesting in order for the Government to be able to better regulate this legitimate form of water access. This amendment, this exemption regulation, is a critical component of moving towards that licensing framework, which will come into effect mid-next year. The exemption ultimately allows for the better management of floodplain harvesting as part of that process, which provides the means for all forms of water access to be managed under the one framework rather than having part of it still managed under the 1912 Act. We would like to say, though, that this is an interim measure and it should only be in effect until the proper licensing framework comes into effect, because that is when floodplain harvesting can be best managed by the Government.

The CHAIR: Ms Miller, do you have anything, or are you leaving it with Ms Freak?

Ms MILLER: I will leave it with Ms Freak. This is my second day. I am on a steep learning curve.

The CHAIR: I might weigh in with the first question if Committee members are okay with that. I hope you have had a chance to look at the submissions that have been made public. One of the submissions is pretty damning of the regulation. In fact, it asserts that the arrangement that has been put in place is illegal. I would be keen to get your views on that.

Ms FREAK: This is actually making it more legal. At present floodplain harvesting is established as a right under the Water Act 1912. What this is doing is bringing it into the contemporary legislative framework. Under the Water Management Act 2000 all water take has to be either under an appropriate water access licence, under a basic landholder right or under a licence exemption. In the process of moving to that more permanent licensing framework, this provides the exemption to shift from that 1912 right to an exemption under the Water Management Act. What it is about is consistency and streamlining, so it will be one piece of legislation, which gives both the Government and water users—and I am talking about water users on floodplains and downstream—certainty over how this is actually managed. This is actually a vital step of improving the way that it is managed and provides further clarity around what those legal access arrangements are.

The CHAIR: The other thing that has been raised, which was a very common theme in just about all of the submissions, was the very poor communication or even lack of communication around the implementation of the regulation. I am keen to get your views about that but, more so, if you think it was poor or it lacked communication, what would you suggest is a better way of having done this so we do not make the same mistakes again?

Ms FREAK: Ultimately this exemption regulation was foreshadowed years ago in the NSW Floodplain Harvesting Policy, but it came into effect at a very critical time, around the time of the first flush. For many people it got confused with the embargoes that were put in place, which is the subject of a separate inquiry. Part of that was because this exemption regulation lacked explanation from our Government about what the purpose and intent was. Perhaps if there was a better explanation around what the intent of this regulation was,

so that the community could better understand the purpose of it, then that would have assisted with people understanding that this is a necessary step for the Government to better manage this form of take.

Ultimately it was put in place the day before the floodplain harvesting embargo, which was the first ever floodplain harvesting embargo, came into effect. That caused a lot of confusion for people. For us, communication on very complex and technical matters from government is incredibly important so people can have confidence in the system of water management. We do think that that could have been done a lot better.

The CHAIR: You talk about the technical aspect of this. If there was a decent lead-in time for the introduction of the regulation rather than the very quick approach as you indicated, how long without lead-in time be and why?

Ms FREAK: This was foreshadowed years ago. It was foreshadowed years ago as part of this and this is part of the transition from the 1912 Act in order to bring it into the 2000 Water Management Act. The sooner that this can be brought into the contemporary legislation the better. What this now provides, if this exemption regulation continues, is for it all to be part of the same legislative framework. The sooner that can happen, the earlier that people can have clarity and confidence to know that this is managed in a consistent way.

The CHAIR: Yes.

Ms MILLER: My understanding is that this was actually foreshadowed for several years and obviously had it been brought in several years ago we would not have had the confusion and the conflation of two quite separate issues in February. I guess what we learned from that is that if it is foreshadowed the Government needs to act and bring these things in rather than have delays that then lead to the kind of confusion that we are in at the moment.

The CHAIR: Okay, thank you.

Ms CATE FAEHRMANN: Hi everyone. I have a question based on your submission on page 8 we talk about the outstanding issues in relation to floodplain harvesting:

> (3) Additionally, there remains uncertainty for those water-users where there is a dispute with the NSW Government regarding the eligibility of flood protection works to be used for FPH, despite the historical practices. These water users must be provided the opportunity to resolve these issues

Could you explain what those issues are and what that refers to?

Mr CUSH: My understanding is that flood works approvals, through a mechanism years ago back in the eighties, people applied for flood work levee banks and what have you. I am trying to be nice to the Government but after 35 years or 30 years there are some people who still have not had those applications processed. So for some levee bank, farm infrastructure has been in place for 30 years and is still not approved through that program, which they are working through now but—

Ms CATE FAEHRMANN: It is illegal in other words.

Mr CUSH: No, there have been applications in place for 30 years since the late eighties but through the government process they have never been finalised. In my understanding the departments are well aware of all that infrastructure, technically they have not finalised the licensing of it but it is in the process.

Ms FREAK: We feel that the Government needs to get on with better managing floodplain harvesting and this is a critical component of doing that. There is a view by water users that we feel let down by the process that has been occurring. We need measures like this to come into effect so that it can be better measured and so that it is clear that people understand what their access arrangements are.

Ms MILLER: If you have an application that has been sitting there for 30 years to be processed and approved you have got irrigators that are trying to do the right thing and if it is taken 30 years for the Government to process their applications—

Mr CUSH: It is rather telling

Ms MILLER: It is hardly the fault of people who are trying to do the right thing and wanted to make sure in fact that everything is in fact legal.

Mr CUSH: It is rather telling the whole process.

Mr JUSTIN FIELD: Thanks for your attendance here today. I have a question that comes straight out of your submission. You note on page 4:

> It is important to note that if the Regulation did not exist, water users would still have legitimate access to FPH (including rainfall runoff) due to existing rights within the Water Act 1912.

Does that mean that now this regulation is in place you feel that has superseded those rights under 1912?

Ms FREAK: I guess this whole process is a process of transitioning from one Act to another. The endgame is having the licensing framework in place and this is just one step to get there. It would be something you would have to get legal advice on but my understanding is that until the permanent licensing framework is in place then those 1912 rights stand until such a time as that is repealed. When the licensing framework comes into place then those elements from the old Act will be brought forward and then be contained within the new Act.

Mr JUSTIN FIELD: Does that not effectively mean that the status quo remains regardless of this regulation until the Healthy Floodplains project and the licensing arrangement are fully implemented?

Ms FREAK: Yes, pretty much. This is not going to create any more or any less take of water because it is an administrative transitional step. For us it provides certainty and clarity because it is easier for things to all be on the one Act rather than having bits and pieces everywhere. But you are right, it does not actually change the volume that can be taken at this stage of the regulation.

Mr JUSTIN FIELD: I know it is semantics to a degree but does that not indicate this regulation is not actually needed? It is not actually a transitional arrangement. It does not change the situation on the ground for you at all. It does not assist with the management, 324 orders were still available and able to be made anyway so it is not related to that so this regulation is not really needed?

Ms MILLER: It is.

Ms FREAK: The issue is that floodplain harvesting is a very complex and controversial issue. The more simple that we can make the regulation and the better that we can communicate it to the public, that will allow people to have greater confidence in the way that it is managed because it will be more clear and more simple. The Water Management Act as I was saying earlier requires a license, an exemption or a right. To have these brought forward into our contemporary legislative framework makes it easier for people to understand because it is clear; it is all in the one place. Our aim for this is to have that licensing framework in place. That is the ultimate end goal; this is a step to get there. We do not want this to exclude or preclude or delay getting to that licensing framework stage but it is an important part for the community to have confidence that this is managed appropriately and sustainably.

Mr JUSTIN FIELD: The position of the Irrigators' Council is that this regulation should no longer exist once the Healthy Floodplains project is finalised and the licensing arrangements are in place. So it would be appropriate for this regulation to sunset at that point?

Ms FREAK: For those valleys. The Healthy Floodplains project is only for those five northern valleys. What we need to remember is that the definition of overland flow in the Water Management Act includes rainfall run-off. All irrigation farms are required to capture rainfall run-off. That is for environmental reasons so that there is no contaminants leaving the farm going into river systems so this is a matter for other valleys across the State as well who are required to capture the rainfall run-off from their properties. For those northern valleys where a licensing framework is coming in next year—yes, a sunset clause would be what we are after. We just need to remember that this is a statewide matter and until such a time as there is licensing frameworks for other valleys, if that is the intent, then we need to be mindful of what impact this is going to have on other valleys as well.

Mr JUSTIN FIELD: I want to get into this issue of rainfall run-off and passive take but I am happy to pass on to someone else and come back to that.

The Hon. ROBERT BORSAK: Good morning. Can you explain exactly to me—rather than just using the words "interim measure"—what you believe this regulation is actually doing for you? Because I, like Mr Field, fail to understand its relevance.

Mr CUSH: It is my understanding that it was a procedural measure that was required to allow the Healthy Floodplains project to proceed. I am just an old farmer from Moree, so that is how it was explained to me and I thought, well, if that is how it has to be that is what has to be to allow this project to move on to create certainty for everyone.

The Hon. ROBERT BORSAK: With due respect, you do not actually know what it does.

Ms FREAK: No. There are essentially two options for government. One option is that the status quo continues where floodplain harvesting remains within the 1912 Act until such time as it is brought into the licencing framework, or we have it all within the contemporary Water Management Act under an exemption until

the licensing framework comes into place. The difference between the status quo and this is whether it is under the old Act or the new Act and from my perspective it should be government's intent to have things consistent with the contemporary legislative framework. That is good practice, that is the best practice of water management, because the Water Management Act allows government to have greater management and control over floodplain harvesting take than the 1912 Act has. This actually puts government in a position to better manage floodplain harvesting than under the 1912 Act because there are more mechanisms and instruments in our contemporary legislation than there was at that time. This is in the interests of government to be putting this in place so they can manage it within their Act.

The Hon. ROBERT BORSAK: Yes, I understand that but what is your understanding of the mechanics? You have not quite answered my question, the mechanics of how this regulation will function in that way. Why has it taken in your view this Government nine years to finally address this?

Ms MILLER: I do not think we can answer for the Government. That would be a question for the Minister.

The Hon. ROBERT BORSAK: Well, no. Again, with respect, that is just trying to weasel out of the question. I asked your view, I did not ask the Government's view. I will ask the Government's view this afternoon when the Minister comes on. Are you saying you do not have a view?

Ms FREAK: It is a complex and technical matter. It is not a simple answer.

The Hon. ROBERT BORSAK: Look, sorry, I have heard you say that about 10 times. What are the complex matters that this regulation is trying to deal with?

Mr CUSH: The Healthy Floodplain Project implementation.

The Hon. ROBERT BORSAK: What is your understanding of that? What does it do? How does it affect you as a farmer?

Ms FREAK: The Healthy Floodplains Project has two components to it. One component is about better managing the environmental health of the flood plains and it is about controlling growth in use. The second component is around introducing a licensing framework for the take of overland flows. This provides an exemption in order to then be able to properly implement that licensing framework.

The Hon. ROBERT BORSAK: Does this require immediate implementation of proper metering?

Ms FREAK: That is a component of the Healthy Floodplains Project, yes.

The Hon. ROBERT BORSAK: But does this regulation do that? Does it commence that?

Mr CUSH: Well, if it allows the Healthy Floodplains project to proceed, it is going to bring the measurement in of the floodplain harvesting as part of the project.

The Hon. ROBERT BORSAK: Again, it does not actually explain why we need a regulation at all. Why would the Government not simply bring in legislation immediately? It has had nine years to figure it out. Do you have a view on that?

Mr CUSH: Maybe you should go and ask a legal opinion of that. I have got no idea, absolutely no idea. I am partaking in this at your invitation. My understanding, it was a procedural matter required to allow the progress of the Healthy Floodplains Project. That is what I know.

Ms FREAK: I think what is important for us to communicate here is that industry is supportive of the need to license floodplain harvesting. It will for some farmers lead to a reduction in that water access but industry is supportive of this because we feel that it needs to be properly regulated so that people can have certainty in that this is sustainable and appropriately managed. We are supportive of this water licensing framework and the sooner that happens the better, but government is in the process of doing that. We have been informed that the timeframe for that is June next year, and that is a timeframe that is being worked towards. There are a lot of things that have to happen in order to do that properly and it is our policy that this has to be done in a timely manner. It does need to be in place as soon as possible.

The CHAIR: On the back of that line of questioning, it raises the question then, you could still operate if you did not have the regulation because you are moving towards, at some point the Government is going to act with legislative arrangements or whatever for floodplain harvesting. It is probably a question for the Chair, but you could still operate without the regulation.

Ms FREAK: Because it is still in the Water Act 1912, that right is still established and until such a time as that right is transitioned over then, yes, there still is that right in place.

The CHAIR: Mr Donnelly?

The Hon. GREG DONNELLY: [Inaudible]

The CHAIR: The Hon. Scott Farlow has a question.

The Hon. SCOTT FARLOW: In terms of your submission it seems in many ways you are comfortable with the regulation as it is and you talk about the contemporising floodplain harvesting, how this is an interim measure in that contemporisation process. Do you see in the sense that the regulation is going to help in moving towards the healthy floodplains harvesting framework, it will get irrigators thinking more in lines with where things are going, rather than relying on the old Act and the old practices?

Ms FREAK: Absolutely. I think industry is very accepting that this needs to be brought into the contemporary framework and it provides clarity for people. What we have seen in fact there is lots of misunderstanding around floodplain harvesting. The Exemption Regulation then that will help with people understanding how this is being managed by government and it will help industry in that transition period to know that everything is streamlined in this one Act.

The CHAIR: The Hon. Greg Donnelly is back on.

The Hon. GREG DONNELLY: [Inaudible]

The CHAIR: Your submission talks about the better regulation principles of government and you are—my words, not yours—critical here. Your submission states:

> The NSW Department did not follow the NSW Government's own guidelines for developing good regulations—which if they did—would have avoided much of the confusion and misinformation surrounding implementation of the Regulation.

I know there are a few regulations in the water space, how often is it your experience that the Government does not adhere to its own better regulation principles? We have lost you as well now. Sorry, we seem to have lost you as well. Can we just see what is going on there? Okay, you should be right now.

Ms FREAK: Are you able to hear us?

The CHAIR: Yes.

Ms MILLER: I think that if we have regulation principles obviously it really assists if government follows them and if this exercise delivers anything, a reminder and a recommitment to actually doing what is set out in these regulation principles would be good. I am sure this is not optimum but there has been confusion because things have been rushed perhaps at the last moment and not done in a timely manner and we would be very supportive of any move to basically remind government agencies that these sort of regulation principles are there for a reason and to have a commitment to them.

The CHAIR: We have Greg Donnelly on the mobile phone—we are pulling out all stops to get Greg into this. Greg, hopefully you can hear me?

The Hon. GREG DONNELLY: Yes, I can, Chair, thank you very much.

The CHAIR: Can the witnesses hear Mr Donnelly?

Mr CUSH: Yes.

The Hon. GREG DONNELLY: Thank you and good morning from Western Australia—that might be part of the reason why it was difficult to get through. Thank you to the witnesses for coming along and thank you very much for your helpful submissions. My question is this: Do we not face this situation that this regulation has been put into place and in the doing of that there has been much confusion planted in the minds of the growers and the users—in that, yes, they were aware that there was going to be some regulation in due course but it happened very quickly, with little consultation, which has been described in your submission, and created, as you in fact describe, a lot of confusion. That was done; that has happened. But I presume that the full implications of what has been done are still not fully understood by all of the members of the organisation and they face the situation that to the Government's best time line, in June next year at the latest, there will be legislation so they will again be put through a whole exercise of trying to come to terms with and understand a new legislative framework.

Having said that, would it not make more sense to say to the members, "Listen, let's just do this properly through the Act itself. That is what we are working towards. If we continue what is the status quo, which has been operating for a very long time, and in one full exercise come under the new framework of an Act and put this regulation aside because it created so much confusion and uncertainty." So, that is my question: Would it not make a lot more sense to just allow the members to look forward to the new legislative framework and work with them and with Government to achieve that but not have all the uncertainty and wonderment about what is going on with this regulation until the Act fully comes into place?

Ms FREAK: Yes, it is a good question. I think it comes down to if we are talking about the exemption regulation itself or the way in which was implemented. If we are talking about the exemption regulation itself, it does provide that clarity and consistency so that people do have that understanding of how it all works. If we are talking about the way it was implemented, then it was implemented very poorly, the timing was very poor, the intentions were not communicated well and that led to the misunderstanding. It is our view that this regulation does allow for greater understanding and for greater simplicity and a better way for it to be managed; however, because it was implemented poorly, that intention was not realised in the first instance.

I would say that there is still opportunity for the Government, particularly through this inquiry, to come back and explain the actual intent of this regulation—what it will achieve and what it will not achieve and what the next steps are for Government in regulating floodplain harvesting. If that was to occur, then I feel we—we as in people who want this managed well—would able to win on both points because we would be able to achieve the regulatory settings that are clear and consistent and would also be able to have people understanding that by having that communication with the community.

The Hon. GREG DONNELLY: So the follow-up question is: Are your members saying that that is what they want? That they in fact want to operate under this regulation and then it goes through another whole exercise of the implementation of an Act—in other words, to do it in these two stages. Is that what they are saying to you?

Ms FREAK: People want the Healthy Floodplains Project in place. That is what they want and that has been going on for years to try to get to that. That is our end point and if this is a necessary step to get there then that is part of it. But what our members want is for that licensing framework to be in place so that those on the flood plains have certainty and those downstream have confidence that it is managed properly and sustainably, as well.

The Hon. GREG DONNELLY: Sorry to interrupt, but who is saying to the members—or, in fact, are the members saying back to you as leadership—that this is a necessary step? Where did the phrase "necessary step" come from?

Mr CUSH: The department.

The CHAIR: Sorry, I missed that.

Mr CUSH: We have been informed by the department that this was a necessary step in the implementation of the Healthy Floodplains Project.

Ms FREAK: It actually comes from the policy itself. If you read the NSW Healthy Floodplains policy and if you have a look on page 4 of our submission there is an extract from it. It actually says that an exemption is required so that X, Y, Z—you can read it on there. It explains that this is needed as part of the process. It is not so much that we see it as an interim step; it is that we have been informed by reading the policy and by the department that this is what is required.

Mr JUSTIN FIELD: I have a follow-up question on that specifically, if that is okay? When you say this was a step that was necessary and you also said before that the problem was with the way it was implemented, what you are talking about here is the embargo and then the exemption orders, right? The Government has said that this regulation was necessary in order to put in place the embargo and then the exemptions. Is that the implementation stuff that you are talking about? You are not talking about the regulation itself but what followed after that regulation came in, which was the embargoes?

Ms FREAK: I think it is really important to separate the embargo and the exemption. It is unfortunate that they came in at a similar time but they are entirely separate and they should be treated separately by Government.

Mr JUSTIN FIELD: But the implementation—I mean, we have already established that you did not really need the regulation, you have at the 1912 rights. I agree that the Government has said it is needed. But the

implementation that you are talking about was the embargo process, not the actual regulation being gazetted because that did not change anything on the ground for you at the time.

Ms FREAK: No, but the commentary that followed from this exemption regulation coming into place, that is what we are talking about. It is an entirely separate matter to the embargo and it is important that, given that there is a separate inquiry for that, it is treated separately. What we are talking about here is the way this exemption regulation was implemented in the sense around how that was communicated to people, what explanatory material was provided to stakeholders and what communications came from Government to assist in understanding what the intent of this was. That is why we were referring to the good regulation principles of government, because we feel that had things such as proper consultation occurred, and winners and losers been identified and why this is in the public interest—had components like that been properly explained to people, then in the implementation of the exemption regulation people would have understood why it was an important regulation to come in.

Mr JUSTIN FIELD: But if it just maintains the status quo until the final policy, how does it matter?

Ms FREAK: In effect, yes, that is what it is doing, but it provides clarity and consistency and we feel that it is important that the public can have confidence in the way this is managed. If this means that people can have confidence because it is all in one clear, concise Act then that is a better outcome for the Government. The mechanisms of the management Act actually give the Government more powers and ability to manage this, so it is in the Government's interests in many ways.

Ms MILLER: I guess we are beholden here to the Government—we were advised that this was a procedural step that was necessary by the Government. It was not something that we were pushing for or anything. We accept that there are procedural matters when doing water reforms and we are supportive of the ultimate objective of this water reform.

Ms CATE FAEHRMANN: I just wanted to ask you a couple of questions in relation to the legality of the flood plain works. Has the Irrigators' Council received or do you have legal advice as to this—you keep going back to the 1912 Act and what has been approved and what has taken place under part 8. I take it you have got legal advice that those works are all legal under the 1912 Act?

Mr CUSH: It has been accepted into the NSW Healthy Floodplains project. Farms with works, as long as they have applications in the system, are part of the process. I take that as the Government accepting that situation of the—

Ms CATE FAEHRMANN: Has the NSW Irrigators' Council received—you would think because you are such a huge, powerful body with powerful interests that you have also sought legal advice to that effect?

Mr CUSH: Not that I am aware of.

Ms FREAK: We have not sought legal advice ourselves, no.

Ms CATE FAEHRMANN: I have one submission provided to this inquiry in relation to the regulation exemption, which is the clause 39AA on eligible works. The submission states:

> This exemption appears to ignore works constructed on or before 3 July 2008 that do not have approval—

I am sure you are aware of that bit. The submission then suggests:

> Our concern is that the Regulation, as currently worded, gives an exemption to floodplain works that do not have approval. This is a form of retrospective approval for works that have not been assessed under any formal process.

I am just interested in your view as to why we would have submissions that are saying this to this inquiry.

Mr CUSH: I am not sure, but what I do know from on the ground is the department, through this NSW Healthy Floodplains project, and the Natural Resources Access Regulator [NRAR] and everything else, are going through and assessing all the works for this project, and if they fail they are out of the project.

Ms CATE FAEHRMANN: What do you mean, "if they fail"?

Mr CUSH: They are not going to get a licence. But that would be a question to put to the department later on today. I understand the department is coming before you. That would be a good question for them.

Ms CATE FAEHRMANN: But you are suggesting that all of the works are legal now though, yes?

Mr CUSH: For the works to be part of the project, if they were not legal they would be rejected by the project. If the project is allowing those works to come into place they will be legal. But it will be a question to put through to the department this afternoon.

The CHAIR: Can I just follow up very quickly? You mentioned NRAR, the Natural Resources Access Regulator. What are the implications for NRAR, as you would understand it, of this regulation coming into effect?

Mr CUSH: I have really got no idea, Chair.

Ms FREAK: It just provides the clarity for NRAR. Rather than having to look at various different Acts it is all in the one place. It is clear.

The CHAIR: So it would provide clarity?

Ms FREAK: That is my understanding.

Mr JUSTIN FIELD: My next question had to do with your mention of rainfall run-off and also the discussion around passive take and how that is related to the regulation, the policy and some of the other orders that have been given around this. In your submission you talk about the Water Act 1912 rights to legitimate access to floodplain harvesting, including rainfall run-off. Can you just explain what you mean by "rainfall run-off"?

Ms FREAK: When we talk about rainfall run-off, that is the rainfall that falls onto the property and moves across the property. In New South Wales all farms are required to catch that rainfall run-off, because as it moves across the farm it could pick up contaminants or pollutants from the property and we do not want that entering into the waterways, so farmers are required to capture that rainfall run-off. Under the Water Management Act 2000 and its section 4A, "overland flow water"—which is the term for the water that is harvested using floodplain harvesting—includes rainfall run-off.

That is why this is significant for all farms in New South Wales, because it is a statewide policy, and if we are talking about overland flow water then we are also talking about that rainfall run-off component, which all farmers are required to capture for environmental purposes. That is a legislative requirement.

Mr JUSTIN FIELD: The rainfall run-off would not just mean any water; it would be talking about if it has run off land that is being cropped, for example, where there might be fertilisers and the like. If there was a grazing property, for example, and there was overland flow that went over that and rain had fallen off that and was running off it they are not required to capture that water, correct?

Mr CUSH: No, I do not believe so in a strictly dry land situation. But if it was a developed situation—like a feed lot, for instance—would you prefer to have the rain—

Mr JUSTIN FIELD: No, I am not making this an argument. I am just trying to get the definition.

Mr CUSH: —into the river? I would say not. I think that is why agriculturally contaminated water is turned into this rainfall run-off component.

Mr JUSTIN FIELD: No, I am just trying to understand the definition—

The CHAIR: Can I just come in, Mr Field?

Mr JUSTIN FIELD: Yes.

The CHAIR: Sorry, Mr Field. Just to be clear, where Mr Field is going here is around definitions and trying to get our heads around the various definitions. That is what I understand—what it actually means when the department tells us, "This is what a passive take" or whatever. I hope that helps, Mr Field.

Mr CUSH: Chair, it might be a bit better to ask the department later on for its interpretation of its terminology.

Mr JUSTIN FIELD: I definitely will. I appreciate that comment, because I have tried with it before; I am going to try again this afternoon. But you mentioned rainfall run-off. Obviously not all of a large cropping property would be under crop; parts of it would not be. I am just trying to understand—sorry, there is a lot of feedback coming on the line there. I am just trying to understand if you feel like all water running across your property needs to be captured, or only water that has run across a cropped bit of land, or any water that has fallen on that land and run off—obviously a lot of the properties up there are actually designed to be able to sort of move water around the property, potentially to run it over a cropping field. I am just trying to understand what that means in practice.

Mr CUSH: Yes, that is correct. A developed irrigation farm generally has a levee bank to keep floodwaters out, and it also has drainage inside for the effective efficiency of irrigation and to control rainfall run-off from rain events and actual tail-water, so it is all part of the equation. The whole farm has been developed around water, as opposed to a dry-land farm that is undeveloped.

Mr JUSTIN FIELD: In the orders lifting the embargo temporarily, the Government exempted passive take from being embargoed. What is your understanding of what the department means by "passive take"?

Mr CUSH: My understanding of passive take is water that cannot be held out of a channel or a system because of the way it is designed. It could be an open-sided dam on the side of a hill that just runs down, like a conventional stock dam. That, as a result of its design, is passive take. You cannot—

Mr JUSTIN FIELD: For an irrigated property where there is a channel or a berm or an embankment to prevent water running onto a crop, those properties would largely not be affected by passive take because that water is being prevented from accessing that part of the property. Correct?

Mr CUSH: It depends entirely on the topography of the farm.

Mr JUSTIN FIELD: Is it your position that water taken passively on a property—it might move into a channel or move into a storage area passively just by gravity across a property—is it your position that that is floodplain harvesting?

Mr CUSH: Well, passive floodplain harvesting. One thing I do know, sir, is water runs downhill.

Mr JUSTIN FIELD: Yes, I am pretty familiar with that as well. Do you believe that any water taken passively would need to be licensed under the NSW Healthy Floodplains process?

Mr CUSH: I think that should be a question to the department this afternoon. I think it would be prepared to actually have the licence, the potential capacity of a channel—you know, put it to the department this afternoon.

Mr JUSTIN FIELD: Just to confirm, you say it is unfair to licence passive take?

Mr CUSH: I think it would be unfair to actually licence the air space on the top of a channel that under normal operation never sees water but in a flood it fills it up and you cannot use it. Say it is a situation where you do have an embargo and the channel is full on the outside of the levy bank and it is impossible to get that water back into the river, you are not allowed to bring it in inside the farm, so what do you do? What can you possibly do with that water in that situation if it is passive take? You have got no control over it. It is there because of gravity. It is sitting there. You cannot let it in because it is illegal. You cannot let it back into the river because it is uphill. What do you actually consider we should do with that situation? That would be the question to put to the department this afternoon.

Mr JUSTIN FIELD: I think most people are concerned that properties have been designed to maximise that sort of take, and that is where the questions are going. I appreciate your feedback.

The CHAIR: I thank you for attending. I do not think you took any questions on notice but there may be some questions from members after today's hearing when we get the transcript. The secretariat will be in touch with you about those.

(The witnesses withdrew.)

(Short adjournment)

JON-MAREE BAKER, Executive Officer, Namoi Water, affirmed and examined

TIM NAPIER, Executive Officer, Border Rivers Food and Fibre, Goondiwindi, affirmed and examined

ZARA LOWIEN, Executive Officer, Gwydir Valley Irrigators Association Inc., affirmed and examined

The CHAIR: In the same order I will give each of you an opportunity to make a short or brief opening statement.

Ms BAKER: Namoi Water thanks the Committee for the opportunity to present today on the exemption which is a statewide exemption. It applies to floodplain harvesting and it is a transitional process which is allowing the Government to exempt flood-plain harvesting take particularly in the northern basin and as we transition across to a licensed process and scheme as we have done for other licensing arrangements. We thank the Committee for its time and interest in this issue and we look forward to presenting on these matters.

Mr NAPIER: I thank the Committee for its time and interest in this subject. I think of paramount importance in this, and one that has not been canvassed as far as I am aware in any of the discussions or debates around floodplain harvesting or, indeed, the exemption is the history and how these things came into being. I welcome the opportunity at some point to run through that history to give the Committee a full background on how that came about.

Ms LOWIEN: I support the comments of my colleagues. I thank the Committee for allowing us to present and elaborate more on our submission. Floodplain harvesting has been an important aspect of our organisation and, in fact, our members for a very long time. Mr Napier will explain some of that. One aspect I do want to call out is the fact that between Ms Baker, Mr Napier and myself we have more than 30 years of water policy experience combined, particularly focused on this aspect of floodplain harvesting. It is the three of us who have been in some cases the most consistent representation on the issue over the last at least 10 years, while the Government has been trying to enact this transitional approach to licensing, which we hope can continue until the end of licences in 2021.

The CHAIR: We will open up the questioning from the Committee members.

The Hon. GREG DONNELLY: I thank the witnesses for coming along today. I appreciate the submission made under the name of Namoi Water. I have three questions. We need to share the time around among members so I will try to move through quickly. First of all, could I just ask each of the witnesses have their respective organisations received or sought and received independent legal advice about the legality of the Government's regulation?

Ms BAKER: Mr Donnelly, thanks for the question. I guess in understanding your question about whether or not we have obtained independent legal advice about the legality of the exemption, we actually did not feel that was necessary. The exemption is a transitional arrangement which is included in the Water Management Act 2000. We have seen a number of transitional processes occur since 2013. There is quite a clear precedent where Government is converting what has been a right, through a work approval, into a volumetric calculation, as we saw under unregulated water licensing processes, which was called the Volumetric Conversion Database—VOLCON—process that occurred in the 1990s.

The Hon. GREG DONNELLY: I do not want to cut you off. My question is very specific. This is a particular regulation that we are reviewing and that is the remit of this Committee. I appreciate your historical context that you are providing me, but my question was very specific. In regards to this regulation which this Committee is reviewing, has your organisation or did your organisation seek independent legal advice about its legality? The answer to that would be yes or no.

Ms BAKER: No, we did not, nor do we consider it necessary.

The Hon. GREG DONNELLY: Sorry, to the other two witnesses if I could, Chair, I ask the same question.

Mr NAPIER: No, we have not sought independent legal advice in the context of the exemption, but we have had conversations over time, as Ms Baker referred to.

Ms LOWIEN: No, Mr Chair. We did not seek formal legal advice, although I agree with the others that we did not feel it was relevant on this piece of regulation, given the history of conditional arrangements in the past.

The Hon. GREG DONNELLY: On the top of page four of the Namoi Water submission, which is No. 7 to the inquiry, it says:

> The embargo of FPH and its removal and then reapplication without sufficient communication with affected stakeholders has resulted in upstream communities and FPH being misrepresented.

I am just wondering if Ms Baker could elucidate on what that means? What is the misrepresentation that has taken place?

Ms BAKER: Thanks, Mr Donnelly. The misrepresentation occurred as a result of an application of an embargo without any detail in how it would be implemented on a Friday afternoon, and then applying that across a whole range of farmers and farming enterprises, which resulted in significant confusion about how the embargo applied in terms of managing a farm during those circumstances. In relation to your issue about upstream communities being misrepresented, my point was really about the volume of extraction that occurs in relation to floodplain harvesting and when opportunities of floodplain harvesting occur. I believe that the New South Wales department, in applying that embargo, undertook an assessment of the potential risk of extraction arising from any rainfall that may occur preceding the event. I guess my concern is that we certainly did not see any transparency about that risk assessment.

In terms of downstream communities, there is an unquantified and unrealistic expectation that rainfall that occurs in those circumstances substantially contributes to downstream flow outcomes. I think quantifying that particular issue is important for Government to resolve the misunderstandings around floodplain harvesting and the flow volumes that are extracted as a result of events that occur. As we demonstrated in the farm tour, many of our farmers do not access water until we have a high flood level. That is why it is actually known as floodplain harvesting. I think that is probably my answer, unless you would like me to expand further, but it is a lack of clarity around—

The Hon. GREG DONNELLY: No, I think that is good because on the previous page you actually have some useful information reflected in a very helpful graph in terms of the flows. I just find it curious that the Government could have got it so wrong in terms of the information being communicated, because the data is the data. It is obviously well known and to have significant communities upstream and downstream being confused I think is very unfortunate, because you end up with a situation of almost farmer versus farmer, so to speak, or grower versus grower. That is just something which is not acceptable. Could I just take you to the bottom of page four of the Namoi Water's submission. It says in the last sentence:

> This would be substantially improved if departmental staff were based in the regional areas to be on the ground to work with the community on these issues …

And it goes on. On this matter, then, of the departmental staff being available on the ground, which is critically important, is it to be implied from what you are saying that there are not any, or many, or only a few departmental staff available to be on the ground to provide this type of advice and assistance?

Ms BAKER: Mr Donnelly, I think in relation to the number of departmental staff that actually have lived in a rural area, and lived in an area where the water resources that they are actually managing are few and far between today, unfortunately we have transitioned from what was a regional management structure, certainly through the eighties and nineties, and as we were developing our water sharing plans, and we have transitioned to a very central agency where very few people actually have real on-ground knowledge about those issues that they are significantly contributing to in decisions that impact rural communities. My point is really, I think, if we are to make better management decisions about natural resources, actually having people that are based in regional areas.

We have even just had a fantastic experience through COVID of everyone working from home. It demonstrates that it is feasible to have senior level staff actually based in rural areas and contributing to those conversations and better understanding issues both at a regional and at a State level. I think there is a significant scope of opportunity to have staff based in regional areas and that allows for better decisions to be made. A really good example is understanding flow dynamics, particularly in rivers such as the graph that we have presented. Then Namoi River is the high point of the bank. The majority of the flow that contributes to downstream out comes from the river itself. We need the substantial flow for a flood harvesting event to break up in the Namoi River. Just understanding the importance of that in the context of individual rainfall events becomes really important.

The Hon. GREG DONNELLY: Yes, of course.

The CHAIR: I want to follow on a bit about the communication. It has been raised in just about every submission that there was very poor communication around the implementation of the regulation. In the Namoi Water submission you say:

> and the immediate removal via a Section 324 embargo caused substantial distress for water users.

Clearly there is an issue here around the distress that is caused, I guess that emanates from the lack of communication. Would having more people based in regional New South Wales from DPI Water assist with the mediation process?

Ms BAKER: Absolutely I think it would**.** Under Labor, if I might say so, we had substantial staff in regional areas that understood these issues and therefore understood the need for communication and how you could effectively communicate in regional areas with people. The embargo was applied at 4:38 on a Friday afternoon. All the media had shut down and obviously there was an inability to communicate via radio. Therefore it was left to groups such as Northern Water Users to communicate directly to farmers. I think it is a partnership between those that are based in regional areas and the relevant agencies in understanding how we actually communicate in an effective way. I think absolutely we need to rethink that process but I cannot stress enough the distress that was caused by the removal of that embargo. I believe it set up what Greg was indicating, farmer versus farmer, due to the information on the perception the event was being somehow mismanaged.

Oddly that comes down to being able to clearly articulate in an embargo event what the public interest test is and the process for applying that. And then going that one step further as events are managed to be able to communicate that clearly and concisely to communities that are affected by those particular issues. Ultimately our goal is to ensure that when we reach critical needs that we have the right process and structure in place to be able to communicate those issues well, so that not only communities where we work and live in the northern basin but also downstream communities are listened to and understood. They are the concerns that they have raised. They feel like they have had opportunity to contribute to and have a good understanding. I think it would highlight a good understanding because Mick Keelty in his report has highlighted that we have a toxic water debate and unfortunately the misrepresentation by the media is promulgating to that issue because water is complex. We really need to rethink how we engage with rural communities both up and down stream to resolve that so everyone gets the best outcome.

The CHAIR: I would not mind asking Mr Napier and Ms Lowien's views around it. Clearly the communication of the regulation has been an issue. People would not have raised it in the numbers they have if it was not. In your minds, what would have been a better way to have communicated this regulation and the subsequent exemptions ?

Ms LOWIEN: I think for this one the communication issue has conflated through timing. The regulation has always been foreshadowed within the various floodplain harvesting policies policies. And just because it has being foreshadowed, we would have expected or would have hoped that the department could have briefed individuals, water users, other communities, Parliament—brief them full stop. Just because it is sitting in the policy does not mean it is going to be potentially enacted or when it is happening. I think where they failed was in the timing of that— it sat there since 2013. It could have been enacted at any time except for some reason, and I thank the Minister for actioning that step to provide clarity for everybody. That happened in a time where we were critical and in a 100 year drought.

The second issue, which is a separate order, was the temporary restriction order that came thereafter. Going back through it—and I believe this committee put forward for regulation guidelines—there is some clear steps there that could have been done in an easy, simple manner; in an explanatory note which could have happened much earlier than what we got on the Friday, and then subsequently that we could have had discussions about the temporary restrictions previously. With other forms of access, for example, regulated entitlement out of a dam, when a temporary restriction is going on it can have potential market impacts so I appreciate that you do not forewarn that. The view that putting a temporary restriction on floodplain harvesting that it cannot be accessed unless we are in a flood. As Ms Baker has pointed out, it has to break certain points in each of the valleys to be initiated. It is not something we can create the opportunity for.

I think earlier discussions about whether there was intention and what that would look like, explanation on how the difference between passive and active might mean, and what it meant for rainfall run-off within irrigation fields, those discussions could have happened with water users well in advance rather than via a text message. To then have that communication of a text message and then have no-one available to explain that except those industry groups—and we cannot sit in our position and provide advice to our members without clearly understanding those definitions ourselves—has meant that there was a lack of communication around that and that is where the frustration stems from.

I think action and following due process on the regulation and then being more upfront and transparent about their intent and how they would embargo if they needed to could have helped alleviate—and I would reiterate Jon-Maree's comments—the significant stress of the people. We have been in drought as much of New South Wales has been. Most people do not have staff available. Because of the drought they got rid of all of all their casual staff so farms have been left idle with no consideration of water occurring, and then to be told that now you have got to exclude water and not even understand how to. There was a staffing issue, there was a lack of understanding and then the third compounding impact. As we understand now we are all living in a water environment with a very firm and fair Natural Resources Access Regulator. That uncertainty and not clearly understanding what they could and could not do in circumstances was very distressing for individuals in a really difficult time. That was where the frustrations have come from industry in particular.

The CHAIR: Mr Napier, your views around communication?

Mr NAPIER: I endorse the comments of Ms Baker and Ms Lowien, it was poorly planned. It certainly was a matter of timing. It could have been done better and not left to the last thing on a Friday afternoon to invoke these things. We were in a slightly different situation because the timing of our event was different. We had towns in our valley that were within weeks of running out of water themselves so we are more than acutely aware of the impact; the drought has impacted everybody. The communication that we had on Friday afternoon consisted of an email and a text message followed up by a phone call in some cases which was then followed over the weekend by us trying to get onto departmental staff to try get some more detail around what was happening.

More confusion was created by the partial lifting in a minority of cases I understand, it was not in our valley, but when that became known that certainly caused confusion of what the hell is actually going on. Back to Ms Baker's earlier point about lack of people on the ground, in the past we had regional management and regional staff. Those people were on the ground, they were embedded in the community, they knew exactly what was going on and who to speak to if they did not know. Now we have the centrally [inaudible] decision-making system that has become problematic and I think this shows acutely the area of problem that has occurred in this case because of the lack of the ability to both prepare and to communicate during an event and I make the observation that the decline in the performance of the New South Wales department can almost be traced back on a time line to the withdrawal of those regional staff from the regions.

The CHAIR: Yes, I probably agree with all of that, particularly the regional staff being located in regional New South Wales, but I am a bushy like some others on the Committee.

Mr JUSTIN FIELD: Thank you for making the time to be here and explain this to us, to everyone. I am still struggling to understand the rationale for the regulation and where the key issues are. The New South Wales Irrigators' Council earlier in their testimony were very careful to try to say they wanted to keep the regulation and the embargo and orders separate, they saw the regulation as a transitional arrangement that was always flagged. Ms Baker, in the Namoi Water submission you say on page 2:

> Take under the Water Act 1912 (NSW) via Part 8 and 2 was exempt from requiring a licence … and the transitional arrangements provided that until licenced through the Healthy Floodplains project, the exemption would continue.

I take it from that, that really it is a continuation of the status quo that the regulation in effect has not had any substantial impact on your stakeholders, is that right?

The CHAIR: Ms Baker, did you hear all of that, because Mr Field faded out at one point?

Ms BAKER: All good. Mr Field, I guess in terms of the rationale for the regulation is that we now have a new Natural Resources Access Regulator and the concern is that for the regulator to undertake proper compliance there needs to be quite clear specific regulations within the Water Management Act that clarify how the regulator can implement compliance that relates to this issue. In terms of the transitional arrangements, the fact that the department would have undertaken, I would assume, their own legal advice that informed the decision to apply the exemption, it had always been intended in the policy regardless. There are two aspects here; one is the requirement for the exemption to cover transitional floodplain harvesting take; and the other is for a general exemption as it applies across the water resources. My understanding is that we will still require a general exemption regardless.

In that context the rationale for the legislation is quite sound because it does currently exist within the Water Act 1912. Is it required prior to the licensing of floodplain harvesting to cover technique from licensed works under the Water Management Act? We have not sought legal advice on that particular issue but I would assume that the New South Wales Government would have done that as part of this process. I agree with, Mr Field, I think on one hand we have a transitional arrangement, but ultimately under the Water Management Act it was always intended that there would be a general exemption because this is a statewide policy position. My

understanding is that it is necessary, it was always intended to be implemented and it does provide the regulator with the necessary clarity and clarification in relation to how they would implement compliance that relates to works approvals or flood work approvals and take that occurs on flood plains.

Mr JUSTIN FIELD: I think we are getting a bit closer to the answer here. There was some media a month or so ago which suggested that NRAR had expressed a view that floodplain harvesting, some elements of it, may well have been illegal and that with some floods expected they might have indicated that they were going to undertake enforcement actions, so this regulation was necessary to clear up the status of the exemptions and bring it under the Water Management Act. Is that respectively what you are saying as well, there is a disagreement internally and potentially even between northern basin and southern basin irrigators about the legality of floodplain harvesting under 1912 and that has tried to be cleaned up under this regulation?

Ms BAKER: I think, Mr Field, the issue that you have highlighted is specifically relating to the general exemption needs to apply and it does apply under the Water Act 1912 and this exemption does provide for that under Water Management Act 2000. In terms of a general exemption, absolutely the regulation does continue that and should be supported. In terms of the issue that you raise in relation to NRAR's view, ultimately they as a regulator would have their own internal processes and ultimately that is for the New South Wales Government through the department of industry, environment and water, to resolve whether or not there is a gap, because certainly this is not the only area of water regulation that the regulator now has highlighted that there are some ongoing issues in relation to how we have transitioned across certain aspects of water management law. That is NRAR's job, Mr Field, as you and I both know.

We want clear regulations. They have raised a concern, that does not necessarily make floodplain harvesting being illegal. I think we need to clarify that particular point. But ultimately my understanding from the beginning of this policy it was always intended to have a general exemption continue and that is what this piece of regulation actually does.

Mr JUSTIN FIELD: The real frustration then is not so much with the general exemption regulation but is then how it was used to implement the 324 embargo, and then there is some confusion around the temporary exemptions to that again. This is for all of you, were you surprised that an embargo was being put in place? Because we know that there have been discussions about the general regulation and the policy for a long time, everyone assumed it would rain again at some point, had it never been raised with you the possibility that an embargo on floodplain harvesting could be put in place as part of a first flush event? Is that where the surprise came from?

Ms BAKER: Look, Mr Field, I can only speak from my own perspective, I was not aware that there would be an exemption applied to then result in an embargo. Certainly we were surprised and that is why in terms of our submission we have raised the issue of transparency around the public interest test of applying embargos is critical, it was a commitment of Niall Blair when he was Minister. In terms of the Water Amendment Bill 2018, quite clearly on the floor there was a commitment that government would undertake proper public consultation on the public interest test to ensure that issues like this were better addressed and better understood by the general community. From Namoi Water's perspective we were not aware that the exemption and embargo would apply. The timing of that, as you have already indicated, we raised in our submission.

But the terms of reference for this Committee specifically relate to the regulation and its necessity and then the impact of it. In terms of answering those questions I guess we feel that the general exemption was always intended and as we move forward I am quite sure that government would be keen not to repeat the poor timing. I would suggest there is acceptance that really ultimately the assessment of floodplain harvesting take and risk probably should have been more transparent in terms of the decision-making around that, because that would have then led to addressing some of the misperceptions that floodplain harvesting took 300,000 megalitres of water in that last rain event, which is in fact incorrect. We do not have a department or agency clarification on the licence volume of floodplain harvesting yet to address those issues.

Ultimately for communities, particularly in the northern basin where floodplain harvesting has developed because government did not build significant head water storage, we ran into practical issues around delivering water. Floodplain harvesting in terms of its historical context—and I know I am answering this in a very long-winded way—we need to reflect that it has developed arising out of government policy positions for over 30 years. That informs how we have got to where we are now and why it is an important part of the landscape because floodplain harvesting and diverting floodwaters has occurred by graziers and by landholders in numerous different ways for decades now. It has been something that Government has recognised and this process is actually about licensing that so that we can volumetrically account for it, as we are required to do under the National Water Initiative.

The CHAIR: Just before Mr Field continues, I wouldn't mind getting Mr Napier's and Ms Lowien's views on that question.

Mr NAPIER: I will go first. In terms of the embargo, we absolutely anticipated an embargo to be put in place. It has to be understood that this is the first time that it has ever been applied to floodplain harvesting. Historically, embargoes have applied to supplementary take and we fully anticipated that because of the depths of the drought that an embargo would be in placed to limit that. We understood that. We knew that was going to happen but the one concerning floodplain harvesting was completely out of left field because it had never happened before. I think it is important to understand that.

The CHAIR: Thank you. Ms Lowien?

Ms LOWIEN: Thank you. If I can just raise a couple of points and readdress something that Ms Baker said earlier about the transitional approach and the regulation, first, and then I will move to the expectation of whether floodplain harvesting would be embargoed. The key aspect in terms of the foreshadowed exemption, which has existed in the floodplain harvesting policy—one area which may explain why it happened is that we all know water is complex but unfortunately in New South Wales there are a number of legacy issues. We still have significant number of approvals, as well as access licences and other forms of rights that are sitting in the Water Act, and so the clarity provisions were required to remove all of those remaining systems, particularly for floodplain harvesting.

But we still have some unregulated access licences that sit in the Water Act as well in some of our areas—is to start making that clearer for everyone going forward. I cannot reiterate that enough—that whilst it was foreshadowed it does also provide a much easier regulatory space for water users, but also the regulator and Government going forward, knowing that a fair portion of that in the northern parts in our five valleys would then transition again to licence. The key aspects of that, too, is that the original Healthy Floodplains project, which started around about 2013, had a staged approach, which had valleys stepping on different time frames and so they needed the transitional arrangement to ensure that all of those valleys were progressing without undue, perverse impacts of what stage they were at in part of the Healthy Floodplains program. That is really important.

The reality is that we are now in our second or third extension and we are 12 months out, potentially, of licences but I believe they are some of the reasons why this transitional arrangement was to be put in place. To highlight that, I believe the Gwydir and the Border Rivers have a floodplain management plan in place, the Barwon-Darling have their floodplain management plan in place and Ms Baker's Lower Namoi's might have been approved. Those are the key instruments which move some people's licensing approval process through to the Water Management Act. That is just providing some clarity for people. On the question of whether we thought an embargo would ever happen, we had done some risk analysis to understand that under a licensing regime we could expect an embargo on this form of take.

As I said earlier, we were—just like Mr Napier's valley most of our valleys had areas and we had members which were short on stock and domestic water, as well as we knew towns just downstream of here were at critical supply. What surprised us is that the movement to floodplain harvesting restriction almost ignored or misunderstood the way floodplain harvesting occurs. Because we know it needs a flood at certain height and a certain extent, the last time we had full access or all of the northern regions were floodplain harvesting, was back in 2011-12, when we had water from the border down to the Macquarie Marshes. It was a sheet of water flowing and Menindee Lakes was surged multiple times because it could not contain its 100 per cent full level. We thought it was a little bit strange from that aspect to put on an embargo when there was an unlikely chance at that time that there would be a flood because it requires a significant amount of water.

As it turned out, we had a very small, isolated and very flashy event because of the intensity of the rainfall in a couple of locations. We were not considering that that would even be a step that the Government would take until that week.

Mr JUSTIN FIELD: Again, I am happy for anyone to answer but I guess Ms Baker because it is picked up in the Namoi Water submissions specifically with that chart—look, there has been commentary in the media about the volumes being much greater than what the Government has currently said the maximum amount of floodplain harvesting take over that period was, which I think it said was about 30 gigalitres. Others have put it at hundreds of gigalitres. I just want to get to the truth of how much water this is. Why are you so confident that it is a relatively small amount?

The CHAIR: You dropped out again, Justin, right at the very end

Mr JUSTIN FIELD: Sorry, the end question was to Ms Baker. Why are you so confident that floodplain harvesting is a relatively small volume compared to the amount of water that ultimately flowed down the rivers?

Ms BAKER: Thanks, Mr Field. So, again, it goes to applying context of when floodplain harvesting opportunity arises. You would have to have a substantial rain event over a sustained period for overland flow and I guess it comes down to—there are two aspects of floodplain harvesting. One that occurs from water that breaks out from the banks of a river and, as we demonstrated at the Myall Vale breakout, you have to have a substantial event to occur for that. The flood plain is basically 50 kilometres long and 25 kilometres wide. We have a flood management plan that ensures that we maintain connectivity. So, in terms of assessing the risk of floodplain harvesting and the volumes that are taken, I cannot really comment on data and projections that we have not seen, Mr Field. I am not aware—it is easy to throw a number out and say it is a hundreds of gigalitres but ultimately have to back that up with some level of assessment.

In terms of government assessment, it would use satellite imagery and it now has a tool where, in terms of compliance with this process, government uses satellite imagery to assess starting storage coverage in terms of service area covered and then assess end-of-event surface area covered. Where there had been a change greater than 20 per cent, that then flags for further assessment. In terms of assessing floodplain harvesting take from satellite imagery, if I have a swimming pool and I fill it up with 15 centimetres of water, is it full? The answer is no: I have 15 centimetres of water at the bottom of my pool.

I think the perception of floodplain harvesting is very much that if a storage is covered with water that that represents a significant volume of take, which is fundamentally incorrect. In terms of how we can be sure it was a small amount, we rang every farmer in the Namoi who had an opportunity to take overland flow and asked them how much water they extracted while the embargo was lifted and how much water they had in their storages, so that we could help quantify that start and end balance of what the volume might look like. That is really I guess the process, where we are reasonably confident that the volume of extraction—because as it relates to the volume of the event, which did not include a breakout from the Namoi River; it was overland flow that occurred from 150 millimetres of rain that fell overnight.

Basically you had a situation where the majority of the flow came across land and is not water that would ever have contributed to maintaining downstream flow outcomes. Again, I think it comes back to local knowledge within each catchment, which operates very differently in each individual flood event depending on rainfall. A really good example, Mr Field, is that we have got a farm that has got 15 rain gauges. One side of the farm that had 10 millimetres during that same event while the other side of the farm that had 150 millimetres, and then received another 50 millimetres on top of that.

Each farm and the water that runs off it is going to be different, and floods occur differently based on whether or not the antecedent conditions are a crop in the ground or grass across the country or bare—which, as we saw in the last event, most country was bare, so there was a substantial shedding of water. Most of that came off irrigation fields, which was rainfall run-off.

Mr JUSTIN FIELD: One quick follow-up to that: Let us talk about the overland flows for a minute. I get the sense that this is where some of the confusion comes from. It can be a substantial amount of water. I understand—and you have said—very little of that would have ever been able to contribute to downstream flows, but I think we know that the size of the properties and the way they are designed is to maximise gravity-fed water moving over the farm and through the landscape to capture it. Just so I understand, that is what I understand the Government calls "passive take". Is it your understanding that using that water, capturing that water, diverting that water is considered "floodplain harvesting"? Is that water use or take going to be licensed as part of the Floodplain Harvesting Policy?

Ms BAKER: Chair, it is going to take a long time to answer this question.

Mr JUSTIN FIELD: I am happy to put some of that on notice if it is useful.

The CHAIR: Yes. Ms Baker, could you put some of that on notice? We are moving closely now to the cut-off time and that is information that we do not want to miss, if you could maybe take it on notice and provide that. Mr Field, Ms Faehrmann has also got a couple of questions as well.

Mr JUSTIN FIELD: Go for it.

Ms CATE FAEHRMANN: Thank you, Chair. Just a question back to Ms Baker, actually, in terms of—can you hear me?

Ms BAKER: Yes.

Ms CATE FAEHRMANN: It is a question in terms of one of your responses just then to Mr Field's questions. You said that after the embargo event you contacted your members to ask them to estimate how much water they took during the embargo. I have a couple of questions about that. Has that information been given to the Government to check against the satellite imagery you have also referred to? Has NRAR asked for that information? That was, I assume—I think it was the 30 gigalitres that you have referred to—is that right as well, in terms of the total of that amount?

Ms BAKER: Ms Faehrmann, obviously those are multiple questions, and Ms Lowien and Mr Napier can probably jump in as necessary. The Natural Resources Access Regulator undertook compliance visits recently. Because there was an embargo that had been applied, and because of the lifting and the whole confusion of how the embargo worked, we wanted to ensure our members understood how they could best report when it came to the end of the event. That process of internal quantification of the number was really to address community concerns that it was a substantial volume of water that would have contributed to downstream outcomes.

We have retained that number within Namoi Water. We know that Government has undertaken its own assessment through satellite imagery and it has undertaken a quantification of floodplain harvesting as a result of tools that it has developed. I think that is an area that will progress over time, where that sort of satellite imagery can continue to provide a validation point in the volumes of take—so long as it is clarified and validated at a farm level, which has now been done through the NRAR visits in every single northern basin catchment. That is the process that we would support to ensure that there is confidence in what volume was actually accessed during the event.

Ms CATE FAEHRMANN: Just a quick question—sorry to jump in: You are talking about NRAR visits, but you also specifically said that you asked all of your members exactly to feed back to you what they think they took during that period. The question is, have you passed all of that on to the Government? Has the Government asked for that, or has NRAR asked for that? The visits are one thing, but the information that you specifically got from your members—it is a question as to whether NRAR has actually asked for that to really quantify what was taken during that time.

Ms BAKER: Yes. No—

The CHAIR: Ms Baker, you will answer that one, but then Ms Lowien has also indicated she would like to respond as well. Ms Baker will go first, then Ms Lowien.

Ms BAKER: Basically, Ms Faehrmann, we were asked to provide our understanding of floodplain harvesting access during the event to address the issues of confusion around the number. We have certainly provided that information in a format of, "Here is what we understood was accessed during that event". It has not been provided to NRAR, because it has not requested that information as it is an independent regulator. I would not expect it to request that information from us, or for it to accept information that relates to that event. It is required to undertake its own independent assessment, which is as it should be.

Certainly we have provided an estimate to the department in terms of what we think was taken but, in terms of quantifying that at an individual farm level, we have not provided individual numbers of each individual farm's take for that. We just aggregated the number that we estimated through that survey of our members and have provided that. Ms Lowien?

Ms LOWIEN: I think some of the context around that is really important, because we did the same process as well. It was a commitment by each of our groups that we had with our members that if an event occurred—a floodplain harvesting event—that, regardless of the conditions at the time, we would trial the proposed monitoring strategy for the floodplain harvesting program. That was the objective that we did, and we encouraged that over that week and that time. That really helped to better inform our understanding of how that monitoring process would go forward and be prepared for that new space of having that approach under a floodplain harvesting licence.

We did a similar approach to Namoi Water. We asked people to voluntarily provide that starting balance and that ending balance at certain dates. We are still waiting to have a discussion where we can understand more the Government's approach. We have been requesting, with plenty of stakeholders, a technical report on how the satellite approach was done. We would have hoped that that could have been available so we can interrogate—because this is the space that we are moving to. I think a fantastic aspect of this is that we did trial, for the first time, voluntary monitoring on the ground, which will be part of the licensing program going forward, and the Government trialled its new technology, which is bringing two forms of existing technology together to estimate volume.

So we think it is important that we have a chance to validate and calibrate that process of which Ms Baker's is correct, in that [inaudible]. It has sort of been occurring lately, They are going and validating the volumes installing the records, and some of those records are very much those ones that we encouraged and asked for at the time.

The CHAIR: What are you views on that, Mr Napier?

Mr NAPIER: We endorse the comments of the others. Again our take in this particular event was very limited because by the time the embargo was lifted in the New South Wales' border rivers the flow had essentially gone. I think we had 1½ days on the tail. The sooner we can get to open and transparent reporting of exact volumes taken—at that very short notice then the happier we will be. What is causing us the pain is the disinformation that is being peddled by those who do not know and they are just throwing numbers out there for the sake of speculation and that is doing us enormous harm.

Ms LOWIEN: Could I just add one thing to some of Mr Field's questions earlier? The department has provided some further analysis on other flows that occurred during the February event and further explanation on the floodplain harvesting components. I think that is important information that is coming, that is now available. There needs to be more detail there. I must say it is July and we are talking about an event in February. I think in a space where we are licensed, where there is a monitoring program in place, roles of being voluntary is mandatory under a floodplain harvesting licensing regime. I think it is really important that we have this information in a more timely manner so that there is not this question of how big is the volume? Is that water that I can see in the satellite image? How is that being taken? We will have clear understanding of that in a licencing regime which includes monitoring, compliance requirements for individuals.

The CHAIR: Mr Napier was nodding as you were speaking. I think that means he concurs with your views. Is that right, Mr Napier?

Ms CATE FAEHRMANN: I would love to get further clarity. Did the department ask you for just the total take in your respective valley or was it after individual takes? I think Ms Lowien suggested that this was an opportunity to trial some of the monitoring. Therefore, did the department want to have access to what that looked like at an individual property level? Did the department just come to you and ask for the total take in your valley? Was it not seeking any more information at all?

Ms LOWIEN: Just quickly, the department has never requested us to provide any monitoring at all, nor has NRAR. We as an industry collectively decided to undertake and to test the monitoring strategy which we understood at the time to be going to be in place. We are still hoping for that final version to be announced. What we did is take the opportunity to provide them the amalgamated information. But we have said, and we have requested a number of times, that we would like to sit down and have a discussion with them about calibrating that process which is really important to the technology, and that is yet to occur. This has been industry driven.

The CHAIR: I have one question before we finish up. This morning the Committee has heard that if the disallowance motion went ahead and the regulation was overturned that, in effect, the arrangements that were in place before could still continue on until such point that the legislation comes in place. Accepting that bringing forward this legislation or the formalised requirements have been pushed back a bit a few times now, how long do you think this regulation could hold up if it goes out beyond the Government's proposed July next year? I have two questions: How long can it go for? If the disallowance motion were successful in the upper House, what does that effectively mean on the ground?

Ms LOWIEN: My understanding the regulation did not have any sunset clauses in its time frame. But Jon-Maree Baker was correct in her initial statement that this is the first one; there needs to be further regulation later on to address the remaining parts of the State that are not licensed. I think that is really important to foreshadow to the Committee and to the Parliament that there is potentially another piece of it through which we will repeal this. What happens with boots on the ground, I think, for largely our region where we sit within transitional arrangements, we have not seen [inaudible]—water supply works approvals for floodplain harvesting be issued yet.

The majority of our work approvals sit within the Water Act still [inaudible] and lack of clarities for those who have Water Management Act approvals announced. And that is that statewide implication where other areas, and may be sections within some of the northern valleys have a Water Management Act works approval and that is where the clarity is really needed. What it does is potentially highlight the statewide issue for some people knowing that the transitional, or that licensing for the Water Act covers most of those water users in the northern parts.

Mr NAPIER: I am not a lawyer but my understanding, and we have always been assured, that the transitional requirements would stay in place until such time as licensing is completed and the transition is completed. So at this stage that is July next year. That is what we have been assured ever since this process started.

The CHAIR: Is that the date to which you are working?

Mr NAPIER: That is the date everyone is working to, I believe, yes.

Ms BAKER: I think your first question about how long the transitional provisions can stand up has probably been answered sufficiently. In terms of the impact on the ground, really this is now extending into the area of compliance. What we do not want to have are regulations that do not provide clarity to a modern, functional regulator to be able to implement. My understanding is that this exemption actually provides significant clarity for the regulator and it reduces the amount of potential for legal interpretation in relation to how the exemption applies on the ground through a range of different forms of take that have transitioned across from the Water Act 1912 across to the Water Management Act 2000.

Ultimately, the test of that is in the legal system but I certainly would not want to place farmers who have done their very level best to comply with the regulation that has been clearly communicated to them by not applying this exemption. It potentially puts them at risk. My understanding from the impact on the ground is that this is actually providing security not just for northern farmers but for farmers and water users across the State. I think in terms of the outcomes that the exemption provides we should really be focussed on that and I think that that stands to itself to recommend particularly to the upper House that the regulation should pass.

The CHAIR: Thus ends the session. I thank Ms Jon-Maree Baker for her time last week to provide a virtual tour, so to speak. We intended to have a look around but COVID-19 gazumped that process. On behalf of the Committee, I say we are appreciative of your time and effort last week. I believe one or two questions were taken on notice. I flag the question that Ms Baker took on notice from Mr Justin Field. I ask that question also be referred to Ms Lowien and Mr Napier to obtain their comments. The secretariat will be in touch with you about that and the Committee has resolved that you have 14 days in which to respond.

(The witnesses withdrew.)

(Luncheon adjournment)

CHRIS BROOKS, Chair, Southern Riverina Irrigators, sworn and examined

DARCY HARE, Executive Officer, Southern Riverina Irrigators, sworn and examined

TIM HORNE, Lawyer, Aqualaw, sworn and examined

The CHAIR: Welcome to this afternoon's session. Would each of you like to make a short opening statement?

Mr BROOKS: We have major problems. We have no problem with the control of licenced water where people like ourselves own a licence from a structure, where there is an allocation of water, where they have bought a licence and paid for it, and when those storages are filled they are allocated accordingly. Unfortunately in our case, because we have complied, we do have a licence and we have works orders supplying water to our properties, we are being adversely affected by the unreasonable take and the uncontrolled take of the volumes of water in the north. There are rules that apply to all of New South Wales and for too long they have not applied to the northern regions. There are so many factors like the volumes, the controls, metering and compliance with works that have not happened.

We have seen such a massive increase in the take, as is evident from a simple meter like at Wilcannia, which has dropped substantially, and we would estimate by that figure 4,000 gigalitres. That has a massive impact on downstream users for critical human needs and for massive environmental damage to wetland in places like Menindee Lakes and Macquarie Marshes. There have been 20 years of demands to meet these and control these. That has not happened and that has not been enforced. Since the basin plan was implemented in 2012, the Liberal-National Party of New South Wales has not actually complied with all of the requirements in the Basin Plan or put the meters in place. The extraction now is having massive impacts, not only on environment downstream, but because there is no water going into those lakes and making no contribution down the Darling River to South Australia's requirement, it is negatively impact our allocation.

They are now taking all of the water out of our storages downstream, which again is having massive environmental impacts all the way down the river and destroying Ramsar-listed wetlands like the Barmah Forest, destroying trees, wildlife and fish all the way along the river, to make up the volume that is demanded into South Australia and downstream. We have been patiently expecting for this process to be implemented. They are out of time. To put in place a regulation to give these guys further extension and to give them an amnesty for taking water without a licence is just intolerable for us. We have no choice but to make the suggestion as strongly as we can and ask the New South Wales Government to please disallow this motion and consider all irrigators, the environment and other users downstream in New South Wales.

Mr HARE: I endorse what Mr Brooks has said there. Also, we talk about this being unregulated take with floodplain harvesting—the Murray-Darling Basin Authority [MDBA] did a compliance report in 2017 and said that the northern basin, and I know we are focusing on New South Wales issues, but it talks about the northern basin floodplain harvesting compliance being 29 per cent. We flick back to the southern basin and we are sitting on about 84 per cent compliance with all of our take. When we couple those together and we see a relaxing or an exemption for works orders, and the fact that there are no licences for floodplain harvesting yet, it puts you at loggerheads when you are in the same State and these completely different set of rules apply for when you are looking to take water. When the taking of that water is at the unregulated approach that it is now, it is having a massive impact on communities in the Murray Valley.

That is where we are coming from. We used to get 39 per cent coming down the Darling and now we have about a third of the water now flowing down the Darling and that is having massive impact because of these agreements that New South Wales is party to, being the Murray-Darling Basin Agreement.

Mr HORNE: We have circulated some supplementary submissions just in response to a lot of the other submissions before the Committee. I think that every single person who has submitted something to the Committee is in agreeance that floodplain harvesting needs to be licenced as soon as possible. I think most of the people who have made submissions to the Committee have recognised the huge impacts of floodplain harvesting and how important and urgent it is that these matters are addressed. However, there really has been a lack of any justification for the regulation. There do not appear to have been any strong submissions as to why it was so urgent or why there was no consultation with the community. There has been no clarity around what was the position before the regulation with respect to all of these forms of take. It just seems to be quite ad hoc and is not the appropriate way to deal with what is a significant issue across the entire Basin.

The CHAIR: Thanks, Mr Horne.

The Hon. SAM FARRAWAY: I have a couple of questions. I have not been able to read through your supplementary briefing that has only just come in. Excuse me for that. To Mr Horne from Aqualaw, in your view does floodplain harvesting occur in the south?

Mr HORNE: Does it occur?

The Hon. SAM FARRAWAY: Yes.

Mr HORNE: I do not think that that is the point of this review, is it?

The Hon. SAM FARRAWAY: It is around the regulation of floodplain harvesting.

Mr BROOKS: No, it is not, though. There is none in the Murray Valley, from Murray Irrigation, that I am aware of. It is controlled and licenced and it is illegal to take water via any method without a works order or a licence and an allocation.

The Hon. SAM FARRAWAY: So any framework that is being looked at as part of this regulation, which is being essentially established for the north, should that be regulated, do you think, in the southern Basin?

Mr BROOKS: It is presently in place. We all comply with the works order, the licence and the water allocation that we have bought. The problem is that we are getting a zero allocation because there is no water coming down from the north, it is not being metered, monitored or controlled in any way, and it is reducing the flows into the Murray by about 4,000 gigalitres per annum.

The Hon. SAM FARRAWAY: How much water do you think is taken during a typical floodplain harvesting event?

Mr HORNE: What is a typical floodplain harvesting event? Without any proper monitoring and metering it is impossible for anyone to give you a really clear answer.

Mr HARE: I could attempt to answer that. Going back to the 2017 compliance review that I mentioned earlier, it actually gives an average annual take in the northern and southern basin. It looks at an average take from 2012-13 to 2015-16. If you go by the 85 per cent compliance within the southern basin and then you look at the northern basin where you have about a 30 per cent compliance—and this is not part of our supplementary submissions, I just thought I would give your question. It looks as if there is about 3,000 gigalitres in this four-year period on average of unmetered take in the northern basin. That is off the 2017 MDBA compliance review. I can flick that through later on if that suits.

The CHAIR: We will treat that as a question on notice. The secretary will get in touch with you to and you can provide that as a response.

The Hon. SAM FARRAWAY: Mr Horne has said that there is not generally a normal floodplain harvesting event but obviously there are articles publicly available in the media. I think you have made comments in media that a normal floodplain harvesting event could take 3,000 gigalitres in an average event. Is Tim wrong in your view? Darcy just touched on it then.

Mr BROOKS: I did not say, "in an average event". What we were saying is the annual take. In the rainfall event that we had earlier in the year when Minister Pavey used her powers to lift the embargo, I think there is a report that she estimated 20,000 megalitres and DPI supported with 30,000 megalitres. On evidence we would like to submit that closer to 900,000 megalitres were taken in a rainfall event in the early part of this year.

The Hon. SAM FARRAWAY: For context, when I was doing a bit of research around today's inquiry I found an article in *The Land*, 27 March last year, which quotes you as saying:

> simply by calculating the amount of cotton grown, the take in the state's north by floodplain harvesters would have to be 3000GL.

Mr BROOKS: Yes, that would have been the case.

The CHAIR: You said you have some information that you want to present. Is that the same information that Darcy is going to provide to us?

Mr BROOKS: No. It is quite separate information that is not quite complete. The volume of water that we would contend was taken in this most recent rainfall event was closer to 900 gigalitres. We would be happy to submit that information when it is finished.

The CHAIR: Yes please. We will take that as a question on notice and the secretary will get in touch with you.

The Hon. ROBERT BORSAK: Why did Mick Keelty not make any comment in his floodplain harvest report north and south?

Mr BROOKS: We were concerned about this. It was an issue when he came down to do the southern basin review. I put that question. I suppose it is a question for him but his response to me when he came to the south was that in the northern region floodplain harvesting was not an issue, subsequently it was not raised with him and subsequently he did not mention in his report. However, he did contend that it was an issue for us because he could see how the hydraulics were negatively impacting our reliability where we had an average of 88.5 per cent reliability for our allocation against the licenses we held on the Murray River for a 42 year period. That has been zero for two years—three per cent last year and it is zero at the moment. That is where it is impacting us and we raced up with Keelty and we find out how it is negatively impacting our region and still he chose not to make any mention of it in the review that he did to an extent other than to say it should be metered, which is obvious.

The Hon. ROBERT BORSAK: Do you have a view on what the purpose of this regulation is all about, the one we are currently discussing?

Mr HARE: I think it is to allow more floodplain harvesting to occur for people who never sought or never had works approvals before 3 July. We know that there is a massive development happening up in the northern basin with floodplain harvesting works for increased take for the last 27 years and nobody is prepared to put a number on that. The Natural Resources Commission [NRC] has said that there is 4,039 gigalitres of storage. The Department of Planning, Industry and Environment [DPIE] has come out and said—and the NSW Irrigators' Council has commented being an advocate in that space that there is only 1,400 gigalitres of storage. It is one of those areas of hot contention and I think they want to take as much as they could in this time frame without worrying about downstream climates.

The Hon. ROBERT BORSAK We heard evidence this morning—I think it was the New South Wales water people, I do not remember the terminology there—that this was an interim measure and that it was necessary, but when they were quizzed about what it was all about they did not seem to know. They just kept saying that the department or the Minister's office was saying this was necessary and had to be done in relation to or before new legislation could be brought forward in July next year. Are you suggesting this is a delaying tactic to allow more work to be done?

Mr HARE: Yes, I would think so.

Mr BROOKS: Absolutely, Robert. It has been a contentious issue for some time. We have been able to establish that facts and data based on that simple cotton crop that Sam was mentioning. Knowing the volume of cotton that was produced in a year when there was no rainfall, when there was no allocation from the rivers there was very little water available from bores, they were still able to still produce a volume cotton that would have required 3 million megalitres. Just to put things in perspective, the basin plan has spent $30 billion of taxpayers money designing a system where they take all the water, they allocate it to the States, and then the intention was to remove about 3 million megalitres of water for the environment. During the same time frame, because there has been no regulation or control or monitoring or metering of what the water in the north by the New South Wales Government that, the same 3 million megalitres of water has been taken from the north. So you have had a zero effect and it is having a major impact on our region because all of our water is supplying the environment downstream.

The Hon. ROBERT BORSAK: Is there any reason at all why they should not immediately implement the sort of controls and licensing arrangements on the floodplain harvesting in the northern basin you talked about other than what you are mentioning now?

Mr BROOKS: I am saying that it absolutely has to come to a head. Right now they have filled their storages from this recent take and this regulation allowed them to take massive volumes of that water without any fear of any conviction. They have a full storage. They have sufficient to grow a crop. This is supposed to be implemented next year and if this regulation is removed it actually forces the whole process to go ahead, to be monitored and to see who is complying with works orders so they can determine who can be given a license. The now comply with the rest the State.

The Hon. ROBERT BORSAK: That leads interestingly to my next question: When was the last time an audit was done in relation to these orders in the northern basin, or even in the southern basin, but let us start with the northern. Are you aware of when that was done?

Mr BROOKS: I am aware of an audit that was done in the five valleys in 2008 but since that period when they were trained to identify the volume of the take, which I might add staggered the New South Wales Government officials who did it, they have since spent another $17 million on Lidar satellite investigation to, I do not know why, but to clarify that take and see what it has grown to.

The Hon. ROBERT BORSAK: Is that March 2008? And that is why they are seeking to exempt all works since then?

Mr BROOKS: Exactly. We know damn well there has been massive construction ever since then and at all times there was specific volumes set by the Murray-Darling Basin Plan. There has been specific volumes set by the 1993-94 take and still continues unabated, unchecked, uncontrolled. It is just unacceptable and we would contend it is unlawful.

The Hon. ROBERT BORSAK: Some have been contending that it in fact was lawful under the 1912 Act. Do you want to comment on that?

Mr BROOKS: Mr Horne, if you would like to explain the difference in the 2000, it was repealed.

Mr HORNE: As a general proposition under the Water Act 1912 there was the opportunity for room for people to apply for licences. We understand that New South Wales has not issued any floodplain harvesting licences and that a lot of irrigators are relying on the fact that it was I guess technically inbuilt into a works approval application. How many of these applications or works approvals have been renewed subsequent to this we do not know. But certainly under the Water Management Act it is very clear and a lot of these subsequent works, all under the Water Management Act, if they are used for the purposes of floodplain harvesting they are doing so illegally.

The Hon. ROBERT BORSAK: In general terms, the evidence we had this morning coming from Namoi Water and the other northern basin water associations—sorry, I cannot quite remember the name—they said they had no problem with licensing properly and dealing with it going forward. We did not seem to get much out of them in relation to what they thought should be happening at the moment and what the purpose of this regulation is. Mr Horne, do you from a legal standpoint have a view on the purpose of this regulation?

Mr HORNE: I do. It is very clear that with this regulation in place there is no incentive to terminate or conclude the licensing process, especially in circumstances—and I raised it with the Gwydir Valley Irrigators Association submission, they even note that once the licensing regime comes in it will improve flows. That can only be a case of the licensing is going to restrict the amount of water that is being extracted currently, that is the only way that it could be improved. This regulation really just allows this situation to go on indefinitely. The MDBA also in its submission was very clear that the regulation has a substantial impact on all water users unless the reform agenda is done in a timely manner. But this floodplain harvesting issue has been at least since the State Water Management Outcomes Plan of 2002, but it has been identified as an issue going back to 1995 and the introduction of the cap.

We have a little reservation, or Southern Riverina Irrigators [SRI] is concerned that this will not be resolved in a timely manner. The 2008 line in the sand that is referred to to proportionately reduce or licence it back to the 1994 levels of extraction as at the 2008 levels of development, that disproportionately affects people who did no subsequent developments post 1994. And that will also be a major issue for New South Wales to deal with. We do not see it proceeding in a simple manner. However, if the northern basin or if New South Wales is extremely confident that it can resolve it, then the regulation is not necessary. The dams are full and we should withdraw the regulation and allow them to finalise their floodplain harvesting licensing question.

The Hon. ROBERT BORSAK: You hit the nail on the head, the dams are full but the Murray-Darling Basin farmers are still on zero allocation.

Mr HORNE: Correct.

The Hon. ROBERT BORSAK: How does that work after a rain event in February that is actually continuing on and off since then? The whole process just does not seem to make any sense. The reality in your comment is I think the right one. The reality is that there is no incentive to finalise this because there is no sunset, for example, on this regulation. It can run indefinitely, as far as I understand it.

Mr BROOKS: Mr Borsak, the concern we have, to put things in perspective, is when there is a zero allocation in the south, and I think the registered farms that have applied for on-farm floodplain harvesting are about 1,340 or 1,350 and putting it in perspective, there is in excess of 10,000 irrigation farms in the south along the Murrumbidgee, Murray and Goulburn that are all impacted by this massive water take. We had a

socioeconomic impact study commissioned by The Australia Institute that would show the difference in the economic income for the people in the north who are growing crops with this water that they are taking of almost four million bales of cotton would be an income for export of $2 billion-worth of cotton. The economic impact on the production and the value-added communities in the south is closer to $25 billion. That is 1.5 per cent of Australia's gross domestic product because there is no volume of water getting down to where people actually have a licence and are expecting a reasonable allocation.

The Hon. ROBERT BORSAK: As far as this, let us call it lack of regulation in the north is concerned, is it any worse now than what it was under Labor, because this process has been going on for over 30 years?

Mr BROOKS: It is getting worse as we speak because the construction and the expansion of the dams and the storage and the capacity of pumps is continuing unchecked. And worse than that, the on-farm efficiency program of the Federal Government is actually funding the construction of these dams without a works order, without a licence to take additional water out of the system that we would contend is owned by people who have a licence for it who have complied with all the rules. The difficulty I have trying to explain to all of my members is why they cannot start their pumps and steal water out of the rivers because they have to comply with rules. These same rules have got to apply to the guys in the north.

Mr JUSTIN FIELD: I am trying to get my head around the volumes here. We have government saying 30 gigalitres floodplain harvesting, or 30 gigalitres taken over that period, a portion of which was floodplain harvesting. You are suggesting it is much, much more. I am trying to work out what the truth is here, because I think it is quite substantive to your concerns, but also to the future of the policy area. Why are you so confidant it is that much more?

Mr BROOKS: I would contend that the volume of the storage and the volume of water that went into it by our interpretations of existing New South Wales rules and regulations is that it is all considered, under any Act you want to look at, the Water Management Act, the Federal Act, it is a water take, and the regulation that was lodged on 7 February has created a new classification of water that Minister Pavey is calling "passive take". There is no difference between passive take. If you remove water from a paddock, from a stream, from underground, whether you flick it in with a spoon or a pump or it gravity feeds in, it is all considered a water take. What Minister Pavey and the department claimed was a 30 gigalitre take is not actually correct. I would contend that there were 900 gigalitres taken into storage. None of it had works orders, none of it has a licence, most definitely, in the northern region that needs to be better monitored and better reported because it is really misleading and deceptive information to people like yourselves making decisions about rules that apply to all of New South Wales constituents.

Mr JUSTIN FIELD: Your position is the vast majority of that take is happening passively, which is a berm or embankment guiding water via gravity and impounding it to a degree, it might be subsequently pumped or it might be retained there for use later, and that is the biggest portion of the take, is that right?

Mr BROOKS: Exactly.

The CHAIR: People need to mute if they are not engaged. We missed all of that because of background music from someone. Can you please repeat that?

Mr JUSTIN FIELD: I will. I take from what you are saying, Mr Brooks, that the majority of the water that you think is taken under floodplain harvesting is actually under this passive take. There are some concerns I am picking up about the definitions of that. Largely it might be a burn or an embankment or some other sort of works that moves water, or via gravity transfers water, into a temporary impoundment or something like that. That is the majority of the take that you are concerned about?

Mr BROOKS: Exactly. It is a vast area and they have heavy rain and it runs across the properties and it is guided into depressions where they have built walls to impound that water. Because it ran in there by gravity, it is like robbing a bank with a smile on your face—you are still taking something that is not yours and there are rules that apply and are specifically spelt out in all of the Acts—as Mr Horne has done with our submission,—showing that water take, there is no difference. That is the volume we are talking about. We are not talking about volumes people have a licence to pump from a river and all of the right triggers have been met with river heights and river flows.

If they have a licence, they are most welcome to pump and that is what we would expect in our neck of the woods. It is worse than that, our rivers are in flood because all of our water is urgently needed down in South Australia to make up the shortfalls that are not coming down the Darling. But we are not allowed to touch it.

Mr JUSTIN FIELD: From your perspective that passive take water is still floodplain harvesting and is still required to be licensed? Are you concerned that this exemption regulation is effectively setting up the situation where the New South Wales Government will try to regulate and license floodplain harvesting but exclude that passive take component?

Mr BROOKS: That is exactly what the intention of the regulation is.

The CHAIR: I have one question before we go back to Mr Farraway. Earlier NRAR was mentioned and the impact of the regulation around activities of NRAR. Either Mr Brooks or Mr Hare, can you explain to the Committee what the impact of the regulation was on NRAR's remit?

Mr BROOKS: The NRAR was present with the department when it went around last year and it took on board what we were saying about the intention and policy of the proposed floodplain harvesting licensing. It contended that these people were actually breaking the law by taking water without a works order and were not actually compliant or able to get a licence without a works order dated pre-3 July 2008. That is what forced the Minister's hand to put in place this regulation and sold on the basis that she was going to put an embargo in place, which she left to two days later when it started to rain, so they all took as much water as they wanted in any event.

The CHAIR: Okay, thanks Mr Brooks.

The Hon. SAM FARRAWAY: I will quickly try to get through—I have a couple of questions but hopefully they are quick ones. Firstly, to Mr Brooks: How have you been able to validate that water storage facilities on farms in the north are actually full?

Mr BROOKS: Well, I fly a light plane and see it regularly. We also have a lot of satellite work being done that identifies clearly the size of the dams. Depths at this stage are still being calculated but known depths would indicate the types of volumes we are talking about. Mr Hare has another document that would indicate a volume of 4,200 gigalitres of storage in the north, if you would like to add that?

Mr HARE: Yes, so that was the figure I had earlier, which was 4,039 gigalitres in turkey nests and then a further—I cannot remember the number exactly, but a further 239 gigalitres in other storages.

The Hon. SAM FARRAWAY: Because we are running out of time, could I ask on notice that you supply that information that your organisation has been able to validate that these storage facilities are full, because from virtual site visits, department briefings and some on-farm visits that I have been involved with over the past six months, I cannot validate that. I would be very interested to see what data you have and if that can be a question on notice to come back to us. My second question is around farms in the Murray. They are required, obviously, to capture rainfall. Do you believe that that in itself is floodplain harvesting?

Mr BROOKS: The only rainfall captured on farms is the reticulation systems, where we have irrigation systems and any run-off can be recycled back into storage for re-use rather than run into rivers. Look, the types of applications of water through centre pivots and the types of soils, there is minimal run-off captured with what you are trying to allude is floodplain harvesting in the south, Sam—very minimal.

The Hon. SAM FARRAWAY: My final question is to Mr Hare. I am interested about Aqualaw and in some of the stuff I have read in a bit of research prior to today that is publicly available in the media. Has anyone at Aqualaw ever contributed to discussion pieces or articles in *The Guardian* on floodplain harvesting?

Mr HORNE: Has anyone—

The Hon. SAM FARRAWAY: —at Aqualaw ever contributed, in commentary or in articles, to *The Guardian* around floodplain harvesting regulation?

Mr HORNE: It would not surprise me. We are contacted all the time for our views on different matters of note, so that would not surprise me at all.

The Hon. SAM FARRAWAY: So that would be a yes, in your view?

Mr HORNE: Well, it would not be a no. I have no reason to say that it would be a no.

Mr HARE: What is the relevance of this one, Sam? You seem to be worried about floodplain harvesting in the inner region of the New South Wales portion of the New South Wales Murray that has nothing to do with what is happening in the floodplain harvesting in the northern basin. I mean, you have the MDBA compliance review in 2017 that stated that there is 3,000 gigalitres of unmetered take happening from river systems and from flood plains and you want to focus on an area that has 98 per cent compliance—Mick, are we going to tolerate this?

The CHAIR: No, we are heading off to Cate now.

Ms CATE FAEHRMANN: Thanks, Chair, I have a question that is actually relevant to the inquiry and the issues before us. I think this is directed to Mr Horne. We have had some of the irrigators this morning—the Gwydir Valley as well as Border Rivers Food and Fibre—that were very much wanting to assure us that—in fact, the Border Rivers Food and Fibre submission states:

> We have been assured by Ministers since 2008 that FPH remained a legal permitted activity under the NSW Water Act 1912 …

They particularly said how frustrating it was that some applications dated back to the eighties were apparently sitting in the department's filing cabinet, such was the low level of priority put to them. Mr Horne, why do you think these applications have sat in department filing cabinets for more than 30 years? Would you care to comment on why these are in the submissions from Gwydir Valley and Border Rivers?

Mr HORNE: It is something that I raised in my supplementary submission that was centred around—effectively, it is a of great concern to SRI that people have applied and decided to just continue on—applied for works approval and then gone and done it without actually receiving a response, especially people who are relying on these that date back over 30 years. The example that was used was someone who applies for a job would not normally work in that job for 30 years before checking whether or not the employer had actually agreed to accept them. I think it emphasises the point of SRI and every single person who is submitting to this Committee that there is a real issue here that we need to bore down into what approvals have been applied for, which ones have been granted, which ones have not, make it transparent and not provide a regulation that just gives a carte blanche approval to anyone and rewards bad behaviour.

It is not a good policy for the New South Wales Government to allow a—I think it was referred to as an "it is easier to seek forgiveness later than ask for permission now" policy. That should not be tolerated and I do not think that would be acceptable to anyone else within New South Wales.

Ms CATE FAEHRMANN: Great, thank you.

The CHAIR: Thanks. I have one last question, probably to Mr Horne. In the submission from SRI, point 17 states:

> These consequences are not only matters of significant economic and environmental concern, but as a matter of law, also raise a very real question as to the potential invalidity or inoperability of the Regulation.

Pretty much the crux of this whole inquiry is there in that one statement. Mr Horne, why do you say that?

Mr HORNE: Because the regulation was made pursuant to section 400 of the Water Management Act 2000, and the regulation needs to be consistent with the objects and purposes of the Water Management Act. We would say that the regulation is not consistent with that. An example is that section 9, I think, requires the Act to be administered according to the principles as enunciated in the State Water Management Outcomes Plan, which is very specific with respect to no additional floodplain harvesting. It is required to be metered and measured and licensed. This regulation does none of that. In any event, it was improperly made pursuant to the Water Management Act.

The CHAIR: Just flowing on from that, no pun intended, earlier today we heard testimony—I think it was from Ms Jon-Maree Baker. She was saying that—no, sorry, it was the New South Wales Irrigators' Council. Those witnesses were talking about the fact that regulation was made without following the Government's own better regulation principles. Have you had a chance to look at that aspect of the creation of this regulation?

Mr HORNE: Certainly. We agreed with what was put forward. Regulation of such importance and such public interest—there should have been some consultation and explanation. Minister Pavey's submission also states that it was to provide clarity; I think that it has done the opposite. It certainly confused the issue. We invite her to actually come out and express what needed to be clarified. What is the advice that she has and why is she not sharing that with everyone and just pushing through these regulations that have no end date?

The CHAIR: Thank you very much for your attendance today. It has been quite thought provoking. The Committee has resolved that answers to questions taken on notice be returned within 14 days. There were a number of questions that were taken on notice and the secretariat will be in contact with you in relation to those. I think you may have generated a few extra questions from members as well, so the secretariat will get those to you when they are available. Thank Mr Horne, Mr Brooks and Mr Hare for your time and your assistance in this matter.

(The witnesses withdrew.)

(Short adjournment)

BEVERLEY SMILES, President, Inland Rivers Network, affirmed and examined

JUSTIN McCLURE, President, Australian Floodplain Association, affirmed and examined

The CHAIR: Ms Smiles, would you like to make a short opening statement?

Ms SMILES: Thank you for the invitation for the Inland Rivers Network to provide evidence to this important inquiry. Firstly, I wish to declare an interest, in that I represent the Nature Conservation Council of NSW on the NSW Healthy Floodplains review committee. A requirement of committee membership was to sign a deed of confidentiality. I declare that no information provided by me today is a result of my participation in the review committee deliberations.

Inland Rivers Network considers that there was no justification to bring back the exemption for floodplain harvesting on 7 February of this year as a means of regulating that form of take. A section 324 temporary restriction order has broad powers to prohibit the take of water in a specified water source, including overland flow. The capture of overland flows before the water reaches the stream or river definitely impacts on downstream flows. There is still no measurement of volumes of water captured in storages or on fields to quantify what the level of floodplain harvesting take actually is. The process of developing a policy, then implementing regulation has been very slow in New South Wales.

Floodplain harvesting is still free access to water at a time when all other take has to be accounted for. We strongly object to the exemption for floodplain harvesting gazetted on 7 February, because it gives a legal right to take water that is not licensed and not measured. The wording in the exemption also has the potential to give retrospective approval to floodplain work that was developed without going through an approval process prior to 2008. The nexus between floodplain management plans and assessment of impacts of floodplain harvesting is very unclear.

We have major concerns with the Floodplain Harvesting Policy adopted in 2013 and amended in 2018. This exemption regulation is one of the elements we strongly object to. Other issues include the 500 per cent carry-over rule, provision for trading and environmental assessment of works. There is no provision to assess the cumulative impact of floodplain harvesting on downstream environments and communities. We note the draft metering policy proposing an exemption to rainfall run-off on developed areas. No-one else in the State has this right.

We do not support the 2014 amendment to the Water Management Act 2000 granting compensable private property rights to floodplain harvesting licences before they have been issued. If the final granting of licences and approvals fails to get the shares right the public of New South Wales may end up paying the price. Water sharing plans are based on floodplain development in 1999-2000, while the policy is based on development at 2008. It is very unclear how this will be reconciled in the assessment process. The capture of first-flush flows in February and March this year has compounded the downstream problem. For example, Wilcannia is very close to going back to high-level water restrictions again.

Floodplain harvesting has had a significant unassessed impact on downstream wetlands, native fish populations, Aboriginal cultural and spiritual connection to rivers, groundwater recharge, downstream communities and other industries on the Barwon-Darling for over 30 years. Inland Rivers Network calls for exemption regulation to be repealed. Floodplain harvesting should be disallowed until it has been fully assessed for cumulative impact, licensed and metered.

The CHAIR: Thank you, Ms Smiles. Mr McClure, do you have a short opening statement?

Mr McCLURE: Yes, I have got a short statement. If I do have a conflict of interest in this scenario, it is that I have got a lot of respect for communities and I have got a lot of respect for people. I am a floodplain grazier and I am an irrigator on the Barwon-Darling, about halfway between Bourke and Wilcannia. I have seen the flows decrease at Wilcannia in the peak summer months when we need the water most. I have seen the impact that this decrease in flow has had on our communities and environment. I agree with what Ms Smiles said and I will not go into a dot-point rendition of what she has put forward. But floodplain harvesting is just another impact on the flows and the increasing decrease in the flows that once were available.

While we are not against irrigation per se, we very much wish to see the return of equity to the communities and the environment along the river. Floodplain harvesting and the subsequent actions of this law have had an impact. I would also like to see it repealed.

The CHAIR: Mr McClure, the submission from the Australian Floodplain Association states:

> In our view it is arguable that the minister has exceeded her power under the Water Act in exempting such floodplain structures.

What do you mean by that strong statement? I would like you to elaborate on it?

Mr McCLURE: Okay, I guess, I hold a water licence and that water licence has certain conditions upon it. One of those conditions is that I shall not impede flood flow to continue downstream. My licence is governed by certain rules to the letter of the law. We question as an organisation the legitimacy of legalising structures that have not been through a process as if to see if they have impact on downstream communities and environment.

The CHAIR: You also say in your submission:

> There should be a complete embargo on harvesting of overland flows until such time as all licensing, monitoring and compliance measures (as per recommendations in the Matthews report) are in place.

Essentially, I take from that comment that you think there should be a permanent embargo in place until the Matthews' report recommendations are implemented?

Mr McCLURE: Pretty well, that is the way we see it. There are a lot of recommendations in the Matthews' report and also the NRC report that support full measurement and full assessment. Yes, that is our position.

The CHAIR: You also talk about the importance of first flush flows. Will you explain to the Committee in your own words what is a first flush flow? Why are they so important? Why should they progress unimpeded?

Mr McCLURE: First flush flows are basically the [inaudible]. It rains, rivers flow and if you live at the bottom of the system, as a lot of our members do, they have been without water in the case of downstream at Menindee for 12 months. The quality of the water they do have is particularly poor. So potentially the first flows from the first rains are very, very important to get water down the system. In this case the rivers themselves were embargoed and the floodplain harvesting was embargoed.

Hence, the first bit of rainfall must get through to the bottom of the river as quickly as possible to ensure that, I guess, the requirements of the Act are upheld. Those requirements are, in times of critical human need, those communities at the bottom of the river have protection. Hence the first flush rule is a mechanism to guarantee those flows through the system.

The CHAIR: I ask both of you this question. Essentially, most of the submissions and some of the commentary we have heard today is critical around the communication on the implementation of this regulation and the subsequent order. A sort of rushed nature to the introduction of the regulation. Are you critical of the way in which the regulation was brought about?

Mr McCLURE: Yes, very much so. There is a lack of transparency, lack of consultation, particularly with the bottom end of the river. I think that the whole scenario was first badly handled and I think there is a degree of in-house decisions and when consultation does take place, on the rare occasion, the decision has already been made by the bureaucracy and that disappoints me greatly. So the lack of transparency in the process and the lack of consultation [inaudible] is basically zero.

The CHAIR: What are you views around that?

Ms SMILES: As I said in my opening statement that the Inland Rivers Network certainly does not support the concept of an exemption in the first place. But the fact that it was actually in the policy from 2013, the Government had ample time to develop up an exemption regulation if they were going to put it to use. It is extremely disappointing that the exemption regulation and then the restriction order happened at the same time. As I also said, there was no need to have the exemption order in place to be able to carry out the restriction on that form of take to allow the very important first flush flow, described by Mr McClure, to get down the Darling River that had been described as a river system in ecological collapse. We certainly were not impressed that the restriction order then got immediately overturned. But the whole process was absolutely no consultation with anybody.

The CHAIR: You also say in the Inland Rivers Network submission that the wording of the regulation is problematic. Will you explain why?

Ms SMILES: Yes, what was pointed out is that the clauses that describe an "eligible work" particularly to do on or before 3 July 2008 is that it is not taken into account whether those structures had actually received approval, or not, under either the 1912 or the 2000 Water Management Act where has the next point in the "eligible work" is quite specific for anything that has been developed after that cut-off date. So I just see that that is quite a loophole in the way the exemption has been written. It has been a very poor writing of the exemption because it

was done so hurriedly. But when you look at the description of "eligible work" in the actual Floodplain Harvesting Policy it actually outlines more specifically that anything constructed before 3 July 2008 had to be constructed in accordance with an approval granted under part 2 or part 8 of the Water Act 1912 or be subject to construction under part 2 or part 8 if there was still an application outstanding. But none of that has appeared in the actual exemption, the wording of the exemption regulation.

So that is basically just open slather. If there is anything that is sitting out there on the flood plain, whether it actually went through an approvals process, whether anyone actually ever applied in the first place to be able to develop that structure, there is no consideration around any of those aspects. That is why I have also mentioned the nexus between the way the floodplain management plans have been constructed, they are supposed to be looking at works on flood plains, and how that is being related to the approval for works around floodplain harvesting is still very unclear.

The CHAIR: On page 4 of your submission you say "This exemption appears to ignore works constructed on or before 3 July 2008" and you explain much as you just have. The next paragraph states

> Our concern is that the Regulation, as currently worded, gives an exemption to floodplain works that do not have approval.

Essentially you are talking about retrospective approval. Are you saying essentially there is no formal process?

Ms SMILES: The wording of the exemption is either pretty sloppy or deliberate. Who can tell because there is no consultation? But that is what we see as one of the glaring problems with the regulation is that it appears to be giving exemption, or really retrospective approval, because the regulation actually now is giving a legal right to the activity of harvesting water off flood plains with all of those works. That was our concern whether it is actually a form of retrospective approval.

The CHAIR: I am going to move to questions from Committee members.

Mr JUSTIN FIELD: Hi, Ms Smiles and Mr McClure. Thank you very much for being here. I just want to turn to this question of compensation that you raised in your submission and in your opening statement. I noted that you are concerned about the compensatable rights being incorporated into the 2014 or the 2018 amendments to the Act and now the concern that this exemption regulation potentially gives an approval without going through the process. I will ask the question of the department; they will say it is an exemption until we have the process established. But do you have concerns that this exemption regulation effectively—and we know that there have been more works and more take than will ultimately be licensed if it is to be inside the cap—are you concerned that this regulation will set up a future compensation claim if those levels of take are sought to be reduced once the licensing arrangements are finalised?

The CHAIR: I gather that is to Ms Smiles, Mr Field?

Mr JUSTIN FIELD: Primarily to Ms Smiles. I think your submission goes to this in more detail.

Ms SMILES: Well, that is a possibility, but I was thinking more in terms of the actual shares in the licensing of the take. If there is an overestimation that is licensed, and then in retrospect the Government decides it actually needs to claw some of that back, that is when the compensation would be triggered. But in regards to retrospective approval of works on the ground, I would have to take that on notice or we would need a bit more legal advice on that I think.

The CHAIR: I am happy for you to take it on notice.

Mr McCLURE: If I could comment, Mr Field. In stakeholder advisory panels and in customer advisory group meetings, the general feedback from the irrigation industry is that they will be seeking compensation if there is any impact on their so-called property right. That is a topic that comes up very regularly in some of the meetings that I am involved with and in some of the consultation meetings that I am involved in. Irrigators per se are not shy in coming forward and in putting their hand up and flagging compensation if any part of their property right is compromised.

Mr JUSTIN FIELD: Do you think this regulation, this exemption, has strengthened the property right claim? Because until there was actually a volume licensed, the property right that they had was questionable. Has this strengthened that claim?

Mr McCLURE: Yes, definitely. It has definitely given them the weight of the law, I guess, in that their non-approved structures, their own scrutinised structures now have legitimacy, in my opinion. The perception is that it definitely gives some weight to their argument. [Inaudible] themselves completely open to a large compensation claim.

Mr JUSTIN FIELD: The other question that I have really is around the volumes here. I think both of your submissions go to this point. You raised in opening statements the largely unregulated and unaccounted for take. The Minister, the Government and DPIE have put out a figure of 30 gigalitres maximum of floodplain harvesting take during these events. We have heard other people suggest it is much more. I am trying to get to the bottom of it. Where do you get your confidence that the take has been largely unaccounted for and is more than the 30 gigalitres that has been put forward by the Government?

Ms SMILES: Well, the fact that there is not one single meter on one single storage that can capture floodplain harvesting means that no-one can be certain about volume until such time as the metering policy is in place.

The CHAIR: Mr McClure?

Mr McCLURE: Look, I have no confidence in the figure. I had discussions with the Minister early in the piece and she was talking to "a minuscule amount". There were some figures bandied around and the confirmed figure was 30 gigalitres. Do I have any confidence in that figure? No, I do not have confidence.

Ms SMILES: If I could just add to that. Regardless of the volume and whether 30 gigalitres is a big volume of water or a small volume of water, as far as the very parched and dying Darling River system is concerned, it was an enormous volume of water. Just previously to that, there was a northern basin connectivity flow using held environmental water from the Gwydir and further up the Border Rivers, and it was a much smaller volume of water than 30 gigalitres. The justification for having that northern connectivity flow was to top-up habitat for our dying native fish and that it was really important to connecting flows in the Barwon-Darling, so 30 gigalitres at that point in time was a significant volume of water for a first flush flow down that river system.

Mr McCLURE: Look, I would support that as well. This sequence of rainfall events, which have amounted to 500 gigalitres arriving in storage at Menindee—it has to be remembered, as Ms Smiles illustrated early in the piece, this was only the first or the second rain event out of probably seven or eight rain events, and 30 gigalitres at that time was nearly 50 per cent of the water that was predicted to reach Menindee at that stage. You really have to put it into context. That 30 gigalitres would have been critical to meeting the community needs downstream. It was only by luck and good fortune that it continued to rain and subsequent events actually contributed to the eventual result at Menindee. It is a critical point I think in that you have to judge events or flows on what you have in your hand. The bird in hand is what you have not got. So 30 gigalitres was potentially 50 per cent of the water that could have reached Menindee if it had not rained again.

Mr JUSTIN FIELD: It seems there is a question mark around active take versus passive take when it comes to floodplain harvesting. Is it your position that passive take should be licensed under the NSW Floodplain Harvesting Policy? Given a lot of these properties are designed to be able to maximise passive take, what would have to happen to ensure that passive take that was not licensed was able to flow?

Mr McCLURE: I will answer with my opinion. If the properties are designed to take passive take, then there needs to be a provision to let that first flush go. It means these structures, when they are licensed, must have a mechanism to release water downstream. My licence insists that I do not impede flood flow. Why would a floodplain licence which has not been issued yet have priority over my licence and/or the community and the environment? I just do not get it. There is no consistency here.

Ms SMILES: Look, if we are talking about a licensed work, as Mr McClure just referred to, any water that a licensed work captures is floodplain harvesting and must be licensed under an assessment process. So this passive water is quite a weird definition that has come in from left field. It does not appear anywhere in policy. I think it is just a furphy. Any capture of water off the overland flow, does not matter whether it is gravity-fed or pumped out of a channel or whatever, is still capturing floodplain water and it will need to be licensed.

Ms CATE FAEHRMANN: Thanks, Ms Smiles and Mr McClure. I just wanted to get a sense, if you could explain to the Committee. Particularly, Ms Smiles, you are the sole people or stakeholder-witnesses talking about the environmental impacts downstream and this decision. I was wondering if you could expand for the Committee on the impacts of the embargo and on the impacts of what happened in February on downstream wetlands and ecological assets. Mr McClure, you as well, of course.

Mr McCLURE: I guess I tried to touch on it before. If it had stopped raining after that event and if the forecast in the Menindee at that time would have been 30 GL. It would have intercepted the other 50 per cent that would have reached the river, in broadbrush terms. The Lower Darling has been dry for a long time—12 to 14 months, I think. The amount estimated to restart the Lower Darling was 30 GL. The impact on environment and the communities downstream, in my opinion, was totally compromised by that decision. But the important

point is that it was a snapshot in time. It was the second rain event and the forecast to reach Menindee was only 30 GL. I hope I have answered your question, Ms Faehrmann.

Ms SMILES: In two of the Northern Rivers catchments, the Gwydir and the Macquarie, where there is substantive floodplain harvesting occurring, we have what are called Ramsar-listed wetlands. It is part of an international agreement that the Australian Government has undertaken to look after those wetland areas. The New South Wales Government is the manager, having responsibility for keeping those wetland areas healthy. The business about there being no cumulative impact assessment of floodplain harvesting that has been going on for free, unregulated for 30 years is that there is no sense of how those important, international wetlands have been impacted by this free form of take.

The other parts of the whole northern basin are extremely important for other international agreements that we have signed. That is for migratory birds that fly to Australia from parts of Asia. We have also signed international agreements that we will look after the habitat and the wetlands that these migratory waterbirds use. There are a number of significant obligations that both the New South Wales Government and Australian Government have. One of the purposes of the Murray-Darling Basin Plan was to really put water back into the system so that those important wetland areas had a bit of a chance to survive into the future, particularly looking down the barrel of climate change. As Mr McClure referred to, the connection of the northern basin through the Darling River and the Menindee Lakes into the Lower Darling and then the Murray is a really important connection for the rest of the wetland down the end of the Murray system, but also we have obligations under the same set of treaties.

I think as the southern irrigators were telling you this morning, because those flows down the Darling had been restricted so much, it is now the southern basin being required to try to get the water right down to the end of the Murray to meet the obligations there. There are significant environmental impacts, not to mention the massive fish kills that just shocked everyone so greatly last summer. Some of our iconic species are listed under federal environment law as being endangered species. All of this water that we are talking about being captured for free with no metering and no licensing up in the northern basin has significant impacts downstream. I have not mentioned the Aboriginal cultural heritage and connectivity values with rivers or the recharge of groundwater systems, which is another really important value of that flood water coming down from the higher rainfall areas at the top of the northern basin rivers where there is much higher rainfall than what you have got down on the flood plains, particularly in the Darling catchment. That lack of cumulative environmental assessment is a key failing of the current policy.

Ms CATE FAEHRMANN: Excellent. Thank you, Ms Smiles and Mr McClure. That was great. I have one more question. During this morning's evidence, we heard from a representative of the NSW Irrigators' Council, who was essentially saying that, in her words, this was making floodplain harvesting more legal. She also said that at the moment floodplain harvesting is established as a right under the Water Act, which was made 108 years ago. We heard from other witnesses who were saying similar things in similar language. What do you both make of the comments from irrigators from the northern part of the basin today, who have been talking about it as established as a right under the Water Act 1912?

Ms SMILES: Could I answer first, Mr Chair?

The CHAIR: Yes, go for your life.

Ms SMILES: If there is already a right under legislation—that is fairy tales, actually—then there would have been no purpose of having this exemption regulation in place. I do not understand the position that the irrigation council is taking: that they already have a right.

The CHAIR: Mr McClure, do you have a view on Ms Faehrmann's question?

Mr McCLURE: Yes, I do. If it is a property right then where is the equity? What gives someone a higher right at the top of the system because they live at the top of a hill to deprive similar people along the length of the system?

Ms SMILES: Thank you. That is good.

Ms CATE FAEHRMANN: I do have another question then. I just wanted to get a sense. In some of the submissions that I have read over the years in relation to floodplain harvesting, there is always this urgent call for audits, if you like, of everything that is happening in terms of floodplain harvesting. One witness today mentioned that there has been one audit undertaken in 2008 and now it is satellite mapping and everything. Ms Smiles, do you have some comments around the need for that or whether what they are undertaking now that you are being assured that it is coming or is adequate?

Ms SMILES: Until there is a full approval and licensing system in place with metering in storages, everything else that is going on with is auditing and assessment is a guesstimate of the volume of water.

The CHAIR: Mr McClure?

Mr McCLURE: I would support Ms Smiles comment. We have got to measure what we are taking now and until we can measure what is being taken, what is being stored—and we are talking about whole-of-basin stuff here—that is the first step. Then we need to have the ability to adjust, wind back to where we need to be with [inaudible], put things in perspective. Because our equity has been eroded or been reversed over the last 40 or 50 years it does not give us the right to seek compensation. It is probably an important point that if the people in the north can think they are entitled to a property right because they are losing the access to water they have had in the last 10 to 20 years, then the people at the bottom end of the system have the same right on the water that is being taken away from them over the last 40 years. We need to measure, we need to have the right to reverse that decision within a very short time frame, but if we cannot measure then we do not know who we are or what we have got. Yes, I agree with Ms Smiles scenario.

Mr JUSTIN FIELD: Obviously we do not have very many large flood events and we know that a portion of floodplain harvesting is what comes over the banks when it spills and a portion is overland flows as well. Some of those overland flows might come out of the river originally and pass over multiple properties, might be moving overland more broadly. Can you give me an indication how much floodplain harvesting happens in those smaller events that do not lead to the rivers overspilling but actually are the capture of just overland flows that would happen in smaller events? How much of that is captured as part of floodplain harvesting, would we know?

Mr McCLURE: Mr Field, my only comment would be, I do not think it is floodplain harvesting. In my opinion it is interception flows. What is the definition of floodplain harvesting? The definition of floodplain harvesting should not include flows that are intercepted before they reach a stream. I cannot give you an answer on that because I do not know. Ms Smiles may have an idea?

Ms SMILES: I think the overland flows are equally as important, and that is what a lot of people do not understand. It just depends on where it happens on the flood plain. A big isolated storm might just dump a big bucket of water over a small area, but if most of that water then as it is flowing over the land ends up in someone's paddock or storage, does not end up in the river or creek, then no-one else gets any advantage to use that water. But it is very hard to answer a question around volume because of the variability of the system we are talking about.

Mr McCLURE: If I capture run-off water for stock and a domestic dam, I think the regulations say I am only allowed to capture 10 per cent of that particular flow.

Ms SMILES: Yes, and that is the harvestable. Right across the State anyone with a block of land anywhere in New South Wales can capture 10 per cent of their rainfall run-off and use it for whatever. But once you start capturing above that you have to have a licence and that is why I referred to in my opening statement this exemption to rainfall run-off on land developed for irrigation is just another loophole for this same set of people and that water should be brought under the 10 per cent harvestable rights rule as well. Every drop of water now needs to be accounted for because of the dollar value that is being put on water.

The CHAIR: Mr Field, we will have to leave it there. Ms Smiles and Mr McClure, thank you for your time and attendance today. The Committee is appreciative of your submission and your time. The Committee has resolved that answers to questions taken on notice be returned within 14 days. I believe there were a couple of questions taken on notice. The Committee secretariat will be in touch with you about those questions on notice. The Committee members may have some questions emanating from your testimony today as well.

(The witnesses withdrew.)

(Short adjournment)

The Hon. MELINDA PAVEY, Minister for Water, Property and Housing, before the Committee

EMMA SOLOMON, Executive Director, Policy, Planning and Sciences, New South Wales Department of Planning, Industry and Environment, affirmed and examined

DAN CONNOR, Director, Healthy Floodplains Project Delivery, New South Wales Department of Planning, Industry and Environment, sworn and examined

The CHAIR: Minister, would you like to make a short opening statement?

Mrs MELINDA PAVEY: I have not been watching the proceedings all day today but I want to respond to [inaudible]. Considering the stress that farmers, irrigators, [inaudible] all across New South Wales, particularly in the south, we had allocations open yesterday on the Murray. At this point there is no general security allocation. We are hopeful that the Bureau of Meteorology's predictions of good rains in July and August will be accurate. It is something that I have raised in the House, this idea of setting one valley up against another valley is something that I do not [inaudible]. There are a couple of points I want to pick up on.

Contrary to earlier claims in that evidence of about 900 gigalitres of floodplain harvesting over one week in February, the rain covered an area of only up to 500 gigalitres of storage. I would like to hear how you fit an extra 400 gigalitres into these storages, especially as there is only a maximum possible take per day of 50 gigalitres. Furthermore, the New South Wales half of the northern area, there is only 1,450 gigalitres on-farm storage in the northern basin of New South Wales. That is 2,750 gigalitres of water which cannot be stored if these dams are full.

I am just talking to the figures that were quoted by Mr Brooks. Also, Mr Brooks' lawyer cannot remember an article he ghost edited for *The Guardian* in May. If he cannot remember this, how he can understand the law is beyond me because an article that he edited was forwarded to me for publication in *The Guardian*. Contrary to claims from Mr Brooks and Mr Hare, this regulation did not approve unauthorised works built after 3 July 2008. Those simple facts need to be put on record to stop the conspiracy theories and to stop this pitting of one farmer against another.

As you would recall, Mr Veitch, as a resident of southern New South Wales, this has been a vexed issue—floodplain harvesting regulation. Your party in government tried to deal with it in 2008 and it has been on our books since 2013, when we came to office. We have done a good job in putting this regulation in place. For the first time ever we had a floodplain embargo on this first flash event in February. Whilst there are a lot of claims and counterclaims being put around it, the one that particularly disturbed me was from Mr Brooks, where he said that I authorised the lifting of the embargo. I did not. It was not my job to do that and I do not have the power to do that. He is undermining the work of professional public servants who made the decision and I am very pleased to report that we will have the independent analysis of that event—an important event—for improved Government policy.

We will have that report to us in the next couple of weeks, hopefully by, at the very least, 16 July. We will be able to release that draft report for people to look at and see the facts. As you know, I have given substantial evidence on this during at budget estimates. I know that the independent report will come out showing that there are things that we need to learn around communication, but it was a good event in terms of good water policy for New South Wales. I think it is probably best if we just get into the questions now. It is a complicated area of policy and I am really pleased to have two really good public servants beside me here today. We have Emma Solomon and Dan Connor, who have been instrumental in getting the arrangements in place for a policy that will, at first, deal with the northern basin—and I know that Queensland is still working through its policy and some questions will need to be directed to Queensland. They did not have an embargo on the floodplain harvesting like us. There was quite a bit of water taken before it got to New South Wales.

The fact that there are 500 gigalitres sitting in the Menindee Lakes is evidence that it worked. We are in a stressful period, as I pointed out at the beginning of my testimony. There is a lot of anxiety because of the general security allocation, high-security allocations, are, for the most part, being delivered. Let us be productive with our time this afternoon [inaudible].

The CHAIR: Thanks, Minister. Just for the Committee's information, I have Robert Borsak, Justin Field and then Sam Farraway. I have one quick question before I go into that sequence. Minister, you mentioned at the end the independent review you had put in place. What is the timetable for that to deliver its report?

Mrs MELINDA PAVEY: I am hoping we will have it by 16 July—that we will be through the processes by then. I have not yet seen it, Mr Chair. But Ms Solomon might give some more details about the processes.

Ms SOLOMON: I understand that in mid-July the independent regulator will release its draft report for public consultation. It will go through a period of consultation and then it will take those submissions [inaudible].

The CHAIR: Just so you know, Minister, in the room there it works when you are speaking but for Ms Solomon it seems to cut right out and then gets really scratchy and no-one can really hear. Ms Solomon, do you want to continue on from the point where you said it was mid-July and then out for public comment?

Ms SOLOMON: So it will be out for public consultation from mid-July and the regulator will take those submissions into consideration and will release the final report, I understand, in [inaudible].

The CHAIR: Okay, thank you. We will now go to questions from Robert Borsak, first, and then Justin Field.

The Hon. ROBERT BORSAK: Welcome, Minister. Minister, you said in response to Helen Dalton's questions in the House on 18 June that floodplain harvesting was completely legal. In fact, I think you said it two or three times. Has the Solicitor General provided you with advice to indicate floodplain harvesting is legal?

Mrs MELINDA PAVEY: My advice came from information and advice I was given by my agency, which relates to the 1912 Water Act.

The Hon. ROBERT BORSAK: Have you received any written advice—any legal advice in relation to that from the Crown Solicitor?

Mrs MELINDA PAVEY: The information I received was agency advice showing that floodplain harvesting was considered a process that was part of the 1912 Water Act.

The Hon. ROBERT BORSAK: Okay, so then does the agency have it?

Mrs MELINDA PAVEY: Agency have what?

The Hon. ROBERT BORSAK: Legal advice from the Crown Solicitor that it is completely legal. I can direct that to the agency.

Mr CONNOR: Thanks for your question. Just to provide some context, as well, floodplain harvesting—the structures that are involved, the levees, the storages, all of those things, require approval under the Water Act as part 8 approvals, now known as flood work approvals under our new legislation. Those structures have required approval since 1983 and they still require approval now. The regulation that has been put in place does not change that in relation to flood work approvals, so I wanted to provide that clarity upfront first. Secondarily to that, the limits that have been set up in our water storage plans and under the basin plan—so these are legal limits for all types of divergence—include floodplain harvesting. Those diversions that were originally set up under the Ministerial Council cap, which was first agreed to in 1995 and then came into effect from about 1997, include floodplain harvesting, as well.

In the policy settings, right from under the Water Act through to the Water Management Act, we have recognised the structures, we have recognised the volumes that those structures are able to take and we have foreshadowed since 2013, as a part of government policy, that we needed these transitional regulations in place to provide that level of clarity around the works themselves and the need for licences in the interim period before licences came to into effect. I just wanted to provide that sort of context and background information about the structures and, certainly, the water take volumes associated with floodplain harvesting.

The Hon. ROBERT BORSAK: Thank you for that background. In relation to my question, you do not hold any Crown Solicitor's advice to that effect?

Ms SOLOMON: We cannot answer that question due to legal professional privilege and for us [inaudible].

The Hon. ROBERT BORSAK: Well, I think you can answer [inaudible] whether you had [inaudible] at such a price. That is not legal professional privilege, I am afraid. I am not asking you what the advice is, I am asking whether you have it.

The CHAIR: Can I just intervene here because, Robert, you dropped out as well and so did Ms Solomon. We only got bits and pieces from both. Robert, I will get you to re-ask your question and then we will go to Ms Solomon.

The Hon. ROBERT BORSAK: My question was about the legal professional opinion from the Crown Solicitor and the answer I got, which I heard at this end, was that you could not answer because of legal professional privilege. Now, I am not asking you what is in the document—that may well be privileged. I am asking whether you have such a document.

Ms SOLOMON: [inaudible]

The CHAIR: Sorry, Ms Solomon, we did not get any of that.

Ms SOLOMON: We will take the question on notice.

The Hon. ROBERT BORSAK: Okay. I honestly do not see what is so difficult about that but, anyway. The Water Management Act 2000 provides for floodplain harvesting access licences. How many licences have been issued under the Act?

Mrs MELINDA PAVEY: Mr Connor, do you have an answer on that?

Mr CONNOR: Yes, there are not any at the moment, Mr Borsak. This is a process through implementing the Floodplain Harvesting Policy, which would create those licences, but at the moment there are no licenses for floodplain harvesting across the State.

The Hon. ROBERT BORSAK: Why would you not have them licensed by now?

Mr CONNOR: For example, the process of developing regulated river water sharing plans—one of our other big reform projects—took six years to develop. The planning processes started in 1998 and finished in 2004. As you would be aware, we are just in the process of starting to implement the non-urban water metering framework at the moment. There was a some 10-year process in developing the arrangements around water metering to bring that into effect. In relative terms of what we are trying to achieve in floodplain harvesting, we have got an action plan the Minister announced towards the end of last year that outlines the process and time frames for bringing licences into effect by 30 June 2021 in the northern basin.

In relative terms, this is pretty similar to other large water reform projects. As I stressed, this is complex, it is clearly contentious and it is a really ambitious reform. Some of the things we have done in the last six years are we have to [inaudible] floodplain models; we have declared new floodplains; and we have developed and commenced three new floodplain management plans in the northern basin, with the next two management plans currently in the final stages of approval as we speak. We have mapped and recorded all the works capable of floodplain harvesting across the northern basin—no mean feat; a three- or four-year extensive on-ground mapping project to get to there.

Mrs MELINDA PAVEY: I think it is just important here to point out that our agencies have expended enormous taxpayer resources into that process—something like $50 million—and we have only done the north. We have not done that work yet in the south. There was some mixed messaging from the evidence earlier from Mr Brooks and Mr Hare that the—I think Mr Brooks said at the beginning that floodplain harvesting does not take place in the south, and then he gave a different response later. Let us be clear: This is about measuring floodplain harvesting in the north, but it does also happen in the south, and this is something that governments are going to have to deal with as well.

The Hon. ROBERT BORSAK: Under what law is floodplain harvesting legal? Which sections of the Water Act 1912 allow for unlicensed floodplain harvesting?

Mr CONNOR: The Water Act 1912 itself deals with licensing from rivers and creeks, in terms of the take of water and aquifer systems. It provides for the construction of works on floodplains through part 8 of the Water Act, so the Water Act is now repealed and those arrangements are now dealt with under the Water Management Act 2000 flood work approvals. The volume has been put in place under our Water Management Act. As I said before, groundwater sharing plans and those water sharing plan limits are reflected in the [inaudible] Basin plan. The volumes are there but there is a licensing process yet to come, Mr Borsak. Hopefully that helps.

The Hon. ROBERT BORSAK: I do not know whether that actually answers the question. Are you saying that under the 1912 Act floodplain harvesting did not have to be licensed and therefore was legal?

Mr CONNOR: The take of water—yes, so the [inaudible] themselves had to be licensed on the floodplain, but the take of water was not licensed under the Water Act 1912—at that same time recognised in cap agreements under ministerial council cap agreements in 1995 and then later brought into the Water Management Act framework through our water sharing plan.

The Hon. ROBERT BORSAK: Why is the New South Wales Government breaching its own Floodplain Harvesting Policy of 2013, which states:

> All floodplain harvesting activities will require a water supply work approval and floodplain harvesting access licence authorised under the *Water Management Act 2000*.

Why have you not properly implemented that policy in seven years?

Mrs MELINDA PAVEY: As we have said, it is a mammoth task. It is complicated, not to say that seven years [inaudible] time frame. I pointed out at the beginning that Labor started the process in 2008. That is why it is so frustrating to hear so much negativity about our first-ever floodplain harvesting embargo during that first flush in February. We are measuring it and we are managing it, and we have moved a long way forward. But this north versus south argument that people like Mr Brooks and Mr Hare are pushing, as if they never had 4,000 gigalitres of water after that event—it is just bonkers stuff and it is setting communities against communities. There is floodplain harvesting that happens in the south as well. At some point with this type of [inaudible] we are going to have to be able to manage and licence and ensure that that is being conducted as well.

The Hon. ROBERT BORSAK: Minister, I would not use the terminology "bonkers". The reality is it is not them against us; the reality is the questioning has been put to you because we are trying to achieve some sort of clarity. They are trying to understand why large volumes of water have not arrived to their part of the river from an unregulated system further up the river. Why has it taken this Government nine years to not get this finalised and now talking about another year, when there is a promise but there is no actuality that it can be done in the next 12 months? Now it is are looking for a regulation that has no sunset clause that forces it to get it done in that period of time.

Mrs MELINDA PAVEY: The reality is, Mr Borsak, there are 500 gigalitres sitting in Menindee. That shows that the water went down the system. Some suggestion that there should have been 4,000 gigalitres get to the south so that they could have got some allocations—that is what I referred to. Water policy is difficult. It is really hard, and it is very easy to create conspiracy theories of wrong facts of information. There was a criticism from Mr Brooks that we have spent $17 million on Lidar technology that actually ascertain the amount of water in an off-farm storage or in a dam storage. Mr Brooks tried to suggest to you that all the dams were full because he took a plane up and he could see how much water was there.

Let us think about that. Let us talk that through in an honest way. You could take a plane up, look down and have a look at a swimming pool and you could say, "That's full", but there might only be five millimetres of water in the bottom of that swimming pool. This is what I am talking about: integrity of the process, integrity in the facts and the information that goes out to the community, so that we do not set farmer against farmer. Acknowledge that we are now in a strong place—stronger than ever before—being able to manage, licence and regulate floodplain harvesting. It is not easy, and I am not defending the time that it has taken either side of the political fence to do it. But we are doing it.

The CHAIR: You are on mute, Mr Borsak.

The Hon. ROBERT BORSAK: Someone keeps switching me muted. In the same context as you are criticising him, Minister Pavey, obviously they can criticise you. The reality is that in their part of the Basin, on the southern Basin they are, even after these massive flood events, still on zero per cent allocation. How can you not expect them to be critical of you and what you are doing and why it is taking so long?

Mrs MELINDA PAVEY: Sadly, Hume and Dartmouth have not filled. That is where the water comes for the south. I wish that those dams were full. I wish Chaffey was full. I wish Dungowan was full. I wish Wyangala was full. I wish Burrendong was full—but they are not. There have been magnificent rains that have fallen in the western part of New South Wales. I am sure that Mr McClure's dams that he has on his property out there that are not caught up in a 10 per cent harvestable right are plentiful. We have finally got water coming out of Toorale Station, after sitting for 13 years when that water was meant to come back into the Darling. We have done good work. But the general security allocations are dependent on what the levels in the dams feeding that system are. Murray-Murrumbidgee got 10 per cent allocation.

I share the frustration. I share the sadness. I understand the financial pain most farmers along the Murray are going through—and the Goulburn in Victoria—simply because we have not had rains that have filled up the dam at the point where general security allocations are available.

The Hon. ROBERT BORSAK: Minister, how much money has the New South Wales Government received from the Commonwealth for monitoring, licensing and compliance in the northern basin?

Ms MELINDA PAVEY: We can take that on notice. I do not think anyone would have that answer. We have received significant funds from the Murray-Darling Basin Authority. The Murray-Darling Basin Authority will be expending significant funds and not helped to give water literacy to our community. A lot of the fear campaign that has been run by some is based off the fact you cannot easily get information. The Murray-Darling Basin Authority has expended at least $53 million to date and yet has not got a dashboard; has not got a clear set of information so a farmer can go onto a website to find out what water is available for the environment, conveyancing water or irrigation allocations, general security, high security, Commonwealth environmental holder water which should all be available.

If people could see that in a more simpler way across South Australia, Victoria, Queensland and New South Wales a lot of these gaps in knowledge and information would be filled and we could have better conversations and support each other.

The Hon. ROBERT BORSAK: If we are in fierce agreement, why will you not support the motion of Ms Helen Dalton to have full declaration, full disclosure and transparency on the ownership and trading of water?

The CHAIR: That is another inquiry.

The Hon. ROBERT BORSAK: The Minister raised that issue.

The CHAIR: We will stick to the regulation.

The Hon. ROBERT BORSAK: I know I am right.

Mr JUSTIN FIELD: I want to refer to questions about volume. You talk about 1,450 gigalitres of on-farm storage in the valleys in the north. The Barwon Darling review report of the NRC last year talked about 4,000 gigalitres of storage in the upstream valleys from the Barwon Darling. I am trying to understand what is correct because there is different information out there about the volumes of storage in these valleys.

Mrs MELINDA PAVEY: You broke up a little bit there but the New South Wales section of the northern rivers [inaudible] was 1,450 gigalitres.

The CHAIR: Minister, you also dropped out. Did you say 1,450 gigalitres?

Mrs MELINDA PAVEY: Yes, on-farm storage in the northern [inaudible] of New South Wales.

Mr CONNOR: Just to clarify from that too these large irrigation storages in the designated flood plains of the northern basin, you have to be careful that we are comparing apples with apples, so there are dams for all sort of purposes. There are farm dams which are quite prolific all through the north and the south. Those dams can be pretty close to capture up to 10 per cent in most areas for stock and domestic use. We need to be careful when you are comparing reports that we comparing apples with apples, that is all.

Mr JUSTIN FIELD: That is exactly what I am trying to get to. You previously said publicly, and I think the department has as well, that during the period of the regulation coming in and the embargo being in place, and then the temporary lifting that 30 gigalitres was captured at that time in floodplain storages. You are not sure what percentage of that is floodplain harvesting. Is that still the figure you are using?

Ms SOLOMON: We have done some satellite imagery and remote sensing. All of the figures that we have tell us that there was an increase of about 30 gigalitres of water and those are on-farm storages in those areas in an approximate week. But that 30 gigalitres is not just from when the floodplain harvesting embargo was lifted, it is all basic landholder rights and other pumping for other reasons.

Mrs MELINDA PAVEY: So filling, for example, an on-farm stock dam. That is incorporated in that 30 gigalitres.

Ms SOLOMON: So the licensing process that is coming into place in the next year will require people to have measurements and metering devices in place so it can be better measured. What is happening now is that it is really showing why we need those measurement policies and the licensing in place. I think we recognise that this is just a transitional period and so there are gaps in the information but the best available knowledge is that from the images that we have got is that it was about 30 gigalitres increase in storage in those few days.

Mr JUSTIN FIELD: The embargo that was put in place after the regulation seemed to create a distinction between active and passive take. For the purposes of floodplain harvesting policy development, will passive take be considered floodplain harvesting and be required to be licensed?

Mr CONNOR: Yes, I will start with some bigger context. When it floods or when it rains and water flows over land, it is moving everywhere over a big large geographical areas. What we are trying to do with the

licensing process is capture that water that is used for irrigation and stored for later irrigation so water in the big storage dams, in effect. The water that is out there on the flood plains does lots of other beneficial things. It enters wetlands, it re-charges groundwater, it sits on pasture land and grows crop for cattle and sheep, it is used for dry land cropping and all sorts of other things. There is a lot of water that goes out to the flood plain that does a lot of good things that will not ever makes its way back to a river because it is supporting other processes.

What we are trying to do in the floodplain harvesting licence is capture that relativity proportion of water that irrigators take from the flood plain and store in large dams for later use for irrigation. I guess that is the broader context I wanted to start with. You are right, this is the first time that we have regulated this activity so we needed to recognise the landscape that existed prior to being able to condition these works and that gave rise to this distinction between passive and active take [inaudible] into the licensing framework but that distinction will not be there. We will be able to condition these individual works so that they cannot take water when they are not allowed to take water, in essence; when they have run out of a count balance or when there is a restriction on.

This is but a transitional arrangement because we do not get [inaudible] licensing once. It is a very long winded answer but once we get into full licensing then all of the water will be required to be measured. All of that component that is floodplain harvesting. I wanted to be really clear with that context at the start that it is not every drop of water that goes out on the flood plain. It is that large volume that is extracted and taken from the flood plain and later used for irrigation that we are building into licensing.

Mr JUSTIN FIELD: Twice in the last five minutes you have made a distinction between big storages or big storage dams so that seems to be significant. What portion of water used for, I guess, productive uses is captured and stored in a big storage dam versus captured in some other way or held back behind embankment or a burn, but otherwise used for productive purposes on the flood plain?

Mr CONNOR: Again, it goes back to what is take and what are we trying to regulate under our legal limits that have been set up under New South Wales law and under the Commonwealth law, under the basin plan. It is not water that is held back behind an embankment. Those broader landscape changes are things that are more loosely termed "interception activities" under the basin plan. As we develop water resource plans we need to look at those interception activities, assess the risk of growth in that interception activity and how that might affect both the environment and allocation reliability for other licensed users. If that risk is large enough then we need to have mitigation strategies in place to deal with those things. They are what the basin plans calls an interception activity. They are not a form of take that we are recognising and trying to licence under our legislation in New South Wales.

Mr JUSTIN FIELD: I think that is where a lot of this frustration is coming from. Other areas, other parts of the community see that very much as floodplain harvesting. My reading of the definition seems to be that as well. I cannot believe that 10 years into this process we are still arguing about definitions that seem amenable to the whole regulation of this section of policy.

Mr CONNOR: I think some more context, just as well, there are two bits to the Healthy Floodplains project. There is the licensing of the volumes that we are talking about now. There are also the floodplain management plans that we developed. As I said, a little bit early on, we have got three of those floodplain management plans in place now: one for the Gwydir, one for the Barwon-Darling and one for the Upper Namoi. Our floodplain management plan for the Lower Namoi, and a floodplain management plan for the border rivers are imminent to be commenced. And then we have got a floodplain management plan for the Macquarie Valley. The real purpose of those floodplain management plans are to make sure that development on the flood plain allows water to move through the floodplain landscape unimpeded.

That is the issue that you reflect on here: structures blocking water from going to places it would have naturally gone to in the floodplain landscape. That is what this reform project is looking at doing. Certainly for new and amended works through floodplain management plans, they make sure that there is rigorous, proper, best available information put to the assessment process behind what you can build in the floodplain landscape to make sure that none of those outcomes are compromised. Because of, like all things, the evolving management of flood plains over time, there is quite a large number of works in the landscape that the Natural Resources Access Regulator will need to look at closely and decide whether or not they need to bring those into compliance. They might not be licensed at the moment.

There are some of those in some valleys. That is a process for the regulator to look at working through and bringing those works into compliance. But we are putting lots of different pieces of the puzzle together to give an overall outcome, if that helps.

Ms SOLOMON: I think the process that Mr Connor is talking about really goes to the complexity and the time that it has taken. We are talking about farm-by-farm assessment and we have also had an independent panel review of the process. I think it just helps to really explain why it is so difficult and why it has taken so long.

The Hon. SAM FARRAWAY: I have a couple of questions. I am happy for these questions to be directed to the Minister, but I am happy for either Mr Connor or Ms Solomon to answer them. The Government has invested something like $15 million into improved data collection and modelling, which will actually help implement the policy itself. From what I have read on it, it is quite cutting edge. I just wanted a quick update on where that is up to and how that will actually assist in developing and implementing this policy.

Mr CONNOR: I am happy to take that. You are right, it is a significant amount of money. There is $50 million in the whole project and about $15 million in the floodplain harvesting project. As I have said, that has really assisted us in undertaking on-ground field surveys, looking at remote sensing and then using that stuff to enhance our tools, our floodplain models and our river system models, to help inform the generation of entitlements and also inform future management arrangements as well. We are getting close, I guess, is the short story long. If you look at our action plan, we have committed to publicly putting in place two modelling reports. There is a model build and calibration report that will really go through what is the data sources we have used and how we have gone about reconfiguring models and how do they perform. Those modelling reports will come out on a valley-by-valley basis.

We have a companion report to that modelling report which describes the different development scenarios that we use—our 1993-94 development scenario, our 1999-2000 development scenario, a 2008 development scenario and a current condition scenario, which is the development on the ground as closely as we can represent it now. Those two reports are going to come out. We are committed to those. They will be independently peer reviewed as well before they come out. Also attached to those I think interestingly is an enrolment of benefits report. We know there has been growth in some areas of the northern basin floodplain harvesting. The licensing process does put in place arrangements to address that growth and bring it back in line with those legal limits that are set. That in itself delivers some hydrological benefits which relate to environmental benefits and downstream benefits.

But we are going to some length in being able to describe those sorts of benefits to people as well, both the benefit to the communities within those valleys, but also the downstream communities as well. We are committed to doing that. You can expect to see the first of those peer-reviewed reports starting to come out in the second half of this year, but for all valleys in the next six months or so. It is all yet to come. The process is outlined in the action plan.

The Hon. SAM FARRAWAY: My second question is to the Minister, I think, but I am happy if you wanted to get someone from the department. I think it is in line to ask you. The Water Management Act outlined rainfall is floodplain harvesting. I asked the question earlier of Mr Brooks from the Southern Riverina Irrigators about farms in the Murray, whether they are required to capture rainfall and whether they think that is floodplain harvesting. I think his response was along the lines that he does not believe it is. What is your view on that? You mentioned it earlier as well. I just wanted to follow-up on that.

Mrs MELINDA PAVEY: I think, Mr Farraway, the best way to answer that is to actually hand it to the experts so I cannot be accused of being political. I think the facts need to be dealt with by those who are not politicians here in the room.

Mr CONNOR: Floodplain harvesting is really any water on the landscape. It comes following heavy rain, water breaks out of rivers and creeks and it floods the landscape. That is the typical type of floodplain harvesting, but it can also occur following heavy rain. Just in the recent event in February, for example, that event was not driven by flooding in the rivers. It came from heavy rainfall on the flood plain that then made its way into the rivers and creeks. Anywhere that there are works that can intercept rainfall, or flooding from rivers, and they exist statewide, there is floodplain harvesting. That is the simple answer.

The Hon. SAM FARRAWAY: That is a far more accurate answer than I got earlier. I have another question. The best information I have from virtual site visits, my own on-farm visits, the department briefings and everything we have done to date is that the northern basin in itself has had zero allocation for years. We have had a lot of people refer to the fact that the southern Basin has not had an allocation in a long time. No-one has mentioned that there has actually been one of the most, if not the most, severe droughts in recent memory. In the submission from Mr Brooks earlier, I asked him about his claim that the northern irrigators basically have all of their water storages full. I asked him to demonstrate how he can prove that and he referred to his light plane that he used, some satellite imaging and a report. I have asked a question on notice for him to come back with that

information, but I cannot find in the site visits, in briefings or anything where these northern basin water storage facilities are full.

The CHAIR: I gather you are asking that to the Minister, Mr Farraway?

The Hon. SAM FARRAWAY: Yes, I direct it to the Minister.

Mrs MELINDA PAVEY: [Inaudible] the answer by giving it to a professional public servant who is able to more accurately ascertain our work to see how full those storages actually are.

Ms SOLOMON: I would just like to give a bit of context to the Committee. From 2017 until the rain in early 2020, northern inland New South Wales was experiencing the worst drought on record. Water bodies dried and contracted, water became scarce and rivers stopped flowing in many parts of the State.

Mrs MELINDA PAVEY: Unregulated.

Ms SOLOMON: Unregulated, of course. Many regional towns and villages had to rely on water carting. Water quality deteriorated and many irrigators up north in these unregulated areas had limited or no access to water for extended periods. We had irrigators tell us that they have not been able to take any water for three years. How it works in the unregulated areas in the north is, regardless of what they have in their account—that almost becomes irrelevant—if the water does not get above a certain flow, which we call the commence to pump or the cease to pump, they cannot legally take water, even if they have hundreds of gigalitres in their account. Because of those really terrible drought conditions—in fact we had to trigger our Extreme Events Policy, so many areas were in levels four and five, which are terribly extreme drought conditions. Towns were running out of water. The Government actually passed some legislation to enable critical water supplies for towns to get approval—

Mrs MELINDA PAVEY: I might just cut in there. One of the towns that we were most challenged and threatened with was Tenterfield. Tenterfield is on top of the Great Dividing Range. There is no extraction or irrigation up there. This shows how it had not rained for three years, which is putting enormous stress on the town's water supply. That was not the fault of the productive farming sector; that was just simply a lack of rain.

Ms SOLOMON: That is right. I think it would be hard to believe that the irrigators in that area had full storages at that point. Just an example of how bad it was and the embargo that we put in place, one of the benefits of it was that we actually filled the weir supplies for 10 towns along the Barwon-Darling, which is a combined total population of 13,000. These were towns that were having to rely on groundwater because their usual town water supplies were severely degraded.

The Hon. SAM FARRAWAY: You have been talking about the unregulated, which I get, versus the regulated system, but it is fair to say from the research I have done that the regulated systems have not had an allocation in the northern basin for four years. So a claim, putting it all in context with floodplain harvesting, that they have had rain, that they have had water, that they have had allocation and the south have not, is not necessarily correct over the past four years, is it? It is that the north has not actually had an allocation for several years?

Mrs MELINDA PAVEY: It is at least two years but it could be longer than that. Remembering four years ago in 2016 all the dams were full, everything was swimmingly, but then we have actually had a critical shortage of rain until this event in February, which has fallen in the far west, but we are yet to still fill our major catchments, even in Bathurst where I think you are speaking from, Mr Farraway. But, yes, there have not been allocations to much of the system, certainly since I have been Minister.

The Hon. SAM FARRAWAY: Just finally, I have one more question then I am finished. I want to touch on, Minister Pavey, your opening remarks. I posed a question to Tim from Aqua Law earlier today about research I had been doing and there was quite a lot of commentary in *The Guardian* around unmeasured floodplain harvesting by irrigators. You mentioned that you had a document, which I have not been privy to, but you said you had a document that had been edited in terms of their commentary in the media on floodplain harvesting. Is that correct?

Mrs MELINDA PAVEY: I am happy to table the document. It came to my attention. It was forwarded to my team and circulated around people within the irrigation industry and it was clear that the lawyers were proof or fact checking the story that was being prepared by *The Guardian*. So, a very interesting alliance and there was work that was being done by that law firm to—

The Hon. SAM FARRAWAY: I might put that as a question on notice for Minister Pavey to table it if she could because I think it answers my question from earlier.

The CHAIR: That is good. We will do that.

Ms CATE FAEHRMANN: Minister, I just wanted to get back to this legal advice that I think has been talked about before. I understand that you have talked to Parliament and stressed the fact that, in your words, that floodplain harvesting is an activity that is completely legal. Is that basically what you have been saying?

Mrs MELINDA PAVEY: I said in Parliament to a question from the member for Murray that it was legal. That was the advice that I had had from my agency. It is something that has been operating within New South Wales for decades. I think it might be appropriate at this point to pass to Ms Solomon or Mr Connor—

Ms CATE FAEHRMANN: Just before you do, just about that advice—no, I think they have been asked this request before by another member of this committee so the question is to you, Minister, because you relied on this advice in Parliament to a question so clearly you have seen this advice.

Mrs MELINDA PAVEY: I was given advice that it was an activity that was covered in the 1912 Water Act and that is what I said in Parliament.

Ms CATE FAEHRMANN: Who was the advice from?

Mrs MELINDA PAVEY: That created, if you want to say it, put the rabbit amongst the hares. I am going to refer to Mr Connor and Ms Solomon to talk to the issue of minute taking that has created this conspiracy that it is not legal.

Ms SOLOMON: I am aware of the minutes that the Minister is referring to and have reviewed them. What the minutes reflect is what I would call some sloppy shorthand from the officers at that meeting and clearly do not take into context, or it is not recorded in the meeting minutes, everything that has been said earlier at the hearing today in this session, which is that floodplain works have had to be regulated under the 1912 Act since 1983. I think it is in that context that the Minister let the Parliament know that it was legal under 1912 Act.

Ms CATE FAEHRMANN: Can I just ask for clarification, essentially, what these meeting minutes say is that if you do not have basic rights or a licence or an exemption, there is no ability to legally take water. Is that correct or is that false? Minister, what does your advice say?

Mrs MELINDA PAVEY: I have been advised—your question was whether floodplain harvesting is legal and my advice has been—

Ms CATE FAEHRMANN: No, to my question just then. Sorry but it is a different question now. This is based on the meeting minutes I have before me that I think that Ms Solomon may have said is sloppy shorthand or something. This says, "If you do not have basic rights or a licence or an exemption, there is no ability to legally take water", yes or no?

Mrs MELINDA PAVEY: The issue is of those minutes that you are quoting, they were taken down in a way that was not accurate to all the other information that was going on in the meeting and all the other information that is available. We are going through a very difficult process and the first part of that process was putting a regulation in place to prohibit the floodplain harvesting during that first flash event in February. We are working through these processes and my point is that there are people who are blaming the north for not having any general security allocations, not putting into context the amount of water that has not fallen in the catchment of the Murray system. My position and my answer is that the advice I have is that it is legal and we are going through a very proper process to ensure that we fully measure it and that is what we are working through.

Ms CATE FAEHRMANN: Minister, was the purpose of this regulation just to give legality to floodplain structures that have never been through a licensing or approvals process?

Mrs MELINDA PAVEY: No.

Ms CATE FAEHRMANN: Mr Connor, I have an email in front of me from you sent on 16 January 2020. Obviously there are a bunch of documents that were revealed through a call for papers in the upper House. This email suggests that you say, "should a floodplain harvesting events occur prior to the exemption being put in place then there will be considerable uncertainty for irrigators about whether or not they can legally take water." The Minister seems to be so sure that this is all legal based on the advice that is coming from somewhere that nobody can talk about, yet here is an email from you saying that there will be considerable uncertainty for irrigators as to whether they can legally take water. What is your response? Firstly, to that email, was that sloppy writing from you there as well or are there are a few strange things going on here?

Mr CONNOR: No, so that is accurate and, in my view, not inconsistent. We have said all the way through here that—and it has been foreshadowed since 2013—these are transitional arrangements that are

necessary to bridge the gap between where we were under the Water Act and where we need to be under the management Act.

Ms CATE FAEHRMANN: But what is that gap? That is gaps in approvals, is it not?

Mr CONNOR: There is indeed uncertainty and that is what we sought to put in place. I guess it is in everybody's interest, in irrigator's interest, in downstream stakeholder's interest to have clear rules. As we have talked about, we now have an independent regulator and in that context the independent regulator was talking to us about what they saw as—and I have had this mentioned at some of the discussions this morning with the northern irrigator groups. There is a view, and it certainly is the remit of a regulator to let us know as the rule makers where the rules are not clear enough for them to be able to take the enforcement action that they would need to have. Certainly the regulator identified here, as we had for some time, that there was some ambiguity in the rules and that we needed to be clear about those rules, as had been foreshadowed since 2013 in the—

Ms CATE FAEHRMANN: You keep talking about uncertainty, Minister does not uncertainty just mean that there is floodplain harvesting that falls through the cracks, if you like, of approvals, exemptions and licensing and therefore it is illegal? And if it is not, two questions; first, that it is illegal and if it is not will you please table the advice for the Committee that you are relying upon, the legal advice which could perhaps end all this conflict between the northern and southern irrigators for starters? If you are so certain about this please table the advice, which would be extremely helpful for the Committee. First, does uncertainty mean basically illegal works?

Mrs MELINDA PAVEY: I am happy to provide information to the Committee and the advice that is prolific through the agency talking to the issue that floodplain harvesting has been a recognised global activity [inaudible]. Happy to do that. I will let you finish your questions, Ms Faehrmann, I just wanted to say something.

The CHAIR: Before you do, Ms Faehrmann, to be clear, Minister, Ms Faehrmann was asking for the legal advice to be tabled just for the Committee members. You are saying that is what you will do?

Mrs MELINDA PAVEY: She asked for advice and I am happy to provide advice showing that it is an activity—you did ask for advice—

Ms CATE FAEHRMANN: Legal advice.

Mrs MELINDA PAVEY: And I am happy to provide advice that I have that talks to the issue of floodplain harvesting.

The CHAIR: I think it was legal advice, but I could be wrong. Ms Faehrmann, your turn.

Ms CATE FAEHRMANN: I think the question, Minister, very clearly is have you seen legal advice that suggests that all floodplain harvesting is legal, like you said in the Chamber I think a few months ago?

Mrs MELINDA PAVEY: Happy to take that on notice in relation to, and I think Ms Solomon answered a question in relation to legal privilege, but I am happy to provide advice that I have received over time from my agency that says that floodplain harvesting is a legal activity since the 1912 Act. I am happy to provide that advice. In terms of legal advice, I will take that on notice.

The CHAIR: Okay, thank you.

Ms CATE FAEHRMANN: If the Minister does take it on notice, to see whether she has that legal advice, would she table it if she has it?

Mrs MELINDA PAVEY: I will take that on notice, in relation to legal advice, but I am happy to provide other advice to the Committee showing that is a process that is appropriate.

Mr JUSTIN FIELD: As a follow up to that, I think there is still a lack of clarity here. If you have received advice that floodplain harvesting is appropriate or legal under the 1912 Act, whatever word you just used, what were the issues that were clarified by the regulation?

The CHAIR: Minister?

Mrs MELINDA PAVEY: It was putting a context, it was putting an authorisation around a process to ban it. That was what we were doing. Ms Solomon?

Ms SOLOMON: Thanks, I might just give a bit more in respect of the question. What the regulation did [inaudible] it gave water users who had the approvals and the infrastructure constructed prior to 2008, 3 July 2008, it gave them some certainty that what they were doing was legal and it also made it, set that date in stone,

after 3 July 2008 the infrastructure or works that were not approved, legal. What it actually did was reduced the [inaudible]works from which people could obtain harvest from [inaudible].

Mr JUSTIN FIELD: Sorry, Chair, I missed a little bit of that. I do not know if you heard it all at your end?

The CHAIR: Ms Solomon, at the end you faded away again, probably the last couple of sentences.

Ms SOLOMON: The regulation did two things. It gave water users confidence that if they were using works that were prior to 3 July 2008, that those works could be used by floodplain harvesting activities, and for works from 3 July 2008 it said that they could only be used if they had approvals under the legislation that is listed in the regulation. What the regulation does is it actually confines or restricts the number of people or number of properties where floodplain harvesting can legally take place. It does not expand it, it actually restricts it because of that line in the sand of 3 July 2008. [inaudible] of whether they are in the right or in the wrong. It also gives confidence to NRAR, the independent regulator, about those dates as well.

Mr JUSTIN FIELD: If you do not conclude your policy by the middle of 2021 for the five northern basins what happens to this regulation? Does it just continue and essentially provide an ongoing exemption for floodplain harvesting in those valleys?

Mr CONNOR: I can answer that, Mr Field. What we have got set up [inaudible], what we have got set up under our water sharing plans is that floodplain harvesting is part of the extraction limit that we have set up, it is part of the legal limits of—what we are trying to do is to give effect to licensing to make sure that floodplain harvesting does not grow and exceed those limits, make sure that everyone [inaudible] their share, I guess. [inaudible] licence and activity and it being exempt is that it continues to grow, then that growth under our legal limits needs to be offset by a reduction in something else. It is a bit like me speeding down the highway and you getting a fine. It is a pretty inequitable solution. That is the way our legislation is set up at the moment. They are the requirements under the basin plan as well.

The basin plan does not say you need to licence everything, but it does make sure that if things are not licensed and they grow, that you have a mechanism to be able to offset that growth to make sure that the outcome overall for the valley is the same level of consumptive take. I wanted to assure you that we have got every intention of being able to deliver this project by 30 June 2021. But there are arrangements, and I am happy to talk to that as well, there are arrangements set up in our plan that means that downstream users and communities are not short-changed as a result of us unable to deliver this.

Mr JUSTIN FIELD: They already do not believe the volumes. I am not sure that is going to happen. That does not answer the question at all. Does the regulation just continue if the policy does not get finalised?

The CHAIR: Mr Field, we are now out of time. There was a suggestion at the end of the answer that the remainder of that would be tabled. If we could make sure that happens as a question on notice, that would be good. I had a series of questions but because I made a mistake with the timing I will put all my questions on notice, Minister, that relate to NRAR and the communication process. Essentially that draws us to a close today.

Mrs MELINDA PAVEY: I just make a clarification on something if I can, Mr Chair. In relation to the 30 gigalitres, I am looking at some correspondence on Twitter. I want to make it very clear for Mr Field that the 30 gigalitre is active and passive. I think it is a very important fact to be able to get those facts right instead of misleading the community [inaudible].

Mr JUSTIN FIELD: Let us ask the question about whether it is a dam storage or interception perhaps, Minister, then we will have more clarity, will we not?

The CHAIR: Okay folks, it is all over red rover.

Mr JUSTIN FIELD: Making it up as you go.

The CHAIR: Minister, if there were any questions on notice, the Committee has resolved 14 days for a response. There may be questions from Committee members—there will be from me—so again 14 days. The Committee secretariat will be in touch with you about all of that. I thank you all very much for you attendance.

(The witnesses withdrew.)

The Committee adjourned at 16:20