
CLARITY OF LAWFULNESS OF FLOODPLAIN HARVESTING UNDER THE WATER MANAGEMENT ACT 2000 (ADVICE NO. 2)

1. By email dated 6 November 2020, you seek my urgent advice on an additional question concerning the clarity of the lawfulness of "floodplain harvesting" with a relevant water access licence, water supply work approval or basic landholder right under the *Water Management Act 2000* ("*WM Act*"). This advice should be read with my advice of 4 November 2020, a copy of which is attached for convenience.

Question 4: 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 hold a water access licence, water supply work approval or basic landholder right in respect of that activity?

2. Generally no, subject to the assumptions below. Prior to the making of the exemption regulation, a person could carry out floodplain harvesting using a water supply work without breaching the *WM Act* provided that the person:
 - (a) held both a water access licence (which authorised the relevant take of water) and a water supply work approval (which authorised the relevant use of a water supply work), and complied with the terms and conditions of these; or
 - (b) had a basic landholder right (that is, an entitlement referred to in Pt 1 of Ch. 3 to the *WM Act*) which entitled the person to the relevant take of water and use of a water supply work, and complied with any limitations of this.
3. I have assumed the following:
 - (a) this question is concerned with the legal position under the legislation in existence immediately prior to the making of the exemption regulation;
 - (b) that Pts 2 and 3 of Ch. 3 of the *WM Act* applied to the relevant floodplain harvesting (see my response to question 1 of my advice of 4 November); and
 - (c) any other applicable consent or approval had been obtained (eg. another approval under the *WM Act*, such as a flood work approval, or if development consent for the work was required under the *Environmental Planning and Assessment Act 1979*) and there is nothing in the specific circumstances of the floodplain harvesting that would contravene the general law.

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4. I note the exemption regulation was disallowed on 22 September 2020 and is not in effect as at the date of this advice.

Karen Smith
Crown Solicitor

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