

# Six reasons to stop\* floodplain harvesting in NSW

\* or more accurately, to bring it into line with the Basin Plan and Water Act.

December 2021

## INTRODUCTION

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The NSW Select Committee on Floodplain Harvesting is currently considering the future of how overland flow water in the NSW Murray Darling Basin will be managed and regulated. Large volumes of water periodically flow over the Basin's flat landscape and the practice of diverting this water into large private storages has become widespread in the northern Basin. This practice, known as floodplain harvesting, is used largely to grow cotton for export, with minimal value added in Australia.

Despite a cap on water extraction in the Murray Darling Basin based upon rules and infrastructure in place on 30 June 1994, floodplain harvesting volumes have been allowed to increase to levels far in excess of the Basin Plan. This has occurred without proper monitoring, measurement or regulation. As a result, floodplain harvesting is having a huge impact on the health of rivers, communities and downstream water users.

This note highlights six clear reasons why floodplain harvesting should be limited to the legal volumetric limits set out in the Water Act 2007 (Cwlth), the Basin Plan 2012 and the Water Management Act 2000 (NSW).

The organisations publishing this note hope to bring the attention of the public and NSW Government leaders to the Select Committee's work as its report is being finalised and the Government prepares its response. Properly regulating floodplain harvesting is one of the most important reforms that the NSW Government can make. Done properly it will improve the health of the state's great rivers, increase community wellbeing, particularly along the Darling/Baaka, increase jobs, protect the financial interests of the state and avoid the risk of legal action. Done poorly, these benefits could be lost, while legal battles and claims for billions in compensation could begin.

## 1: IT'S KILLING THE RIVER

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Floodplain harvesting contributed to the 2018-19 fish kills.<sup>1, 2</sup> Waterbird populations are also in significant decline, directly as a result of floodplain harvesting and river regulation.<sup>3</sup>

While water still flows down the Darling during particularly wet periods, increases in storage volumes from 574GL in 1994 to 1395GL in 2020, a 142 per cent increase since the Cap reference year.<sup>4</sup> This means smaller floods do not make it down the river and the river is drier for longer periods.

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<sup>1</sup> Australian Academy of Science (2019) *Investigation of the causes of mass fish kills in the Menindee Region NSW over the summer of 2018 -2019*, <https://www.science.org.au/supporting-science/science-policy-and-sector-analysis/reports-and-publications/fish-kills-report>

<sup>2</sup> Mallen-Cooper and Zampatti (2020) *Restoring the ecological integrity of a dryland river: Why low flows in the Barwon–Darling River must flow*, <https://www.parliament.nsw.gov.au/lcdocs/other/16095/Martin%20Mallen-Cooper%20and%20Brenton%20P%20Zampatti,%20Restoring%20the%20ecological%20integrity%20of%20a%20dryland%20river.pdf>

<sup>3</sup> Kingsford (2021) *UNSW Centre for Ecosystem Science Submission into floodplain harvesting: Select Committee on Floodplain harvesting Legislative Council of NSW*, <https://www.ecosystem.unsw.edu.au/news/submission-inquiry-floodplain-harvesting-select-committee-floodplain-harvesting-legislative-council>

<sup>4</sup> Slattery & Johnson (2021) *Floodplain water harvesting in the Northern New South Wales Murray-Darling Basin*

An estimated 778 gigalitres on a long-term annual average is extracted by floodplain harvesting.<sup>5</sup> The first water captured are the small and medium floods. It is these more regular, smaller flows that keep the river alive, not the rarer major floods.<sup>6</sup>

## 2. IT'S KILLING PEOPLE

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Water in rivers has a direct correlation with the health of Aboriginal communities.

It is vital for our daily life; for food, drinking water and the deep history of the community in stories.<sup>7</sup>

In Wilcannia, the life expectancy of a Baakandji man is 36.7 and a woman is 42.5 years old.<sup>8</sup> There is a direct relationship between low flows in the Darling/Baaka and increased domestic violence, drug use, incarceration rates and suicide in Wilcannia.<sup>9</sup> Floodplain harvesting is literally killing people.

Related to this, the Baakandji were granted native title in 2015 in:

the largest native title case in the history of New South Wales. It involves pockets of land spread across 128,000 square kilometres of Barkandji country, land that extends from the South Australian border to Tilpa in the east, Wentworth in the south, north almost to Wanaaring. Within it lie the towns of Broken Hill, Wilcannia and Menindee.<sup>10</sup>

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<sup>5</sup> Fenner School of Environment and Society and Slattery & Johnson (2021) *A sustainable level of take: on-farm storages and floodplain water harvesting in the northern Murray-Darling Basin, Australia*, <https://www.parliament.nsw.gov.au/lcdocs/submissions/76306/0285%20Fenner%20School%20of%20Environment%20and%20Society,%20ANU%20and%20Slattery%20and%20Johnson.pdf>

<sup>6</sup> Sheldon (2017) *Characterising the ecological effects of changes in the 'low-flow hydrology' of the Barwon-Darling River*, <https://www.awe.gov.au/water/cewo/publications/characterising-eco-effects-changes-barwon-darling-2017>

<sup>7</sup> Dharriwaa Elders Group (2021) *Submission to NSW Parliament Legislative Council Select Committee on Floodplain Harvesting*, <https://www.parliament.nsw.gov.au/lcdocs/submissions/75950/0069%20Dharriwaa%20Elders%20Group.pdf>

<sup>8</sup> McCausland and Vivian, (2009), *A tale of two towns: A comparative study of Wilcannia and Menindee*, <http://www5.austlii.edu.au/au/journals/IndigLawB/2009/27.html#:~:text=With%20a%20life%20expectancy%20of%2036.7%20years%20for,result%20and%20contributor%20to%20Wilcannia%E2%80%99s%20high%20crime%20levels.>

<sup>9</sup> University of Technology, (2009), *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee*, <https://www.uts.edu.au/sites/default/files/JumbunnaWMcommunityreportfinal.pdf>

<sup>10</sup> Tan (2015) *'We've got to tell them all our secrets' – how the Barkandji won a landmark battle for Indigenous Australians*, <https://www.theguardian.com/australia-news/2015/jun/23/weve-got-to-tellthem-all-our-secrets-how-the-barkandji-won-a-landmark-battle-for-indigenous-austr>

The success of the native title claim relied heavily on evidence of the continuous occupation of the Barkandji around the Baaka. Native title includes access to water for cultural purposes.<sup>11</sup>

### 3. IT'S HURTING OTHER INDUSTRIES

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The decline of water in the Barwon-Darling/Baaka has resulted in the once thriving Lower Darling irrigation district being almost completely abandoned. Floodplain grazing businesses have declined by approximately 25% due the removal of low and medium flows caused by increased floodplain and river extractions upstream.<sup>12</sup>

Murray irrigators are also impacted. With less water coming from the Darling/Baaka into the Murray at Wentworth, more water must flow down the Murray to meet South Australia's legislated requirements and the increasing irrigation demands around the South Australian border. As a result, Murray irrigators are meeting the entire commitment to South Australia where previously, 39% of the annual SA entitlement was met from the Barwon-Darling/Baaka. There is also more water needed to deliver water downstream, which also results in less water available to Murray irrigators.<sup>13</sup>

Were it not for reduced flows in the Darling/Baaka and related river management decisions, southern irrigators who have endured zero allocations in several years could have been allocated between 16% and 61% of their entitlements.<sup>14</sup>

Recreational fishing in the Murray-Darling Basin contributes approximately \$1.3 billion per annum.<sup>15</sup> Tourism in the Basin contributes approximately \$8 billion per annum.<sup>16</sup> Floodplain harvesting is detrimental to both fish populations and tourism.<sup>17</sup>

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<sup>11</sup> Federal Court of Australia (2017) *Commonwealth Court Portal*, <https://www.comcourts.gov.au/file/Federal/P/NSD6084/1998/actions>

<sup>12</sup> MDBA, (2016), *draft: Lower Balonne Floodplain grazing model report*, [https://www.mdba.gov.au/sites/default/files/pubs/NB-floodplain-grazing\\_2.pdf](https://www.mdba.gov.au/sites/default/files/pubs/NB-floodplain-grazing_2.pdf)

<sup>13</sup> Slattery and Campbell (2019) *Southern Discomfort: Water losses in the southern Murray Darling Basin*, <https://australiainstitute.org.au/report/southern-discomfort/>

<sup>14</sup> Ibid.

<sup>15</sup> The recreational fishing alliance of NSW, (2021), *Submission to Inquiry into Floodplain Harvesting (extension granted)*, <https://www.parliament.nsw.gov.au/lcdocs/submissions/76064/0145%20The%20Recreational%20Fishing%20Alliance%20of%20New%20South%20Wales.pdf>

<sup>16</sup> MDBA, (2020), *A plan for the Murray-Darling Basin*, <https://www.mdba.gov.au/basin-plan/plan-murray-darling-basin>

<sup>17</sup> The recreational fishing alliance of NSW, (2021), *Submission to Inquiry into Floodplain Harvesting (extension granted)*,

## 4. IT'S BAD FOR JOBS

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Almost all floodplain harvesting water is used for large-scale, capital-intensive cotton growing for export. This kind of farming uses a lot of land, water and machinery, but creates very few jobs.

Basin wide, cotton growing and ginning accounts for just 0.59% of employment within the agricultural industry. Even in the most well-known cotton producing areas, such as Narrabri, Goondiwindi and Balonne, cotton and cotton ginning are small employers, making up around 5% of jobs. Many of these jobs would remain even if floodplain harvesting volumes were significantly reduced, as cotton would still be grown using other water sources.<sup>18</sup>

Key industries in the cotton supply chain are not based in Basin communities, meaning there are few related jobs in other industries. By contrast, the more diversified irrigation operations of the southern Basin, such as wine grapes, other fruit, dairy, etc, are more labour intensive and see more processing conducted locally. Reducing floodplain harvesting could increase overall employment across the Basin if more water is available to more labour intensive agriculture sectors.<sup>19</sup> Tourism is also relatively labour intensive, and would likely benefit from any improvement in river health.

## 5. IT'S UNLAWFUL

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During the Select Committee hearings, confusing headlines were caused by misinterpretations of legal opinion, particularly that of former South Australian Royal Commissioner Brett Walker SC's. Mr Walker stated the act of diverting floodwater without a licence was not unlawful. He did subsequently clarify this by noting a licence or right was required if a work was used to impound water for use in irrigations (no licences have been issued in NSW).

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<https://www.parliament.nsw.gov.au/lcdocs/submissions/76064/0145%20The%20Recreational%20Fishing%20Alliance%20of%20New%20South%20Wales.pdf>

<sup>18</sup> Campbell and McBride (2021) *Pulling the cotton over your eyes: Submission to NSW Legislative Council inquiry into floodplain harvesting*, <https://australiainstitute.org.au/report/pulling-the-cotton-over-your-eyes/>

<sup>19</sup> Ibid.

Consequently, the more relevant question for the Select Committee and the NSW Government is whether it is lawful to licence floodplain harvesting at current volumes or the volumes proposed.

The legal extraction limit in the Basin Plan (sustainable diversion limit) includes just 64 gigalitres of floodplain harvesting volume in NSW, while the NSW Government is proposing to licence more than 340 gigalitres.<sup>20</sup> The Murray Darling Basin Authority (MDBA) and NSW Department of Planning, Industry and Environment (DPIE) have explained this breach of the sustainable diversion limits (SDLs) will be rectified by simply increasing them with ‘best available information’, rather than following the statutory process prescribed in the Water Act 2007 and the Basin Plan 2012.<sup>21</sup>

Mr Walker’s written advice to Southern Riverina Irrigators is clear:

[Such licencing arrangements would be based on] an argument that the BDLs [Baseline Diversion Limits] can be increased with changes in “best available information”, and the SDL can therefore change because there is a fixed statutory relationship between the BDLs and SDLs.

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

To the extent that the NSW DPIE, by regulation or other legislative instrument, purports to license floodplain harvesting inconsistently with the SDLs as currently calculated, then that regulation may be vulnerable to challenge on the basis of inconsistency under s 109 of the Constitution (Cth) with the Basin Plan or the *Water Act 2007* (Cth).

That is, while floodplain harvesting might not be illegal, licensing the proposed volumes will be.<sup>22</sup>

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<sup>20</sup> MDBA, (2020), *Best available baseline diversion limits (BDL) – impacts of NSW floodplain harvesting (FPH) 6 December 2019*, Freedom of Information Request FOI115 MDBA

<sup>21</sup> Slattery & Johnson. (2021). *Licensing floodplain harvesting in Northern NSW: analysis and implications*,  
<https://www.parliament.nsw.gov.au/lcdocs/submissions/76066/Attachment%20B%20%20-%20Slattery%20and%20Johnson.pdf>

<sup>22</sup> Slattery (2021) *Floodplain harvesting isn’t unlawful, but the way it’s being licensed is*,  
<https://bdtruth.com.au/main/news/article/12402-Floodplain-harvesting-isnt-unlawful-but-the-way-its-being-licensed-is.html>

## 6. IT COULD COST THE PUBLIC BILLIONS

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Floodplain harvesting licences could be issued for free. If they are withdrawn in the future, the licence holder would be eligible for compensation.<sup>23</sup>

While the exact value of these licences is uncertain, estimates range between \$4 billion and \$1.5 billion.<sup>24</sup>

The main Government proposal has been to issue licences based on an irrigator's historical capacity to take water with infrastructure, even that infrastructure is illegal. The Committee heard that the Deputy Secretary of the NSW DPIE has stated:

Whilst it is clear that some works may need to be decommissioned, this will not affect the determination of floodplain harvesting entitlements under the provisions of the NSW Floodplain Harvesting Policy. In such circumstances, the allocation may only be taken using other works that have secured the appropriate works approvals.<sup>25</sup>

Another DPIE officer has stated:

Where the works are not approved by NRAR, they may need to be modified or decommissioned. The landholder then has the option of trading their floodplain harvesting rights.<sup>26</sup>

Consequently, floodplain harvesting licences are being issued on the basis of illegal infrastructure, which the irrigator can sell and realise their property right if they cannot legally take the water.

If Mr Walker's prediction of a legal challenge to the increased SDLs is successful, the existing limits will need to be reinstated and the associated floodplain harvesting

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<sup>23</sup> NSW (2000) *Water Management Act Section 79*, <https://legislation.nsw.gov.au/view/pdf/asmade/act-2000-92>

<sup>24</sup> Miller (2020) *So what will the licensing of floodplain harvesting mean?*, <https://www.theland.com.au/story/6977219/floodplain-harvesting-licensing-essential/>

<sup>25</sup> Select Committee on floodplain Harvesting (in camera), (2021), *Virtual hearing, Sydney, on Monday 20 September 2021*, <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2765/Transcript%20-%20Inquiry%20into%20Floodplain%20Harvesting%20-%20Ms%20Beverly%20Smiles%20-%202020%20September%202021.pdf>

<sup>26</sup> Select Committee on Floodplain Harvesting (in camera), (2021), *Virtual hearing, Sydney, on Monday 20 September 2021*, <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2765/Transcript%20-%20Inquiry%20into%20Floodplain%20Harvesting%20-%20Ms%20Beverly%20Smiles%20-%202020%20September%202021.pdf>

licences revoked. This exposes the NSW taxpayer to a potentially multi-billion-dollar contingent liability.

## CONCLUSION

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Licensing floodplain harvesting at lawful, sustainable volumes would be a major environmental, social and economic reform for the NSW Murray Darling Basin. There are also major implications for human health, community wellbeing, equity and the state budget. With so much at stake, public and government attention needs to be focused on the work of the Select Committee and the Government response.

Of particular importance will be the Committee's recommendations on how reforms can be implemented. How can authorities that have long struggled to regulate this industry be motivated, overseen and empowered to carry out this reform?

Implementing any reform will be difficult. Floodplain harvested cotton can produce huge profits and this has drawn the attention of powerful, well-connected, international agribusinesses. Some are based in tax havens like the Cayman Islands and many pay little or no tax in Australia.<sup>27</sup> Without involvement from a wide range of stakeholders both outside and inside of government, implementing and enforcing these important reforms will be very difficult.

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<sup>27</sup> Campbell and McBride (2021) *Pulling the cotton over your eyes: Submission to NSW Legislative Council inquiry into floodplain harvesting*