



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

Report 6

September 2020



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Regulation Committee

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of the Water Management
(General) Amendment
(Exemptions for Floodplain
Harvesting) Regulation 2020**

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Terms of reference

1. That the Regulation Committee inquire into and report on the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.
2. That the committee report by the last sitting day in September 2020.¹

The terms of reference were referred to the committee by the Legislative Council on Thursday 27 February 2020.²

¹ The original reporting date was Thursday 14 May 2020 (*Minutes*, Legislative Council, 27 February 2020, p 847). On Tuesday 24 March 2020 the reporting date was extended to the last sitting day in September 2020.

² *Minutes*, NSW Legislative Council, Thursday 27 February 2020, p 842.

Committee details

Committee members

The Hon Mick Veitch MLC	Australian Labor Party	<i>Chair</i>
The Hon Matthew Mason-Cox MLC	Liberal Party	<i>Deputy Chair</i>
The Hon Mark Banasiak MLC****	Shooters, Fishers and Farmers Party	
The Hon Catherine Cusack MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC*	The Greens	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Sam Farraway MLC***	The Nationals	
Mr Justin Field MLC**	Independent	

* Ms Cate Faehrmann MLC substituted for Ms Abigail Boyd MLC from 9 March 2020 for the duration of the inquiry.

** Mr Justin Field MLC is a participating member from 9 March 2020 for the duration of the inquiry.

*** The Hon Sam Farraway MLC substituted for the Hon Ben Franklin MLC from 5 August 2020 for the duration of the inquiry.

**** The Hon Mark Banasiak MLC substituted for the Hon Robert Borsak MLC from 25 August 2020 for the duration of the inquiry.

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Chair's foreword

The legislative framework providing for the management of water in NSW is complicated, complex and highly contested. This inquiry looked at the impact and implementation of the *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020*, made on 6 February 2020.

In my view, the report provides a balanced perspective on the written and verbal evidence obtained by the committee. It is very clear there are divisions between irrigators, between basins and indeed between river catchments. Everyone has a view!

The committee has determined that the Disallowance Motion should proceed to debate and that its future is a matter for the House. During the inquiry the committee heard how the Regulation was a transitional arrangement in the journey toward licensing of floodplain harvesting under the governments *Healthy Floodplains Project*. The committee was advised by the Government that the timeline for implementation of the policy is June 2021.

There was widespread criticism at the Government's communication of the implementation of the Regulation and I would draw the Minister's attention to these comments. It was one area where there was broad condemnation of the poor communication methods applied to the implementation of the Regulation. Clearly, it was not good enough and the Department of Planning, Industry and Environment's communication methods with all stakeholders, must improve as a matter of priority.

The committee also took evidence regarding the legality of the floodplain harvesting practice and legality of the Regulation itself. There were quite differing views on this and I would urge the Minister to table the Government's legal advice on both matters during the Disallowance Motion debate in the Legislative Council.

The committee also heard evidence regarding the actual amount of water taken over the month of February 2020, following the lifting of the temporary restriction on floodplain harvesting. The committee notes there have been amendments by the Department on the estimated take since the committee hearing day. Again, the Department must improve the ability to quantify the amount of water taken during any event. The current arrangements are clearly not satisfactory.

Finally, this inquiry was conducted at the height of COVID-19 pandemic in NSW and as such was delayed considerably. The committee participated in, as I understand it, the Legislative Council's first 'virtual site visit' to assist committee members with their knowledge of floodplain harvesting. I wish to extend my appreciation to Jon-Maree Baker, Jeffrey Carolan, Steve Carolan and Bernie Martin for preparing and participating in the virtual site visit programme.

I also want to express my appreciation to all stakeholders who participated using technology. There were the occasional 'technological glitches' which would have been frustrating for all I am sure and so thank you to everyone for your patience.

It is appropriate that this matter now proceed to debate in the Legislative Council.



The Hon Mick Veitch MLC

Committee Chair

Findings

Finding 1 **26**

That the absence of regionally based officers from the Department of Planning, Industry and Environment undermined efforts to communicate about the implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 and has negatively impacted stakeholders.

Finding 2 **26**

That the communication surrounding the implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 by the NSW Government was inadequate. The inadequate communication contributed to poor perceptions of the Regulation, as well as to perceptions of inequity between the northern and southern basin.

Recommendations

- Recommendation 1** **26**
That the NSW Government commit to complying with the *Guide to Better Regulation* for all future regulatory change.
- Recommendation 2** **27**
That the Legislative Council proceed to debate the disallowance of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020, and that the NSW Government address the committee comments and concerns identified by stakeholders, as set out in this report, during debate in the House.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on Thursday 27 February 2020.

The committee received 20 submissions and 1 supplementary submission. An online questionnaire was also conducted which received 29 individual responses.

The committee held 1 virtual hearing through WebEx.

The committee also conducted 1 virtual site visit through WebEx

The reporting date was extended to the last sitting day in September 2020 due to the COVID-19 pandemic.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents, answers to questions on notice, answers to supplementary questions and a summary report on the online questionnaire.

Chapter 1 Overview

This chapter provides an overview of the background to the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (the Regulation), its introduction and how it operates within the broader regulatory framework for floodplain harvesting. It also examines the relationship between the Regulation and the Temporary Water Restriction (Northern Basin) (Floodplain Harvesting) Order 2020, both of which were made during a flood event in February 2020.

Background to the Regulation

The regulatory framework for floodplain harvesting

- 1.1** Floodplain harvesting is the capture and use of water flowing across a floodplain. According to the submission of the Minister for Water, Property and Housing, the Hon Melinda Pavey MP, floodplain harvesting provides 'an important source of water for industry, particularly in the Northern Murray–Darling Basin areas of NSW'.³ Describing the practice, Ms Jon-Maree Baker, Executive Officer for Namoi Water explained that 'floodplain harvesting and diverting floodwaters has occurred by graziers and by landholders in numerous different ways for decades now'.⁴ Similarly, Mr Zara Lowien, Executive Officer at Gwydir Valley Irrigators Association observed that 'floodplain harvesting has been an important aspect of our organisation and, in fact, our members for a very long time'.⁵
- 1.2** Notwithstanding its long history, evidence received as part of this inquiry showed that significant uncertainty surrounds both the historical and contemporary regulation of floodplain harvesting. Stakeholders such as the Environmental Defenders Office attributed this confusion, in part, to the fact that regulation of the practice spans both the *Water Act 1912* and *Water Management Act 2000*, along with a number of water sharing plans, regulations, floodplain management plans and gazetted notices.⁶
- 1.3** Commenting on the pre-existing confusion before the introduction of the Regulation, Mr Tim Horne, a lawyer from Aqualaw representing Southern Riverina Irrigators, observed:
- 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.⁷
- 1.4** The lack of clarity was acknowledged by the NSW Irrigators' Council, with the Council's Acting Policy Manager Ms Christine Freak describing 'lots of misunderstanding around floodplain

³ Submission 2, The Hon Melinda Pavey MP, Minister for Water, Property and Housing, p 1.

⁴ Evidence, Ms Jon-Maree Baker, Executive Officer, Namoi Water, 2 July 2020, p 15.

⁵ Evidence, Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators Association, 2 July 2020, p 11.

⁶ Submission 8, Environmental Defenders Office, p 1.

⁷ Evidence, Mr Tim Horne, Lawyer, Aqualaw, 2 July 2020, p 21.

harvesting'.⁸ In this regard, Ms Freak praised the Regulation for 'provid[ing] that clarity and consistency so that people do have that understanding of how it all works'.⁹

- 1.5 Related concerns around the legality of floodplain harvesting also comprised a significant amount of evidence received by the committee. The legality of the practice – and the consequential effect of the Regulation's enactment – is explored in detail in chapter 2.

The making of the Regulation and Order

- 1.6 The Regulation was made on 6 February 2020, providing an exemption from the requirement under the *Water Management Act 2000* to hold a water access licence to take water from a water source for the purpose of floodplain harvesting.

- 1.7 As explained in the submission of the Minister for Water, the effect of the Regulation was to permit floodplain water to be harvested through eligible works without a water supply work approval or an access licence. For the purpose of the Regulation, eligible works are:

- those that are located on a floodplain, and;
- were constructed on or before 3 July 2008, or were constructed after 3 July 2008 in accordance with an approval under the *Water Management Act 2000* or a licence or approval under Part 2 or Part 8 of the *Water Act 1912* for which an application was pending at 3 July 2008.¹⁰

- 1.8 In answers to supplementary questions, the Minister confirmed that eligible works included 'lift pumps, regulators, channels and pipes that intercept overland flow as well as on-farm storages'.¹¹

- 1.9 The Temporary Water Restriction (Northern Basin) (Floodplain Harvesting) Order 2020 ('the Order') was made under section 324 of the *Water Management Act 2000* on 7 February 2020.¹² This Order had the effect of prohibiting the take of water for the purposes of floodplain harvesting (except where the take was by a work for the purpose of a tailwater return system) in the following locations:

- Barwon-Darling Valley Floodplain
- Gwydir Valley Floodplain
- Lower Namoi Valley Floodplain
- Narrabri – Wee Waa Floodplain
- Narromine to Oxley Station Floodplain

⁸ Evidence, Ms Christine Freak, Acting Policy Manager, NSW Irrigators Council, 2 July 2020, p 6.

⁹ Evidence, Ms Freak, p 7.

¹⁰ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 1.

¹¹ Answers to supplementary questions, The Hon Melinda Pavey MP, Minister for Water, 24 July 2020, p 9.

¹² Note that various terms for this Order are used by stakeholders, including 'the embargo', 'the s.324 Order' and 'the restriction'.

- Upper Namoi Valley Floodplain.¹³

- 1.10** On 12 February 2020, the Temporary Water Restriction (Northern Basin) (Floodplain Harvesting) Amendment Order 2020 ('the Amendment Order') was made, further prohibiting the take of water from the Lower Macintyre River, Whalan Creek, & Boomi River Floodplain and Lower Macquarie Valley Floodplain.¹⁴
- 1.11** Whilst prohibiting the take of water for the purposes of floodplain harvesting, both Orders did not apply to the take of water pursuant to basic landholder rights (including harvestable rights) or passive take by water management works (including on-farm storages, dams and open channels). The definition of 'passive take' and the type of works excluded from the Orders' operation was of significant concern to many stakeholders and is discussed further at 2.74.
- 1.12** According to the Minister's submission, the enactment of the first Order:
- ...was crucial for maximising the volume of floodplain water that could enter rivers and creeks in order to assist in providing a 'first flush' flow along the entire length of the Barwon and Darling Rivers to meet critical human and environmental needs.¹⁵
- 1.13** In answers to supplementary questions, the Department of Planning, Industry and Environment referred to a document entitled 'Assessment of take and protection during first flush flows in the Northern Basin' published by the Department on 23 July 2020 which provides further context for the enactment of the Order.¹⁶
- 1.14** Over the month of February 2020, the Department of Planning, Industry and Environment lifted the temporary restriction on floodplain harvesting across parts of a number of valleys subject to the Regulation. Both Orders ceased to have effect across all valleys on 28 February 2020.¹⁷
- 1.15** Decisions to lift temporary restrictions in parts of the Gwydir Valley, Namoi Valley and Barwon-Darling Floodplain over the period between 9 and 13 February 2020 related to complaints from land holders of infrastructure damage. The Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event published an 11 February 2020 NRAR Flight Observation Report in their final report dated September 2020. That report noted 'no significant infrastructure damage was identified'.¹⁸

Estimate of take during the month of February 2020

- 1.16** A number of stakeholders gave evidence on the estimated amount of water taken over the month of February 2020, following the lifting of the temporary restriction on floodplain

¹³ *NSW Government Gazette*, No 30, 7 February 2020, p 2.

¹⁴ *NSW Government Gazette*, No 31, 12 February 2020, p 3.

¹⁵ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 3.

¹⁶ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 4.

¹⁷ *NSW Government Gazette*, No 30, 7 February 2020, p 3.

¹⁸ Department of Planning, Industry and Environment Independent Panel, *Final Report: Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event* September 2020, Appendix K.

harvesting. When asked if it was correct that 30 gigalitres of water had been captured in floodplain storages during the period of the Regulation coming in and the first Order being in place, Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, Department of Planning, Industry and Environment responded:

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.¹⁹

1.17 In contrast, representatives of the Southern Riverina Irrigators argued that the amount taken was much larger, with the Chair, Mr Chris Brooks contending that 'the volume of water that ... was taken in this most recent rainfall event was closer to 900 gigalitres'.²⁰

1.18 The Minister for Water disputed this figure of 900 gigalitres, asserting that there was a total limit of 1,450 gigalitres of on-farm storage in the northern basin:

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.²¹

1.19 The Minister provided a further breakdown of this on-farm storage in answers to supplementary questions. These figures reflect storages on designated floodplains in the valleys referred to below and are shown in Table 1.

Table 1 Total storage capacity of private storages by valley in the NSW northern basin

Floodplain/Valley	Number of storages	Estimated capacity (GL)
Border Rivers	132	179
Gwydir	403	553
Namoi	554	312
Macquarie	213	167
Barwon-Darling	117	239

Source: *Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 5.*

1.20 The Department of Planning, Industry and Environment's document entitled 'Assessment of take and protection during first flush flows in the Northern Basin' also states that an estimated 30,000 ML (30 gigalitres) was taken by mid-February, and advised that in future, there will be improvements to how floodplain water take is quantified:

At the start of February, the large on-farm storages held an estimated 23,000 ML, by mid-February 51,000 ML and by the end of April 292,000 ML. We therefore estimate

¹⁹ Evidence, Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, Department of Planning, Industry and Environment, 2 July 2020, p 39.

²⁰ Evidence, Ms Chris Brooks, Chair, Southern Riverina Irrigators, 2 July 2020, p 22.

²¹ Evidence, The Hon Melinda Pavey MP, Minister for Water, 2 July 2020, p 35.

an increase in stored water of approximately 270,000 ML from February to April 2020. This includes an estimated 30,000 ML by mid-February, during which there were four days when restrictions on floodplain harvesting were lifted in specified areas.

Stored water includes floodplain harvesting as well as water actively taken under several different water licence classes including unregulated, supplementary and groundwater and water taken under a basic landholder right. The stored water can also include passive floodplain take i.e. water entering gravity fed storages that cannot be restricted by a pump, pipe or regulator and rainfall run-off collected in tailwater drains.

It is likely that the total take estimate of 270,000 ML in on-farm storage contains much of the 69,500 ML of licensed take in taken in [sic] the regulated tributaries for the full first flush assessment period. Future telemetry and measurement of floodplain harvesting will improve how we quantify floodplain water take and make information more rapidly available.²²

- 1.21** The final report of the Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event noted that 'there were some significant data gaps relating to flows entering NSW from Queensland, floodplain harvesting extraction and flow data, unregulated extraction data, channel capacity and allowances for water to move to downstream locations'.²³

²² Department of Planning, Industry and Environment, *Assessment of take and protection during first flush flows in the Northern Basin*, July 2020, pp 16-17.

²³ Department of Planning, Industry and Environment Independent Panel, *Final Report: Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event* September 2020, p 5.

Chapter 2 Key issues

This chapter examines stakeholders' views on the purpose of the Regulation, including whether it was a necessary transitional step towards licencing of floodplain harvesting and its role in providing clarity to water users. In particular, it explores the discussion around the legality of floodplain harvesting and whether the Regulation was required to legalise the practice. It also examines the key issues surrounding the Regulation's implementation, including problems with communication, views on its impact and definitional concerns particularly around active and passive take.

Need for the Regulation?

- 2.1 Stakeholders expressed divergent opinions on the purpose of the Regulation. Some stakeholders took the same position as the Minister – that the Regulation was a transitional step to the new water licencing framework and would provide clarity to water users as well as the Natural Resource Access Regulator, which is tasked with ensuring compliance. Others argued that the Regulation was a means to legalise a form of water take that otherwise may not be legal. The committee received some evidence on the legality of the Regulation itself, insofar as it was made in accordance with the requirements of the *Water Management Act 2000*.

Was the Regulation required for the making of the Order?

- 2.2 The committee received considerable evidence on the relationship between the Regulation and the Order, and whether the Regulation was required before the Order could be made on 7 February 2020.
- 2.3 According to the Minister's submission, the making of the Regulation was a necessary precondition to the Order:
- The s.324 Order restricting Floodplain harvesting in the Northern Basin could not have been practically achieved without the temporary exemption being put in place.²⁴
- 2.4 When asked how the Regulation related to the making of the Order, Minister Pavey stated: 'It was putting a context, it was putting an authorisation around a process to ban it'.²⁵
- 2.5 The NSW Irrigators' Council appeared to agree, describing the Regulation as 'a mechanism for the NSW Government to enact a Section 324 Temporary Restriction within the *Water Management Act 2000*'.²⁶ Border Rivers Food and Fire also contended that that the Regulation 'created the ability for NSW to place a s.324 restriction...for the first time ever'²⁷ and argued that disallowance of the Regulation would mean it 'would not be possible for any further s 324 embargoes to be placed on...water-users'.²⁸

²⁴ Submission 2, The Hon Melinda Pavey MP, Minister for Water, Property and Housing, p 3.

²⁵ Evidence, The Hon Melinda Pavey MP, Minister for Water, Property and Housing, 2 July 2020, p 44.

²⁶ Submission 3, New South Wales Irrigators Council, p 6.

²⁷ Submission 12, Border Rivers Food and Fibre, p 1.

²⁸ Submission 12, Border Rivers Food and Fibre, p 2.

- 2.6 Other stakeholders disagreed with this view and asserted that the Regulation was not required to enact the Order. In this regard, Ms Bev Smiles of Inland Rivers Network asserted that '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'.²⁹
- 2.7 The Environmental Defenders Office also queried the Department's position that the Regulation was made to allow the Minister to impose the Order, observing that their organisation's interpretation of s 324 was that the Minister 'already had broad discretion to impose an embargo, including in relation to the diversion of water from floodplain', without the existence of the Regulation.³⁰ Similarly, Southern Riverina Irrigators suggested the Order could have been imposed without the Regulation, stating: 'it is difficult to follow how the objectives of the Order could NOT have been achieved without the Regulation'.³¹

A transitional measure to provide certainty?

- 2.8 The NSW Government advised the committee that the Regulation is a transitional step towards licencing of floodplain harvesting under the Healthy Floodplains Project. Commencing in 2013, the NSW Government's Healthy Floodplains Project aims to '[reform] the management of water on floodplains through development and implementation of the floodplain management program and floodplain harvesting program'.³² It is currently being implemented over a six-year period across the five northern valleys in NSW's Murray–Darling Basin: the Barwon–Darling, Border Rivers, Gwydir, Macquarie and Namoi valleys.³³ As part of the Project, the NSW Floodplain Harvesting Policy will be implemented in order to license floodplain harvesting water extractions and make them subject to volumetric limits under the *Water Management Act 2000*. The timeframe for this implementation, as stated by the Department, is June 2021.³⁴
- 2.9 On the relationship between the Regulation and the Healthy Floodplains Project, the Minister's submission explained that the Regulation had been introduced as a transitional step to a formal licensing regime under the Project:

The Regulation is required under the [Floodplain Harvesting] Policy as a transitional arrangement to completing the licensing process. These transitional arrangements will ensure that there is more certainty for water users and that the Natural Resources Access Regulator (NRAR) has clear and unambiguous rules to follow until the Policy is implemented.³⁵

- 2.10 According to the submission of the Hon Melinda Pavey MP, Minister for Water, Property and Housing, the Regulation 'provides clarity that certain water users in New South Wales can

²⁹ Evidence, Ms Bev Smiles, Inland Rivers Network, President, Inland Rivers Network, 2 July 2020, p 30.

³⁰ Submission 8, Environmental Defenders Office, p 2.

³¹ Supplementary submission 20a, Southern Riverina Irrigators, p 4.

³² Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 2.

³³ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 2.

³⁴ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 3.

³⁵ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 2.

undertake floodplain harvesting legally using eligible works until implementation of the policy is complete'.³⁶

- 2.11** Ms Christine Freak, Acting Policy Manager, NSW Irrigators' Council, described the Regulation as a necessary measure to transition from regulation under the *Water Act 1912* to the new *Water Management Act 2000*:

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.³⁷

- 2.12** Other irrigator groups supported this view of the Regulation as an interim measure to provide clarity. For example, Ms Zara Lowien, Executive Officer of Gwydir Valley Irrigators Association, characterised the transition as a 'legacy issue' to move approvals, access licences and other forms of rights from the *Water Act 1912* to the new scheme. She noted that while floodplain management plans are the key instruments which move licensing to the *Water Management Act 2000*, the Regulation nevertheless provides clarity for water users and for NRAR. Ms Lowien told the committee that the Regulation provides 'a much easier regulatory space for water users, but also the regulator and Government going forward ...'.³⁸

- 2.13** Similar comments were made by Ms Jon-Maree Baker, Executive Officer of Namoi Water who argued that in clarifying the issue for NRAR, the Regulation provided security for farmers and other water users as it 'reduces the amount of potential for legal interpretation in relation to how the exemption applies on the ground ...'.³⁹

- 2.14** In contrast, Southern Riverina Irrigators were less willing to classify the Regulation as a necessary interim measure and expressed concerns that its implementation might delay transition to the *Water Management Act 2000*. In evidence, Mr Tim Horne of Aqualaw, speaking on behalf of Southern Riverina Irrigators, stated:

It is very clear that with this regulation in place there is no incentive to terminate or conclude the licensing process ...this regulation really just allows this situation to go on indefinitely.⁴⁰

- 2.15** He noted that Southern Riverina Irrigators are concerned that licensing will not be finalised in a timely manner but said that, if it can be, the Regulation should be withdrawn.⁴¹

³⁶ Submission 2, The Hon Melinda Pavey MP, Minister for Water, p 2.

³⁷ Evidence, Ms Christine Freak, Acting Policy Manager, NSW Irrigators' Council, 2 July 2020, p 2.

³⁸ Evidence, Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators Association Inc, 2 July 2020, p 16.

³⁹ Evidence, Ms Jon-Maree Baker, Executive Officer, Namoi Water, 2 July 2020, p 20.

⁴⁰ Evidence, Mr Tim Horne, Lawyer, Aqualaw, 2 July 2020, p 24.

⁴¹ Evidence, Mr Horne, 2 July 2020, p 24.

- 2.16** Noting that some witnesses had expressed concerns that the Regulation would not actually be 'transitional' and in fact, might remain in place past July 2021, the committee questioned departmental representatives on what would happen if the licensing regime was not implemented by this time. Responding to this, Mr Dan Connor, Director, Healthy Floodplains Project Delivery, New South Wales Department of Planning, Industry and Environment stated:

... we have got every intention of being able to deliver this project by 30 June 2021. But 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.⁴²

- 2.17** In answers to questions on notice, Minister Pavey confirmed that 'the Regulation will continue until licences are created or it is repealed' and that, if licences are not in place by 1 July 2021, then any growth in floodplain harvesting 'will be offset by reducing allocations to supplementary water access licences'.⁴³

A means to legalise floodplain harvesting?

- 2.18** A number of stakeholders questioned whether the Regulation would legalise water supply works used for the purpose of floodplain harvesting that otherwise may not be legal. Under the Regulation, floodplain harvesting using 'eligible works' (a water supply work on a floodplain built on or before 3 July 2008) is exempted from the requirement to hold a licence to take water.

- 2.19** Some stakeholders, such as Southern Riverina Irrigators, argued that, in their view, the purpose of the regulation 'is to allow more floodplain harvesting to occur for people who never sought or never had works approvals before 3 July'.⁴⁴ According to their submission, under the *Water Management Act 2000*, taking water without holding an applicable licence, and using or constructing water supply works without applicable approvals, 'were and continue to be criminal offences'.⁴⁵ The organisation also noted that other stakeholders had suggested that licence applications for water supply works dating back to 30 years remained unapproved, yet such works continued to be used.⁴⁶

- 2.20** On this issue, Mr Tim Horne, a lawyer with Aqualaw and witness for Southern Riverina Irrigators, told the committee that the view of Southern Riverina Irrigators was that such works were operating illegally:

As a general proposition under the Water Act 1912 there was the opportunity 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.

⁴² Evidence, Mr Dan Connor, Director, Healthy Floodplains Project Delivery, New South Wales Department of Planning, Industry and Environment, 2 July 2020, p 45.

⁴³ Answers to questions on notice, the Hon Melinda Pavey MP, Minister for Water, Property and Housing, 24 July 2020, p 5.

⁴⁴ Evidence, Mr Darcy Hare, Executive Officer, Southern Riverina Irrigators, 2 July 2020, p 23.

⁴⁵ Submission 20, Southern Riverina Irrigators, p 2.

⁴⁶ Submission 20a, Southern Riverina Irrigators, p 1.

But certainly under the Water Management Act, if they are used for the purposes of floodplain harvesting they are doing so illegally.⁴⁷

2.21 Ms Beverley Smiles, President, Inland Rivers Network, claimed that that Regulation 'has the potential to give retrospective approval to floodplain work that was developed without going through an approval process prior to 2003',⁴⁸ whilst the Australian Floodplain Association expressed concerns about 'the legitimacy of legalising structures that have not been through a process to see if they have impact on downstream communities and environment'.⁴⁹

2.22 Other stakeholders were concerned about applications for approval of floodplain harvesting works remaining unfinalised for decades. Mr Ian Cush, Chair of NSW Irrigators' Council said a number of flood work approval applications had not been finalised by the Department, sometimes after 30 or 35 years.⁵⁰ Similar evidence was contained within the submission of Border Rivers Food and Fibre, which identified the existence of many works applications – some unprocessed 'for more than 30 years'.⁵¹

2.23 When asked whether the Regulation legalised floodplain harvesting, Mr Dan Connor, Director, Healthy Floodplains Project Delivery, Department of Planning, Industry and Environment told the committee that the Regulation does not change the fact that floodplain works require approval under the *Water Act 1912*. He stated:

... [F]loodplain 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.⁵²

2.24 The Department of Planning, Industry and Environment was asked a number of supplementary questions relating to works approvals. The Department was asked to clarify how many existing flood works will require approvals as part of the licensing process. The Department responded that, while works with existing approval will not require further approval, almost all eligible pumps, pipes and regulators will need to go through the approvals process. The Department also indicated that flood works will not be licensed, stating:

Any works that have an existing approval and are being operated within the terms of that approval will not require further authorisation. Almost all eligible pumps, pipes and regulators used for floodplain harvesting will require approval as water supply works. It is not possible to quantify the number of eligible works that will not require approval to operate as water supply work approvals. For clarity, unlicensed flood works including levees, storages, roads etc will not be licensed as part of floodplain harvesting.⁵³

⁴⁷ Evidence, Mr Horne, 2 July 2020, p 24.

⁴⁸ Evidence, Ms Smiles, 2 July 2020, p 29.

⁴⁹ Evidence, Mr Justin McClure, President, Australian Floodplain Association, 2 July 2020, p 30.

⁵⁰ Evidence, Mr Ian Cush, Chair, NSW Irrigators' Council, 2 July 2020, p 3.

⁵¹ Submission 12, Border Rivers Food and Fibre, p 1.

⁵² Evidence, Mr Connor, 2 July 2020, p 36.

⁵³ Answers to supplementary questions, Department of Planning, Industry and Environment and the Hon Melinda Pavey MP, Minister for Water, 24 July 2020, q 25, p 10.

- 2.25** The Department also confirmed in answers to supplementary questions that the Regulation exempts 'a small subset' of eligible works from the requirement to hold an approval. While they could not provide exact numbers, they noted that the vast majority of eligible works are either required to have a flood work approval or are exempt from this requirement under the *Water Management (General) Regulation 2018*.⁵⁴
- 2.26** Other stakeholders did not directly address the impact of the Regulation on the legality of existing flood works, yet generally agreed that the Regulation expressly enabled the taking of water via floodplain harvesting. For example, in response to questioning about whether floodplain harvesting would be legal without the Regulation, Ms Christine Freak of the NSW Irrigators' Council asserted that the Regulation 'is actually making it more legal'.⁵⁵ She stated:
- 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.⁵⁶
- 2.27** The Murray Darling Basin Authority observed that floodplain harvesting has occurred in New South Wales for many years, stating that 'although it has not been specifically enabled through legislation, it also hasn't been prohibited' and the Regulation 'specifically enables that take'.⁵⁷
- 2.28** Minister Pavey was asked if the purpose of the Regulation was just to legalise floodplain structures that had never been licensed or approved. She stated that it was not.⁵⁸
- 2.29** The committee wrote to NRAR to seek their view about whether floodplain harvesting would be legal and possibly subject to enforcement actions without the Regulation. In response, NRAR advised 'the Regulation provided much needed clarity to water users on floodplain harvesting activities permissible under the *Water Management Act 2000*'.⁵⁹

Legal issues

- 2.30** This section explores the legality of the practice of floodplain harvesting, including a discussion of the legal advice received by stakeholders on the issue. It also touches briefly on discussions on the legality of the Regulation; that is, whether it had been made in accordance with the requirements of the *Water Management Act 2000*.

⁵⁴ Answers to supplementary questions, Department of Planning, Industry and Environment and the Hon Melinda Pavey MP, Minister for Water, , 24 July 2020, q 26, p 10.

⁵⁵ Evidence, Ms Freak, 2 July 2020, p 2.

⁵⁶ Evidence, Ms Freak, 2 July 2020, p 2.

⁵⁷ Submission 1, Murray Darling Basin Authority, p 3.

⁵⁸ Evidence, The Hon Melinda Pavey MP, 2 July 2020, p 43.

⁵⁹ Response to questions from the committee on 8 July 2020, Natural Resource Access Regulator, 24 July 2020, Attachment A, p 1.

Is there legal advice on the legality of floodplain harvesting?

- 2.31** Noting the significant disagreement between stakeholders on the legality of floodplain harvesting, the committee explored witnesses' views on the legality of floodplain harvesting under the previous Act and what legal advice stakeholders had received, if any, on this issue.
- 2.32** Representatives from the Department of Planning, Industry and Environment were asked whether, before the Regulation was introduced, irrigators could legally take floodplain water. In response, Mr Connor confirmed that there was 'some ambiguity in the rules' prior to the Regulation and that this had been identified by the regulator.⁶⁰
- 2.33** When asked if floodplain harvesting was a legal activity under the *Water Act 1912*, the Minister for Water told the committee that floodplain harvesting 'has been operating within New South Wales for decades' and that she had received 'agency advice showing that floodplain harvesting was considered a process that was part of the 1912 Water Act'.⁶¹
- 2.34** When asked whether they had sought legal advice on the legal status of floodplain harvesting prior to the Regulation, Executive Officers from Namoi Water, Border Rivers Food and Fibre, and Gwydir Valley Irrigators Association Inc confirmed they had not sought, nor received, any such legal advice.⁶² In this regard, Ms Baker from Namoi Water, told the committee that it would have been the role of the NSW Government to seek legal advice on this issue:
- ... [T]he 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 taking from licensed works under the Water Management Act? ... We have not sought legal advice on that particular issue but I would assume that the NSW Government would have done that as part of its process.⁶³
- 2.35** Similarly, Ms Zara Lowien of Gwydir Valley Irrigators Association, when questioned on whether the Association had sought legal advice, advised that the organisation 'did not feel it was relevant on this piece of regulation, given the history of conditional arrangements in the past'.⁶⁴
- 2.36** Representatives from the NSW Irrigators' Council also confirmed they had not sought their own legal advice regarding the legality of flood works.⁶⁵
- 2.37** The committee wrote to NRAR asking if they had commissioned any internal or external legal advice in relation to their position on the legality of floodplain harvesting. NRAR confirmed they had not commissioned any legal advice.⁶⁶

⁶⁰ Evidence, Mr Connor, 2 July 2020, p 44.

⁶¹ Evidence, The Hon Melinda Pavey MP, 2 July 2020, pp 43; 36.

⁶² Evidence, Ms Baker; Mr Tim Napier, Executive Officer, Border Rivers Food and Fibre; Ms Lowien, 2 July 2020, p 11.

⁶³ Evidence, Ms Baker, 2 July 2020, p 14.

⁶⁴ Evidence, Ms Lowien, 2 July 2020, p 11.

⁶⁵ Evidence, Mr Cush and Ms Freak, 2 July 2020, p 8.

⁶⁶ Response to questions from the committee on 8 July 2020, Natural Resource Access Regulator, 24 July 2020, Attachment A, p 1.

- 2.38** Southern Riverina Irrigators, in their supplementary submission, called for the Minister to clarify what advice she had received from the Crown Solicitor regarding the legality of floodplain harvesting.⁶⁷
- 2.39** In response to questions on notice on whether she had received legal advice from the Crown Solicitor, Minister Pavey stated that 'there is no such legal advice from the Crown Solicitor's Office'.⁶⁸
- 2.40** In response to a request to provide a copy of any legal advice that she had received, the Minister provided a document by the Department of Planning, Industry and Environment entitled 'Floodplain harvesting fact sheet: Answers to frequently-asked questions'.⁶⁹

Legality of the Regulation

- 2.41** In addition to questioning the legality of the practice of floodplain harvesting, the committee heard evidence expressing concerns about the legality of the Regulation itself; that is, whether it had been made in accordance with the requirements of the *Water Management Act 2000*.
- 2.42** In her submission to the inquiry, the Minister for Water advised that the Regulation was made under section 400 of the *Water Management Act 2000* which allows for regulations to be made that exempt a person or thing from complying with the Act. The Minister stated that the Regulation was temporary and consistent with existing government policy.⁷⁰
- 2.43** In contrast, Southern Riverina Irrigators argued that the Regulation 'may be invalid as an impermissible exercise of the regulation-making power' under the Act.⁷¹ According to their submission, anyone exercising functions under the *Water Management Act 2000* is under a duty to exercise those functions in accordance with the water management and water sharing principles of the Act, as well as the State Water Management Outcomes Plan Order 2002.⁷²
- 2.44** However, according to the organisation, by allowing users to take water without a licence, the Regulation 'prioritises the economic benefits sought to be realised by the Northern Basin's irrigators to the prejudice of the protection of the water source and its dependent ecosystems'. They claimed, therefore, that the Regulation is 'repugnant to the objects and purposes' of the *Water Management Act 2000*, as well as to the principles of the Act and the State Water Management Outcomes Plan Order 2002.⁷³
- 2.45** At the hearing, Mr Tim Horne of Aqualaw, representing Southern Riverina Irrigators, elaborated on the organisation's position as follows:

⁶⁷ Submission 20a, Southern Riverina Irrigators, p 7.

⁶⁸ Answers to questions on notice, the Hon Melinda Pavey MP, Minister for Water, Property and Housing, 24 July 2020, p 1.

⁶⁹ Answers to questions on notice, the Hon Melinda Pavey MP, 24 July 2020, Attachment A, document entitled 'Floodplain harvesting fact sheet: Answers to frequently-asked questions'.

⁷⁰ Submission 2, The Hon Melinda Pavey MP, Minister for Water, Property and Housing, p 2.

⁷¹ Submission 20, Southern Riverina Irrigators, p 4.

⁷² Submission 20, Southern Riverina Irrigators, pp 4-5.

⁷³ Submission 20, Southern Riverina Irrigators, p 6.

Because the regulation was made pursuant to section 400 of the Water Management Act 2000, 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. ... 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.⁷⁴

Implementation

- 2.46** This section explores stakeholder views on the implementation on the Regulation as well as the effect of the Order. It examines the evidence received regarding the poor timing of the Regulation's implementation and the compounding effect of the lack of communication around the flood event. Stakeholder suggestions for improvement are also considered, including more departmental officers in the regions and better compliance with the NSW Government's *Guide to Better Regulation*.

Communication and timing

- 2.47** Two significant issues consistently raised by stakeholders during the inquiry were the timing of the Regulation's enactment and communication surrounding this.
- 2.48** Nearly all stakeholders argued that the timing of the Regulation's implementation had been poor, occurring rapidly on a Friday afternoon in February 2020 with little notification. Mr Tim Napier of Border Rivers Food and Fibre described receiving notification of the implementation by email and text message, before noting that landholders were required to follow up over the weekend to clarify the situation:

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.⁷⁵

- 2.49** Ms Baker of Namoi Water described a similar situation, observing that it was left to water users themselves to communicate the effect of the Regulation:

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.⁷⁶

- 2.50** Many also expressed frustration that this had occurred despite the Regulation having been foreshadowed since the start of the Healthy Floodplains Project in 2013. For example, Ms Lowien of Gwydir Valley Irrigators Association stated:

The regulation has always been foreshadowed ... [a]nd just because it has been foreshadowed, we would have expected or would have hoped that the department could

⁷⁴ Evidence, Mr Horne, 2 July 2020, p 27.

⁷⁵ Evidence, Mr Napier, 2 July 2020, p 14.

⁷⁶ Evidence, Ms Baker, 2 July 2020, p 13.

have briefed individuals, water users, other communities, Parliament—brief them full stop 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... [it] happened in a time where we were critical and in a 100 year drought.⁷⁷

- 2.51** Ms Bev Smiles, President of Inland Rivers Network commented that 'the fact that [the Regulation] 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'.⁷⁸ Similar observations were made by Border Rivers Food and Fibre, which referred to a lack of progress in implementing floodplain harvesting policy:

We have long been frustrated by the lack of progress of FPH policy implementation as successive governments delayed starting the project due to funding being sought from the Commonwealth. Unfortunately, it was left until early February this year, as rain was falling and flows became apparent, that it was finally rushed into place. This was done without any meaningful consultation and communication, as the Department has always said they would do.⁷⁹

- 2.52** The National Parks Association,⁸⁰ Wentworth Shire Council⁸¹ and Healthy Rivers Dubbo⁸² made similar statements around the lack of communication surrounding the Regulation's implementation, with Murray Lower Darling Rivers Indigenous Nations describing its implementation as 'secretive'.⁸³

- 2.53** According to many stakeholders, poor communication around the Regulation's implementation contributed to confusion around its connection with the Order. On the reason why the two were implemented so close together in time, the Minister's submission noted the need to provide a 'first flush' along the Barwon and Darling Rivers:

This Order was crucial for maximising the volume of floodplain water that could enter rivers and creeks in order to assist in providing a 'first flush' flow along the entire length of the Barwon and Darling Rivers to meet critical human and environmental needs.⁸⁴

- 2.54** Similarly, Border Rivers Food and Fibre described, in their understanding, the intent of the Order as being 'to provide water to downstream communities both in our own valley and beyond, who had, or were about to, exhausted their town water supplies'.⁸⁵

- 2.55** However, other stakeholders such as Healthy Rivers Dubbo suggested the Order was implemented due to a fear of infrastructure damage as a result of the rain event, yet contended that this reason 'does not pass the pub test'.⁸⁶

⁷⁷ Evidence, Ms Lowien, 2 July 2020, p 13.

⁷⁸ Evidence, Ms Smiles, 2 July 2020, p 30.

⁷⁹ Submission 12, Border Rivers Food and Fibre, p 1.

⁸⁰ Submission 14, National Parks Association, p 1.

⁸¹ Submission 15, Wentworth Shire Council, p 1

⁸² Submission 17, Healthy Rivers Dubbo, p 1.

⁸³ Submission 16, Murray Lower Darling Rivers Indigenous Nations, p 1.

⁸⁴ Submission 2, The Hon Melinda Pavey MP, p 3.

⁸⁵ Submission 12, Border Rivers Food and Fibre, p 1.

⁸⁶ Submission 17, Healthy Rivers Dubbo, p 1.

2.56 A number of stakeholders referred to this close proximity in timing as the reason why both the Regulation and Order had suffered from poor public perception. Chief of these perception issues was the apparently immediate overturning of the Regulation by the Order – an action that many stakeholders criticised. Ms Bev Smiles of Inland Rivers Network stated 'we certainly were not impressed that the restriction order then got immediately overturned'.⁸⁷ Namoi Water contended that the timing 'caused substantial distress for water users'⁸⁸ and negatively impacted compliance:

...result[ing] in poor outcomes for landholders in terms of public perception and ability to comply due to a lack of clear communication products being tailored to improving water literacy.⁸⁹

2.57 Similarly, the NSW Irrigators' Council suggested that 'there should have been better consideration of the timing of implementation to ensure it did not get conflated with other events'.⁹⁰

Suggestions for improvement

2.58 The committee explored how the implementation process might have been improved. A number of stakeholders gave evidence to this effect. For example, Ms Lowien of Gwydir Valley Irrigators Association suggested that public perception of the Regulation's implementation might have been better had discussions happened earlier, as well as in person as opposed to via text message:

I think earlier discussions about whether there was intention ... the difference between passive and active ... 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... meant that there was a lack of communication around that and that is where the frustration stems from.⁹¹

2.59 Ms Jon-Maree Baker, Executive Officer at Namoi Water elaborated on her organisation's submission that water users' ability to comply with both the Regulation and Order could have been improved 'if departmental staff were based in the regional areas to be on the ground to work with the community on these issues if and when they arise in the future,'⁹² stating:

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.⁹³

⁸⁷ Evidence, Ms Smiles, 2 July 2020, p 30.

⁸⁸ Submission 7, Namoi Water, p 2.

⁸⁹ Submission 7, Namoi Water, p 4.

⁹⁰ Submission 3, New South Wales Irrigators Council, p 6.

⁹¹ Evidence, Ms Lowien, 2 July 2020, p 13.

⁹² Submission 7, Namoi Water, p 4.

⁹³ Evidence, Ms Baker, 2 July 2020, p 13.

- 2.60** More broadly, the NSW Irrigators' Council identified non-compliance with the NSW Government's *Guide to Better Regulation* – particularly with regards to explaining the Regulation's purpose – as undermining its implementation:

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 the implementation of the Regulation... the Department has still not provided a plain English summary explaining the key aspects of the Regulation, particularly:

1. Why the Exemption Regulation was needed;
2. Whether it would be subjected to reviews with a definite expiry date, i.e. when it can be deemed no longer needed;
3. What the likely impacts of the Regulation would be.⁹⁴

Impact

- 2.61** This section explores stakeholder views on the impact of the Regulation. This includes its effect on downstream water users, as well as its impact on the environment and rate of floodplain harvesting.

Impact on downstream water users

- 2.62** As discussed in chapter 1, the Regulation provided an exemption to the need to hold a licence to conduct floodplain harvesting, which applied uniformly across all of New South Wales. Southern Riverina Irrigators told the committee that for stakeholders located in the State's south, this uniform exemption was concerning based on a perceived difference in approach to water take between northern and southern water users. In this regard, Southern Riverina Irrigators described the Regulation as 'a serious misstep in the development of New South Wales' water resource management regime',⁹⁵ based on the negative effect of unregulated floodplain harvesting by northern irrigators on 'both licence holders and downstream States'.⁹⁶
- 2.63** In evidence to the committee, Mr Darcy Hare, Executive Officer with Southern Riverina Irrigators, expanded on the organisation's submission. He referred to a 2017 Murray-Darling Basin Authority compliance report which showed a significant disparity in compliance with the requirements of the Murray-Darling Basin Plan between the north and the south. In his view, this disparity – coupled with the effect of the Regulation – was negatively impacting communities in the south:

[The 2017 report] ... 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

⁹⁴ Submission 3, New South Wales Irrigators Council, p 6.

⁹⁵ Submission 20, Southern Riverina Irrigators, p 4.

⁹⁶ Submission 20, Southern Riverina Irrigators, p 1.

floodplain harvesting yet...[and] 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.⁹⁷

- 2.64** The Chair of Southern Riverina Irrigators, Mr Chris Brooks also expressed concern about the difference in effect on irrigators in the north and south:

Right now [the northern basin] 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...

....to put things in perspective, is when there is a zero allocation in the south... 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.⁹⁸

- 2.65** The idea that southern-based irrigators were disproportionality shouldering the State's obligations under the Murray-Darling Basin Plan was also put forward by Ms Smiles of Inland River Networks:

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 ... 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.⁹⁹

- 2.66** Responding to contentions from some stakeholders that southern irrigators were adversely affected by the Regulation, the Minister suggested that properties in the southern basin still received enough water to carry out floodplain harvesting themselves:

...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.¹⁰⁰

Impact on the environment

- 2.67** Stakeholders also raised concerns about the environmental impacts of floodplain harvesting more broadly, with some suggesting the practice be discontinued until the formal licensing regime was implemented in 2021. According to Ms Smiles of Inland Rivers Network, the environmental impacts of floodplain harvesting have not been properly assessed for over 30 years:

⁹⁷ Evidence, Mr Hare, 2 July 2020, p 21.

⁹⁸ Evidence, Mr Chris Brooks, Chair, Southern Riverina Irrigators, 2 July 2020, p 23.

⁹⁹ Evidence, Ms Smiles, 2 July 2020, p 33.

¹⁰⁰ Evidence, Minister for Water, Property and Housing, 2 July 2020, p 38.

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... [f]loodplain harvesting should be disallowed until it has been fully assessed for cumulative impact, licensed and metered.¹⁰¹

- 2.68** The National Parks Association submission was also critical of the holistic effect of the Regulation on downstream flows:

This amendment has considerable implications not only locally – both as a result of the reduced flows downstream in the northern basin but also through current management and trading rules has implications for the southern basin, environmentally, socially and economically. The environmental health of the system as a whole, which underpins long term social wellbeing and economic viability, is put at risk.¹⁰²

- 2.69** Contrastingly, departmental representatives suggested that the Regulation – insofar as it would facilitate the transition to a formal licensing scheme – might bring environmental benefits. In this regard, Mr Connor stated:

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.¹⁰³

Impact on the number of flood works and floodplain harvesting

- 2.70** Witnesses before the committee disagreed on whether the Regulation would lead to an increase in the rate of floodplain harvesting. According to Mr Darcy Hare, Executive Officer with Southern Riverina Irrigators, there had been a 'massive development' of floodplain harvesting works in the northern basin over the last 27 years and the Regulation allowed further works to be constructed.¹⁰⁴

- 2.71** By contrast, Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, Department of Planning, Industry and Environment argued that that by restricting floodplain harvesting to works built before 3 July 2008 or approved after 3 July 2008, the Regulation had actually reduced the number of legal works and restricted floodplain harvesting.¹⁰⁵ She stated that the Regulation 'gave water users who had the approvals and the infrastructure constructed prior to 3 July 2008... some certainty that what they were doing was legal'.¹⁰⁶

¹⁰¹ Evidence, Ms Smiles, 2 July 2020, p 29.

¹⁰² Submission 14, National Parks Association, p 1.

¹⁰³ Evidence, Mr Connor, 2 July 2020, p 41.

¹⁰⁴ Evidence, Mr Hare and Mr Brooks, 2 July 2020, p 23; Submission 11, Australian Floodplain Association, p 1; Submission 17, Healthy Rivers Dubbo, p 1.

¹⁰⁵ Evidence, Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, Department of Planning, Industry and Environment, 2 July 2020, p 45.

¹⁰⁶ Evidence, Ms Solomon, 2 July 2020, pp 44-45.

- 2.72 In her submission, the Minister for Water noted that there had been a growth in floodplain harvesting in some parts of the State and that growth will need to be offset in order to comply with Water Sharing Plans and the Murray-Darling Basin Plan.¹⁰⁷

Definitions

- 2.73 A key concern for both the committee and stakeholders alike was ascertaining the meaning of a number of terms used in both the Regulation and Order. Chief of these was 'passive take' – a type of water take excluded from the operation of the Order created in 7 February 2020. Other terms discussed included 'interception activities', 'rainfall runoff' and 'overland flow'. This section discusses these definitions as well as the role they may play in future licensing activities.

Defining passive take

- 2.74 The term 'passive take' is not contained within the Regulation. Rather, 'passive take' was referred to under the Order made on 7 February 2020 as a form of take to which the prohibition on take did not apply. The Explanatory Note to the Order stated:

The object of this Order is to prohibit the take of water for the purpose of floodplain harvesting across the floodplains within the Northern Basin except where the take is by a work for the purpose of a tailwater return system. This order does not apply to the take of water pursuant to basic landholder rights (including harvestable rights) or passive take by water management works (including on-farm storages, dams and open channels).¹⁰⁸

- 2.75 Further explanation of the term was given in the 'Northern Basin temporary water restrictions factsheet' released on 24 February 2020, which stated:

Once overland flow on a property has ceased, any water remaining in supply channels and surge areas is considered 'passive take' and this water can be moved into on-farm storage. The decision to not restrict 'passive take' in these orders recognises that water that remains in on-farm irrigation infrastructure after overland flow has ceased will no longer contribute to river flows. We encourage landholders to keep detailed records of any 'passive take' that is transferred to on farm storages.¹⁰⁹

- 2.76 When asked about the idea of 'passive take' at the hearing, Mr Connor of the Department did not define the phrase as such. However, he provided context on what the Department was seeking to do with the licensing process stating that a distinction between active and passive take would not be carried over:

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 ... 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

¹⁰⁷ Submission 2, the Hon Melinda Pavey MP, Minister for Water, Property and Housing, p 1.

¹⁰⁸ *NSW Government Gazette*, No 30, 7 February 2020, p 2.

¹⁰⁹ NSW Department of Planning, Industry and Environment, *Northern Basin Temporary water restrictions – Fact sheet*, 24 February 2020, p 2.

works and that gave rise to this distinction between passive and active take ... into the licensing framework but that distinction will not be there.¹¹⁰

2.77 However, when asked a supplementary question on whether any component of 'passive take' would be required to be licensed under the Floodplain Harvesting Policy, the Department responded: 'Yes. Although a component of the rainfall runoff from irrigation fields is not proposed to be licensed'.¹¹¹

2.78 Throughout the inquiry it became clear that for a number of stakeholders, particularly Southern Riverina Irrigators, ascertaining what was considered 'passive take' was of significant importance. This was because, according to the organisation's submission, 'the amount of water captured via passive take is ten to twenty times greater than via other methods of floodplain harvesting'. This led them to assert that the Order 'does little to restrict the amount of water which is floodplain harvested'.¹¹² Moreover, the organisation's submission stated that:

Prior to the Regulation, the use of water obtained via Passive Take (in this context) was illegal. The effect of the Order and the Regulation therefore legalised access to, and use of, at least 350GL of water, though SRI estimates the true number to be significantly greater.¹¹³

2.79 There was some discussion around whether 'passive take' could be defined with reference to how water was captured. Some stakeholders, such as Mr Chris Brooks of Southern Riverina Irrigators asserted that it did not matter how the water was taken as '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'.¹¹⁴

2.80 Ms Bev Smiles of Inland Rivers Network also discussed the means by which water was taken and instead contended that any capture by any means of water off the overland flow should be considered floodplain harvesting:

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.¹¹⁵

2.81 Other witnesses were more equivocal. For example, Mr Jim Cush from the NSW Irrigators' Council stated:

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.¹¹⁶

¹¹⁰ Evidence, Mr Connor, 2 July 2020, p 40.

¹¹¹ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, pp 17-8.

¹¹² Submission 20, Southern Riverina Irrigators, p 1.

¹¹³ Submission 20, Southern Riverina Irrigators, p 3.

¹¹⁴ Evidence, Mr Brooks, 2 July 2020, p 21.

¹¹⁵ Evidence, Ms Smiles, 2 July 2020, p 29.

¹¹⁶ Evidence, Mr Cush, 2 July 2020, p 10.

- 2.82** When asked by the committee if he believed water taken in this way could be considered floodplain harvesting and whether it was appropriate to license it, Mr Cush referred to it as 'passive floodplain harvesting'.¹¹⁷ Mr Cush said that the decision as to whether such take should be licensed was a matter for the Department.¹¹⁸
- 2.83** The committee put the question as to whether water held back by an embankment was floodplain harvesting to Departmental representatives. The response of Mr Connor showed the complexity of the definition of 'interception activity', as defined under the Murray Darling 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.¹¹⁹

- 2.84** In answers to supplementary questions, the Department responded that 'all floodplain harvesting is considered an "interception activity" under the Basin Plan'.¹²⁰ It also confirmed that some interception activities – including 'embankments, roads, farm dams and other on-farm structures such as erosion and salinity mitigation measures that intercept or divert the flow path of water' – were outside the definition of floodplain harvesting.¹²¹ The Department's response also stated that 'water impounded by embankments that is transferred to on-farm storage will be licensed and measured as floodplain harvesting'.¹²²

Overland flow and rainfall runoff

- 2.85** Other related terms of interest to the committee included the definitions of 'rainfall runoff' and 'overland flow', the latter of which is defined in section 4A of the *Water Management Act 2000* as:

...water (including floodwater, rainfall run-off and urban stormwater) that is flowing over or lying on the ground as a result of—

- (a) rain or any other kinds of precipitation, or
- (b) rising to the surface from underground, or
- (c) any other process or action of a kind prescribed by the regulations.

- 2.86** Explaining her understanding of the definition, Ms Christine Freak, Acting Policy Manager at the NSW Irrigators' Council stated:

¹¹⁷ Evidence, Mr Cush, 2 July 2020, p 10.

¹¹⁸ Evidence, Mr Cush, 2 July 2020, p 10.

¹¹⁹ Evidence, Mr Connor, 2 July 2020, p 40.

¹²⁰ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 17.

¹²¹ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 14.

¹²² Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 13.

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.

...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.¹²³

- 2.87** Ms Bev Smiles emphasised the importance of 'overland flow' whilst at the same time noting the difficulty in measuring the amount of water falling into this category. Notwithstanding this difficulty, she asserted that accounting for these quantities was important:

...overland flows are equally as important.... 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.

...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 ... Every drop of water now needs to be accounted for because of the dollar value that is being put on water.¹²⁴

- 2.88** When asked how rainfall runoff was to be treated within the floodplain harvesting regulatory framework, the Department confirmed in answers to supplementary questions:

In response to peer reviews and stakeholder consultation, it is proposed that rainfall runoff harvested from irrigation areas when there is no other overland flow being taken will not be part of floodplain harvesting. This will require regulatory change. An exposure draft of these changes will be provided to stakeholders as part of planned consultation during September 2020.¹²⁵

- 2.89** The Department's response also noted that 'rainfall runoff from irrigation fields that re-entered irrigation systems through tailwater drain' was intended to be included in the definition of passive take excluded from floodplain harvesting within the Order made on 7 February.¹²⁶

¹²³ Evidence, Ms Freak, 2 July 2020, p 9.

¹²⁴ Evidence, Ms Smiles, 2 July 2020, p 34.

¹²⁵ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 16.

¹²⁶ Answers to supplementary questions, Department of Planning, Industry and Environment, 24 July 2020, p 17.

Committee comment

- 2.90** It is clear to the committee that significant uncertainty surrounds both the historical and contemporary regulation of floodplain harvesting. The committee notes that many stakeholders presented evidence that the Regulation had provided more clarity with regard to floodplain harvesting activities, however it is not clear what issues were specifically clarified by the Regulation. The committee has formed the view that the regulation has had the effect of creating exemptions to avoid further legal questions about the legality of floodplain harvesting activities and the status of certain works until such time as the licencing process is completed.
- 2.91** We note in particular the view of the Murray Darling Basin Authority that floodplain harvesting was not expressly catered for in legislation but had taken place in New South Wales for many years. In the context of the uncertainty surrounding floodplain harvesting, the committee believes greater engagement by the National Resources Access Regulator with this inquiry would have been of assistance, given NRAR's key role in this area (noting that when requested, NRAR responded to written questions about matters raised at the hearing).
- 2.92** The committee's request for the Minister to provide legal advice on the historical legality of floodplain harvesting was unsuccessful. In contrast, evidence was received questioning the legality of the Regulation itself. This lack of evidence from the Government and conflicting evidence from stakeholders has left some uncertainty about the implications of disallowing the Regulation and the implications of the Regulation remaining in force.
- 2.93** The Regulation allows all eligible works built on or prior to 3 July 2008 to be used to take floodplain water. We acknowledge evidence from the NSW Government that in doing so the Regulation restricts the number of works that may be used. At the same time, we note evidence from some stakeholders that the Regulation allows the use of some works that may not have undergone appropriate approvals. We are particularly concerned about evidence from a number of stakeholders that some works had never been approved, sometimes many years after applications had been lodged. We call on the NSW Government to expedite assessments of all water supply and flood works in New South Wales, particularly for any that have never had a finalised approval.
- 2.94** On the balance of evidence received, the committee recognises that bringing the regulation of floodplain harvesting under one Act, namely the *Water Management Act 2000*, should offer more certainty to irrigators and water users.
- 2.95** The committee is concerned that without a sunset clause, the existence of the exemption Regulation could reduce incentives for the government and some stakeholders to finalise the floodplain licencing regime by July 2021 and would prolong a level of floodplain harvesting that the Minister noted would need to be offset in order to comply with Water Sharing Plans and the Murray Darling Basin Plan as a result of the formal licencing.
- 2.96** A key theme underlying this inquiry is the need for adequate communication to be a primary consideration in any regulatory change. There appeared to be near unanimous agreement that the communication surrounding the Regulation's implementation was completely inadequate. This is particularly concerning given both the complexity of the Regulation and its significance for stakeholders. Whilst the committee acknowledges that the relatively sudden nature of the flood event of February 2020 complicated some aspects of communication, it is clear that things could have been done better – particularly given that a regulation of this type had been

contemplated since 2013. Receiving a text on a Friday afternoon should not be the default means of communicating regulatory change.

- 2.97** Whilst it is incumbent upon any government department responsible for such change to ensure all stakeholders are adequately informed, the committee is not convinced this occurred in this instance. In this regard, the committee finds that the absence of regional officers from the Department of Planning, Industry and Environment undermined efforts to communicate about the implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 and has negatively impacted water stakeholders.
-

Finding 1

That the absence of regionally based officers from the Department of Planning, Industry and Environment undermined efforts to communicate about the implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 and has negatively impacted stakeholders.

- 2.98** Furthermore, the committee accepts the evidence of a number of stakeholders that communication failings contributed to the poor perceptions of the Regulation, notwithstanding the fact that many stakeholders may have supported it in principle. This approach also appears to have contributed to perceptions of inequity between the northern and southern basin. In particular, the hasty and poor implementation of the Regulation has fed the perceptions that irrigators in the north were able to take more than those in the south.
-

Finding 2

That the communication surrounding the implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 by the NSW Government was inadequate. The inadequate communication contributed to poor perceptions of the Regulation, as well as to perceptions of inequity between the northern and southern basin.

- 2.99** Noting these implementation issues, the committee is concerned that the NSW Government did not comply with its own *Guide to Better Regulation*. The committee believes there is merit in the NSW Irrigators' Council's point regarding compliance with the NSW Government *Guide to Better Regulation* and recommends that the NSW Government commit to complying with the *Guide* for all future regulatory change.
-

Recommendation 1

That the NSW Government commit to complying with the *Guide to Better Regulation* for all future regulatory change.

- 2.100** The committee notes that some stakeholders raised concerns about the impact of the Regulation, including both environmental and equity concerns. Stakeholders also expressed concern with some definitions included in the Regulation and Order and associated floodplain harvesting. Chief of these is the type of take intended to be caught by the Regulation, and the position of 'passive take' within the regulatory framework. Given the confusion that has arisen
-

during this interim period, the committee believes it is important that the NSW Government clarify the meaning of the term 'passive take' and ensure all stakeholders are aware of the parameters of this definition as it relates to works to be brought into the floodplain licensing.

- 2.101** The committee is of the view that this inquiry has raised a number of important questions and there is compelling evidence on both sides as to whether the Regulation should be disallowed. For this reason, the committee leaves the ultimate decision to the House, taking into account the concerns and issues raised during the inquiry.

Recommendation 2

That the Legislative Council proceed to debate the disallowance of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020, and that the NSW Government address the committee comments and concerns identified by stakeholders, as set out in this report, during debate in the House.

Appendix 1 Submissions

No.	Author
1	Murray–Darling Basin Authority
2	The Hon. Melinda Pavey MP, Minister for Water
3	New South Wales Irrigators Council
4	Inland Rivers Network
5	Gwydir Valley Irrigators Association Inc
6	Macquarie Marshes Environmental Landholders Association (MMELA)
7	Namoi Water
8	Environmental Defenders Office
9	Ms Catherine Merchant
10	Mr Peter Duggan
11	Australian Floodplain Association
12	Border Rivers Food and Fibre
13	Cotton Australia
14	National Parks Association of NSW
15	Wentworth Shire Council
16	Murray Lower Darling Rivers Indigenous Nations
17	Healthy Rivers Dubbo
18	Dubbo Environment Group
19	Ms Melissa Gray
20	Southern Riverina Irrigators
20a	Southern Riverina Irrigators

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Thursday 2 July 2020 Video conference	Mr Jim Cush	Chair, New South Wales Irrigators Council
	Ms Claire Miller	Interim Chief Executive Officer, New South Wales Irrigators Council
	Ms Christine Freak	A/Policy Manager, New South Wales Irrigators Council
	Ms Jon-Maree Baker	Executive Officer, Namoi Water
	Mr Tim Napier	Executive Officer, Border Rivers Food and Fibre
	Ms Zara Lowien	Executive Officer, Gwydir Valley Irrigators Association Inc
	Mr Chris Brooks	Chair, Southern Riverina Irrigators
	Mr Darcy Hare	Executive Officer, Southern Riverina Irrigators
	Mr Tim Horne	Lawyer, Aqualaw
	Ms Beverley Smiles	President, Inland Rivers Network
	Mr Justin McClure	President, Australian Floodplain Association
	The Hon Melinda Pavey, MP	Minister for Water, Property and Housing
	Ms Emma Solomon	Executive Director, Policy, Planning and Sciences, NSW Department of Planning, Industry and Environment
Mr Dan Connor	Director, Healthy Floodplains Project Delivery, NSW Department of Planning, Industry and Environment	

Appendix 3 Minutes

Minutes no. 6

Monday 9 March 2020

Regulation Committee

Room 1136, Parliament House, Sydney, 8.31 am

1. Members present

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair*

Mr Banasiak (substituting for Mr Borsak)

Mr Donnelly

Mr Farlow

Mr Farraway

Mr Mason-Cox (by teleconference)

2. Apologies

Ms Cusack

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 5 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 28 February 2020 – Email from Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators' Association Inc, to secretariat, attaching a letter regarding the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020
- 4 March 2020 – Email from Mr Michael Murray, General Manager – Operations, Cotton Australia, inviting the committee on a site visit to the North West for the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

5. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

5.1 Terms of reference

The committee noted the following terms of reference referred by the House on 27 February 2020:

1. That the Regulation Committee inquire into and report on the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.
2. That the committee report by Thursday, 14 May 2020.

5.2 Provision of documents to participating member

Resolved, on the motion of Mr Banasiak: That Mr Field, who has advised the committee that he intends to participate for the duration of the inquiry into the impact and implementation of the

Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020, be provided with copies of all inquiry related documents.

5.3 Proposed timeline

Resolved, on the motion of Mr Donnelly: That, the committee adopt the following timeline for the administration of the inquiry:

- Thursday, 19 March 2020 – private briefing Department of Planning, Industry and Environment
- Week beginning Monday, 6 April 2020 – possible regional site visit to North West area, subject to member availability
- Thursday, 9 April 2020 – full day hearing
- Wednesday, 6 May 2020 – Chair’s draft report to members
- Monday, 11 May 2020 – report deliberative
- Thursday, 14 May 2020 – table report.

5.4 Private briefing

Resolved, on the motion of Mr Farlow: That the Chair, on behalf of the committee, write to the Department of Planning, Industry and Environment seeking a private briefing on the provisions of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

5.5 Submissions and stakeholder list

Resolved, on the motion of Mr Donnelly: That the closing date for invited stakeholder submissions be Monday, 30 March 2020.

Resolved, on the motion of Mr Farraway: That the stakeholder email be varied to include the statement: ‘The committee requests that your submission focus specifically on the implementation of the regulation and its direct impacts.’

Resolved, on the motion of Mr Farraway: That the following list of stakeholders be invited to make a submission to the inquiry:

- The Hon. Melinda Pavey, MP, Minister for Water, Property and Housing
- Department of Planning, Industry and Environment
- Murray-Darling Basin Authority
- National Farmers’ Federation
- NSW Farmers
- Broken Hill City Council
- Local Government NSW
- National Irrigators Council
- New South Wales Irrigators Council
- Mr Ian Cole, Barwon-Darling Water
- Mr Tim Napier, Border Rivers Food and Fibre
- Ms Zara Lowien, Gwydir Valley Irrigators' Association
- Ms Jon-Maree Baker, Namoi Water
- Mr Grant Tranter, Macquarie River Food and Fibre
- Mr Michael Murray, Cotton Australia
- Mr Justin McClure, Australian Floodplain Association
- Inland Rivers Network

- Australian Floodplain Graziers Association
- Western Division Shires Association
- South West Water Users Association
- Macquarie Marsh Graziers Association
- Macquarie Effluent Creek Users'
- Open questionnaire

Resolved, on the motion of Mr Banasiak: That:

- (a) an online open questionnaire be used to capture submissions from stakeholders,
- (b) the questions be as follows:
 1. In what capacity are you answering this questionnaire? (Answer options: Interested Citizen; Organisation; Irrigator; Local Resident; Farmer; Other –free text)
 2. What is your view on the way the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 was implemented? (1000 word text box)
 3. What is your view on the impact of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020? (1000 word text box)
 4. Do you have any other comments on the regulation? (500 word text box)
- (c) the open questionnaire be publicly available until 11.59 pm, Sunday, 12 April 2020, and
- (d) the inquiry website submissions page be updated to direct stakeholders to the open survey.

6. Inquiry into the making of delegated legislation in New South Wales

6.1 Terms of reference

The committee noted the following terms of reference referred by the House on 26 February 2020:

- (1) That the Regulation Committee inquire into and report on the making of delegated legislation in New South Wales, and in particular:
 - (a) the extent to which the Parliament has delegated power to make delegated legislation to the executive government, including through the passage of so-called "shell" legislation and "Henry VIII clauses",
 - (b) the use of delegated legislation making power, including any instances of executive government overreach, which might include:
 - (i) the amendment of primary legislation by delegated instruments,
 - (ii) the adoption of certain laws by means of delegated rather than primary legislation, and
 - (c) any other related matter.
- (2) That the committee report by the last sitting day in June 2020.

6.2 Proposed timeline

Resolved, on the motion of Ms Boyd: That the committee adopt the following timeline for the administration of the inquiry:

- Close of submissions: Friday 1 May 2020
- Hearing: June/July 2020

- Reporting date: that the Chair give notice and move in the House that the reporting date be extended to the last sitting day in September 2020.

6.3 Stakeholder list

Resolved, on the motion of Mr Farlow:

- That members have until 5.00 pm Friday 13 March 2020 to amend the Chair's proposed stakeholder list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement
- That the Chair write to party leaders and crossbench members of the Legislative Council asking them to suggest stakeholders to be invited to make a written submission, with any suggestions received to be circulated to members for approval.

7. Adjournment

The committee adjourned at 8.47 am, *sine die*.

Sharon Ohnesorge

Clerk to the Committee

Minutes no. 7

Thursday, 28 May 2020

Regulation Committee

Virtual meeting via Webex, 10. 32 am.

1. Members present

Mr Veitch, *Chair*

Mr Banasiak (substituting for Mr Borsak from 10.52 am)

Mr Donnelly

Ms Faehrmann (substituting for Ms Boyd)

Mr Farlow

Mr Farraway

Mr Field (participating)

Mr Mason-Cox

2. Apologies

Ms Cusack

3. Election of Deputy Chair

The Chair called for nominations for a Deputy Chair for the purposes of the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

Mr Farraway moved: That Mr Mason-Cox be elected Deputy Chair of the committee for the purposes of the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

There being no further nominations, the Chair declared Mr Mason-Cox elected Deputy for the purposes of the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

4. Previous minutes

Resolved, on the motion of Mr Farraway: That draft minutes no. 6 be confirmed.

5. Correspondence

The committee noted the following items of correspondence:

Received

- 9 March 2020 – Email from Ms Abigail Boyd MLC to secretariat, advising that Ms Cate Faehrmann MLC will be substituting for her for the duration of the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.
- 10 March 2020 – Email from Jon-Maree Baker, Executive Officer, Namoi Water, to secretariat, requesting that Namoi Water appear before the committee and host an on-farm tour for the committee for the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

Sent

- 9 March 2020 – Correspondence from the Chair, Mr Mick Veitch MLC, to Mr Jim Betts, Secretary of the Department of Planning, Industry and Environment, requesting a committee briefing on the provisions of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.
- 10 and 13 March 2020 – Emails from the secretariat to the following stakeholders, inviting submissions to the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020:
 - The Hon. Melinda Pavey, MP
 - Department of Planning, Industry and Environment
 - Murray-Darling Basin Authority
 - National Farmers' Federation
 - NSW Farmers
 - Broken Hill City Council
 - Local Government NSW
 - National Irrigators Council
 - New South Wales Irrigators Council
 - Barwon-Darling Water
 - Border Rivers Food and Fibre
 - Gwydir Valley Irrigators' Association
 - Namoi Water
 - Macquarie River Food and Fibre
 - Cotton Australia
 - Australian Floodplain Association
 - Inland Rivers Network
 - Western Division Shires Association
 - Environmental Defenders Office
 - Natural Resources Commission
 - Prof. Richard Kingsford
 - Murray Darling Association
 - Moree Plains Shire Council

- Narrabri Shire Council
- Bourke Shire Council
- Macquarie Marshes Environmental Landholders Association (Macquarie Marsh Graziers Association)
- 27 May 2020 – Email from the secretariat to Natural Resources Access Regulator with an invitation to make a submission to the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

6. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

6.1 Unsolicited submissions

Resolved, on the motion of Mr Donnelly: That the committee authorise the Chair to facilitate receipt of unsolicited submissions on behalf of the committee.

6.2 Revised timeline

Resolved, on the motion of Mr Farraway: That the committee adopt the following timeline for the administration of the inquiry:

- Thursday 28 May 2020 – private virtual briefing, Department of Planning, Industry and Environment (Webex)
- Sunday 31 May 2020 – closing date for submissions and online questionnaire
- Tuesday 23 June 2020 – virtual site visit (Webex)
- Thursday 2 July 2020 – virtual hearing (Webex)
- Friday 11 September – Chair's draft report to members
- Friday 18 September 2020 – report deliberative
- Thursday 24 September 2020 – table report.

6.3 Briefing from the Department of Planning, Industry and Environment

The committee received a briefing on the provisions of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 from:

- Mr Daniel Blacker, Group Director, Water Programs and Performance, Water Group, Department of Planning Industry and Environment
- Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, Water Group, Department of Planning, Industry and Environment.

7. Adjournment

The committee adjourned at 12.15 pm, *sine die*.

Allison Stowe

Clerk to the Committee

Minutes no. 8

Tuesday 23 June 2020

Regulation Committee

Virtual meeting via Webex, 10.30 am.

1. Members present

Mr Veitch, *Chair*

Mr Banasiak (substituting for Mr Borsak)

Mr Donnelly
 Ms Faehrmann
 Mr Farlow
 Mr Farraway
 Mr Field

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 7 be confirmed.

3. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

3.1 Submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-20.

3.2 Virtual site visit

The committee attended a virtual site visit on the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

Resolved, on the motion of Mr Farraway: That the Chair write to Namoi Water, on behalf of the committee, to thank them for their time in holding the site visit.

4. Adjournment

The committee adjourned at 12.10 pm, until Thursday 2 July 2020 (virtual hearing).

Laura Ismay
 Clerk to the Committee

Minutes no. 9

Thursday 2 July 2020
 Regulation Committee
 Virtual meeting via Webex, 9.32 am.

1. Members present

Mr Veitch, *Chair*
 Mr Borsak
 Ms Cusack (from 1.20 pm)
 Mr Donnelly
 Ms Faehrmann
 Mr Farlow
 Mr Farraway
 Mr Field (from 9.45 am)

2. Apologies

Mr Mason-Cox

3. Previous minutes

Resolved, on the motion of Mr Farraway: That draft minutes no. 8 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Received:

- 23 June 2020 – Email from Ms Pauline Cain, Executive Assistant to Executive Director, Policy, Planning and Services, Department of Planning, Industry and Environment to the secretariat, providing a copy of the slides relating to the confidential briefing on the Floodplain Harvesting regulation on 28 May 2020.

Sent:

- 25 June 2020 – Letter from the Chair to Jon-Maree Baker, Namoi Water, thanking her for hosting the virtual site visit.

5. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

5.1 Summary report of online questionnaire

Resolved, on the motion of Mr Donnelly: That the committee authorise the publication of the online questionnaire report on the committee's website.

5.2 Allocation of questioning

Resolved, on the motion of Mr Farlow: That the allocation of questioning for the hearing be determined by the Chair.

5.3 Publication of hearing footage

Members to note the committee has previously resolved to publish the hearing footage on the inquiry website, following the hearing.

5.4 Questions on notice and supplementary questions

Resolved, on the motion of Mr Donnelly: That answers to questions taken on notice at the public hearing or supplementary questions from members be provided within 14 days of the transcript being sent to witnesses.

Mr Field joined the meeting.

5.5 Public hearing

The committee proceeded to take evidence in public.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

New South Wales Irrigators Council witnesses were admitted via video link.

The following witnesses were sworn and examined:

- Mr Ian James Cush, Chair, New South Wales Irrigators Council
- Ms Claire Miller, Interim Chief Executive Officer, New South Wales Irrigators Council
- Ms Christine Freak, A/Policy Manager, New South Wales Irrigators Council.

The evidence concluded and the witnesses withdrew.

Namoi Water, Border Rivers Food and Fibre and Gwydir Valley Irrigators Association Inc witnesses were admitted via video link.

The following witnesses were sworn and examined:

- Ms Jon-Maree Baker, Executive Officer, Namoi Water
- Mr Tim Napier, Executive Officer, Border Rivers Food and Fibre

- Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators Association Inc.

The evidence concluded and the witnesses withdrew.

Ms Cusack joined the meeting.

Southern Riverina Irrigators and Aqualaw witnesses were admitted via video link.

The following witnesses were sworn and examined:

- Mr Chris Brooks, Chair, Southern Riverina Irrigators
- Mr Darcy Hare, Executive Officer, Southern Riverina Irrigators
- Mr Tim Horne, Lawyer, Aqualaw.

The evidence concluded and the witnesses withdrew.

Inland Rivers Network and Australian Floodplain Association witnesses were admitted via teleconference.

The following witnesses were sworn and examined:

- Ms Beverley Smiles, President, Inland Rivers Network
- Mr Justin McClure, President, Australian Floodplain Association.

The evidence concluded and the witnesses withdrew.

The Hon. Melinda Pavey MP, Minister for Water, Property and Housing and Department of Planning, Industry and Environment witnesses were admitted via video link.

The following witnesses were sworn:

- Ms Emma Solomon, Executive Director, Policy, Planning and Sciences, NSW Department of Planning, Industry and Environment
- Mr Dan Connor, Director, Healthy Floodplains Project Delivery, NSW Department of Planning, Industry and Environment.

The Minister and departmental witnesses were examined by the committee.

The evidence concluded and the Minister and witnesses withdrew.

6. Adjournment

Sine die.

Laura Ismay
Clerk to the Committee

Draft minutes no. 11

Friday 18 September 2020
Regulation Committee
Room 814/815, 10.05 am.

1. Members present

Mr Veitch, *Chair*
Mr Mason-Cox, *Deputy Chair*

Mr Banasiak
Ms Cusack
Mr Donnelly
Ms Faehrmann
Mr Farraway (via teleconference)
Mr Field (participating for the duration of the inquiry)
Mrs Maclaren-Jones (substituting for Mr Farlow)

2. Previous minutes

Resolved, on the motion of Ms Cusack: That draft minutes no. 10 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 9 July 2020 – Email from Mr Tim Napier, Executive Officer, Border Rivers Food and Fibre, providing a document entitled 'Floodplain Harvesting – A Historical Context'
- 24 July 2020 – Letter from Mr Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator, responding to evidence raised in the hearing on 2 July 2020
- 14 September 2020 – Letter from Mr Tim Horne, Horne Lawyers, providing additional information to answers to questions on notice provided by the Southern Riverina Irrigators.
- 17 September 2020 – Email from Mr Tim Horne, Horne Lawyers, providing additional information to answers to questions on notice provided by the Southern Riverina Irrigators.

Sent:

- 8 July 2020 – Letter from Chair to the Natural Resources Access Regulator, inviting the organisation to respond to evidence raised in the hearing on 2 July 2020.

Resolved, on the motion of Mr Donnelly: That:

- The committee note that it had previously agreed to the publication of the correspondence from Mr Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator, via email.
- That all correspondence from Mr Tim Horne, Horne Lawyers be published.

4. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

4.1 Answers to questions on notice

The committee noted that it previously resolved to keep the following documents confidential:

- Attachment 3 to answers to questions on notice from Hon Melinda Pavey MP and Department of Planning, Industry and Environment, received 24 July 2020.

4.2 Transcript corrections

Resolved, on the motion of Mr Mason-Cox: That the secretariat make the transcript corrections requested by Ms Christine Freak, A/Policy Manager, NSW Irrigators Council and Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators Association.

4.3 Consideration of Chair's draft report

The Chair submitted his draft report entitled *Impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Donnelly: That:

- Footnote 3 be amended by omitting: '.' after 'Hon';
- Paragraph 2.36 be amended by omitting 'flood plain' and inserting instead 'flood';
- Paragraph 2.52 be amended by omitting ',' after 'Wentworth Shire Council' and inserting instead 'and'.

Resolved on the motion of Ms Faehrmann: That:

- The following new paragraph be inserted after paragraph 1.14:

'Decisions to lift temporary restrictions in parts of the Gwydir Valley, Namoi Valley and Barwon-Darling Floodplain over the period between 9 and 13 February 2020 related to complaints from land holders of infrastructure damage. The Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event published an 11 February 2020 NRAR Flight Observation Report in their final report dated September 2020. That report noted 'No significant infrastructure damage was identified'. [FOOTNOTE: Appendix K, Final Report: Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event, September 2020, p 151.]

- The following new paragraph be inserted after paragraph 1.19:

'The final report of the Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event noted that 'there were some significant data gaps relating to flows entering NSW from Queensland, floodplain harvesting extraction and flow data, unregulated extraction data, channel capacity and allowances for water to move to downstream locations'. [FOOTNOTE: Final Report: Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event, September 2020, p 5.]

- Paragraph 2.18 be amended by omitting 'other' and inserting instead 'otherwise'
- Paragraph 2.31 be amended by inserting 'advice' after 'legal'
- Paragraph 2.72 be amended by inserting 'had' after 'there'
- Paragraph 2.90 be amended by omitting:

'While the committee agrees that the Regulation clarifies the circumstances in which floodplain harvesting may occur, we note conflicting views about whether floodplain harvesting was occurring legally prior to the making of the Regulation or whether the Regulation itself legalised the practice.'

and inserting instead:

'The committee notes that many stakeholders presented evidence that the Regulation had provided more clarity with regard to floodplain harvesting activities, however it is not clear what issues were specifically clarified by the regulation. The committee has formed the view that the regulation has had the effect of creating exemptions to avoid further legal questions about the legality of floodplain harvesting activities and the status of certain works until such time as the licencing process is completed.'

Ms Faehrmann moved: That paragraph 2.91 be amended by omitting:

"The committee was unable to establish in evidence whether all water taken as floodplain harvesting prior to the Regulation being made was taken legally. As such we have not been able to determine whether floodplain harvesting would be legal if the Regulation were to be disallowed. The committee's request for the Minister to provide legal advice on the legality of floodplain harvesting was unsuccessful"

and the following new paragraph be inserted instead:

"The committee's request for the Minister to provide legal advice on the historical legality of floodplain harvesting was unsuccessful. In contrast, evidence was received questioning the legality of the Regulation itself. This lack of evidence from the Government and conflicting evidence from stakeholders has left some uncertainty about the implications of disallowing the regulation and the implication of the regulation remaining in force."

Question put.

The Committee divided.

Ayes: Mr Banasiak, Mr Donnelly, Ms Faehrmann, Mr Veitch.

Noes: Ms Cusack, Mr Farraway, Mrs Maclaren-Jones, Mr Mason-Cox.

There being an equality of votes, question resolved in the affirmative on the casting vote of the Chair.

Ms Faehrmann moved: That paragraph 2.93 be amended by omitting: "The committee is of the view that, provided it remains a transitional measure and is replaced by a formal licensing scheme by the stated date of July 2021, the Regulation may offer certainty in this interim period."

Question put.

The Committee divided.

Ayes: Mr Banasiak, Mr Donnelly, Ms Faehrmann, Mr Veitch.

Noes: Ms Cusack, Mr Farraway, Mrs Maclaren-Jones, Mr Mason-Cox.

There being an equality of votes, question resolved in the affirmative on the casting vote of the Chair.

Ms Faehrmann moved: That the following new paragraph be inserted after paragraph 2.93:

"The committee is concerned that without a sunset clause, the existence of the exemption regulation could reduce incentives for the Government and some stakeholders to finalise the floodplain licencing regime by July 2021 and would prolong a level of floodplain harvesting that the Minister noted would need to be offset in order to comply with Water Sharing Plans and the Murray Darling Basin Plan as a result of the formal licencing."

Question put.

The Committee divided.

Ayes: Mr Banasiak, Mr Donnelly, Ms Faehrmann, Mr Veitch.

Noes: Ms Cusack, Mr Farraway, Mrs Maclaren-Jones, Mr Mason-Cox.

There being an equality of votes, question resolved in the affirmative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That:

- a) The draft report as amended be the report of the committee and that the committee present the report to the House;
- b) The transcripts of evidence, submissions, tabled documents, answers to questions on notice, answers to supplementary questions, responses to online questionnaire, summary report of online questionnaire and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished attachments to submissions and all individual responses to the online questionnaire be kept confidential by the committee;
- d) Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- g) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- h) That the report be tabled on 22 September 2020.

The Chair advised that he did not intend to hold a press conference on tabling.

5. Other business

6. Adjournment

The committee adjourned at 10.19 am.

Laura Ismay

Committee Clerk

