
CLARITY OF LAWFULNESS OF FLOODPLAIN HARVESTING UNDER THE WATER MANAGEMENT ACT 2000

1. By email dated 3 November 2020, you seek my urgent advice concerning the clarity of the lawfulness of "floodplain harvesting" without a relevant water access licence, water supply work approval or basic landholder right under the *Water Management Act 2000* ("WM Act").

Background

2. These questions are posed in light of the *Water Management (General) Amendment (Floodplain Harvesting) Regulation 2020* ("exemption regulation") which commenced on 7 February 2020 and was disallowed by the Upper House of the NSW Parliament on 22 September 2020.
3. By "floodplain harvesting", you mean "the use of a water management work to capture, store or use water flowing across a floodplain (where 'use' has the same meaning set out in the Dictionary to the WM Act)".

Nature of advice

4. You have requested me to answer the questions posed in the affirmative or negative and not to provide detailed reasoning. I have responded accordingly with brief reasons.

Question 1: Prior to the making of the exemption regulation, was there any ambiguity as to whether a person could carry out floodplain harvesting, if they did not hold a water access licence, water supply work approval or basic landholder right in respect of that activity?

5. Yes, although this may depend on the circumstances in which the floodplain harvesting was proposed to be carried out.
6. There are two main areas of ambiguity as to whether a person could carry out floodplain harvesting if they did not hold a water access licence, water supply work approval or basic landholder right in respect of that activity. First, there is potentially some doubt as to whether "water flowing across a floodplain" is, or forms part of, a declared water source, that is, a water source the subject of a proclamation under ss. 55A or 88A of the *WM Act*. This depends on the language used in each proclamation and in the water sharing plans to which they refer. Secondly, depending on the circumstances in which it is undertaken, there is a question as to whether floodplain harvesting constitutes a "take" of water from a water source for the purposes of s. 60A of the *WM Act*.
7. I have assumed this question is concerned with the legal position under the legislation in existence immediately prior to the making of the exemption regulation.

Prepared for: DWE770 Department of Planning, Industry and Environment
Client ref:
Author:

Date: 10 November 2020 (This advice was provided in email form on 4 November 2020.)

Question 2: While the exemption regulation was in force: (a) was the degree of ambiguity (if any) reduced; and (b) was it lawful for a person to – without a licence, water supply work approval or basic landholder right in relation to that activity – carry out floodplain harvesting in the circumstances set out in the exemption regulation?

8. Yes to both (a) and (b), but only in relation to the class of persons and activities falling within the scope of the regulation.
9. The exemption regulation could be said to reduce “ambiguity” for the class of persons and activities falling within its scope in the sense that, prior to its making, those persons may have been uncertain as to whether they were required to hold an access licence or approval to undertake floodplain harvesting by means of an “eligible work” as defined in the regulation (see response to question 1). After its making, those persons could assume that, were such licences or approvals required, the exemption regulation had the effect that this was no longer the case and that they could lawfully carry out floodplain harvesting in the circumstances set out in the regulation.
10. I have made the following assumptions for the purposes of question 2:
 - (a) that the phrase “floodplain harvesting” in the exemption regulation had the meaning outlined above, although it is not defined as such;
 - (b) that the exemption regulation was valid (I am instructed that Parliamentary Counsel issued the usual opinion to the effect that the regulation could legally be made); and
 - (c) that I am being asked in question 2(a) to compare the relative ambiguity of the legal position under the exemption regulation with that existing immediately prior to the making of the regulation and that the “ambiguity” is the ambiguity as to whether a person could carry out floodplain harvesting, if they did not hold a relevant licence, approval or right in respect of that activity.

Question 3: If a new regulation was made substantially in the form attached to your email of 3 November 2020 (“proposed regulation”), would this reduce ambiguity as to the lawfulness of taking water via floodplain harvesting in the circumstances set out in the regulation, in the absence of a person holding a water access licence, water supply work approval or basic landholder right in respect of that activity?

11. Yes, but only in relation to the class of persons and activities falling within the scope of the regulation.
12. The proposed regulation, although in different terms, has the same substantive effect as the exemption regulation. My comments in relation to question 2 apply.
13. I have made the following assumptions for the purposes of question 3:
 - (a) that the phrase “floodplain harvesting” in the proposed regulation has the meaning outlined above, although again it is not defined as such;
 - (b) that the proposed regulation can be validly made; and

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- (c) that I am being asked to compare the relative ambiguity of the legal position under the proposed regulation with the current legal position.

Karen Smith
Crown Solicitor

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