

Our Ref: ARB:BES:714

15 September 2022

[REDACTED]

[REDACTED]

BY EMAIL: nrc@nrc.nsw.gov.au

[REDACTED]

Submissions on the draft Evaluation Framework for the Review of Water Sharing Plans and the Water Sharing Plan for the Lachlan Unregulated River Water Sources 2012

We act for a landholder in the Western Riverina region of NSW. We are instructed that our client has consulted with other landholders in the Western Riverina and other stakeholders and the submissions set out below are supported by the Muthi Muthi people and the other landholders consulted.

We are instructed to provide the following submission on the “*Draft Water Sharing Plan Review Evaluation Framework*” (**Framework**) and comments relevant to the current review of the Water Sharing Plan for the Lachlan Unregulated River Water Sources 2012 (**Lachlan Unregulated WSP**).

Draft Framework

1. Under the *Water Management Act 2000* (**WM Act**) all water resources in the State are vested in the Crown. Water Sharing Plans (**WSP**) provide the framework for ensuring that water resources covered by the WSP are allocated, taken and used in accordance with the objectives of the WM Act. A water management plan (including a WSP) has a 10 year life and the life of a WSP can be extended for multiple further periods, each of 10 years, on the recommendation of the Natural Resources Commission (**NRC**), such recommendation to be based on a report prepared by the NRC under s43A(3). The NRC may in its report recommend amendment of the WSP. Accordingly, the NRC’s review of WSPs under s43A is the critical safeguard for ensuring that WSPs give effect to the objectives of the WM Act.
2. Given the critical importance of the NRC’s role in reviewing WSP under s43A of the WM Act (**s43A Review**) and the very long-term implications of any recommendations consequent on that review, our client makes the following recommendations to enhance public accountability and transparency in the review process:

- a. The NRC's "stakeholder engagement plan (internal)" should be made public to allow comment on the processes to be used by the NRC to ensure fulsome and appropriate consultation with the persons most affected by a WSP (i.e. water users).
 - b. The stakeholder engagement process should allow for the preparation and notification of a "response to submissions" before the report is finalised to allow stakeholders to have confidence that key concerns have been understood and considered in the review and to provide stakeholders with a targeted opportunity to provide further information before any report is finalized.
3. Our client is highly concerned by the inference in the Draft Framework that a statutory audit to ascertain whether the provisions of a WSP are being given effect to can be circumvented by a s43A report which confines itself to an "outcome evaluation".
 4. Given the complexity of the interactions between the responsibilities of numerous government agencies and the overlapping nature of water resources management plans at the State and federal level it is concerning that the NRC considers the scope of its review to be so constrained. For example, specific concerns of our client relate to:
 - a. the number of "unlicensed works" (often works that did not require licensing under the *Water Act* 1912 or works that have never been recorded) that continue to be operated and impact water flows;
 - b. the failure to review and update the conditions of licences granted under the *Water Act* 1912 to ensure that they are consistent with the WM Act and objectives of the relevant WSP; and
 - c. the potential for significant issues to slip between the cracks, for example when the Regulated River WSP regulates environmental flows and translucency intended to benefit unregulated effluent creeks (which are covered by the Unregulated River WSP). Would this issue be addressed in the review of the Regulated River WSP or the Unregulated River WSP?

The scope of a s43A Review must include the ability to consider the details of how rules are implemented and enforced. This issue is discussed below in paragraph 11.

5. Our client and the landholders and Aboriginal Stakeholders they have consulted have concerns regarding the effectiveness of the consultation processes employed by the NRC in undertaking a s43A Review. We note that the NRC's Aboriginal Engagement Policy 2020 identifies the importance of consultation with "*Aboriginal Elders and other community representatives*" and that "*consultation with Aboriginal stakeholders takes time and requires ongoing relationships, not just one-off communication*". It is unclear how the Draft Framework gives effect to the Aboriginal Engagement Policy 2020 or whether the consultation undertaken in the Lachlan Unregulated WSP review was

consistent with that policy. We also note that our client does not recall being advised of the review of the Lachlan Unregulated WSP.

6. Given the significant of a s43A Review, the reference in the draft Framework to tight timeframes and limited scope are of particular concern to our client.
7. The ability of key affected stakeholders to make meaningful comments in the engagement process is constrained by the lack of progress in updating the NSW Water Register to include unregulated water licences under the *Water Act* 1912. Our client notes that the majority of the licences/approvals in unregulated water sources (including the unregulated effluent creeks in the Lachlan Unregulated WSP) have still not yet been transferred over from the *Water Act* 1912 to the WM Act (and are accordingly not on the NSW Water Register).
8. Our client also draws the NRC's attention to The December 2021 report of the Legislative Council's Select Committee on Floodplain Harvesting (**Floodplain Inquiry Report**). Recommendation 11 in that report was that the "*NSW Government ensure that the NSW Water Register includes information regarding structures on floodplain, including their location, volume, ownership, approvals and licence conditions*". The Government's May 2022 response indicates that the recommendation is supported.

Our client notes that government records still do not identify (and allow for searching of)

- a. Water users (by name);
- b. The priority of the water access licence held;
- c. Details of water management works;
- d. Significant enforcement actions against those licences/users; and
- e. Conditions including operating protocols or rules.

Easily searchable registers for other government licences or approvals to use State resources (such as EPA licences, development consents) are made available to ensure transparency.

9. Any non-statutory entity with the ability to regulate or control water access must be required to maintain publicly accessible records regarding the distribution of water specifically allocated to them. For example, under clause 30 of the Water Sharing Plan for the Lachlan Regulated River Water Source 2016 (**Lachlan Regulated WSP**), the Merrowie Creek Trust District, and the Torrigany, Muggabah and Merrimajeel Creeks Trust District are granted additional replenishment flows to meet domestic and stock requirements. The Merrowie Creek Trust still appears to retain a disproportionate interest in water management decisions despite holding no statutory authority or public reporting obligations. This is of concern in instances where downstream users are unable to fulfil their stock and domestic water requirements.

10. s43A Reviews should be specifically required to have regard to the implications of climate change, revised government environmental objectives and the implications of technology in improving water efficiency. For example, the vision statement and objectives in clause 9 and 11 of the Lachlan Unregulated WSP (and in fact most pre 2013 WSPs) should be updated having regard to the Government's stated environmental objectives for the Lachlan valley and greater understanding of the long-term implications of climate fluctuations on the water availability and river health. Our client notes the significant water efficiency gains that have been achieved in their region through investment in water infrastructure upgrades (e.g. the removal of BMR pumps and their replacement with a pied stock and domestic system). Improvements in water efficiency and improved environmental outcomes should be clearly supported as a priority in all WSPs.

Lachlan Unregulated WSP

11. The Lachlan Unregulated WSP is currently under s43A review by the NRC. Our client notes the following significant concerns in relation to the grant and enforcement of works approvals affecting Merrowie Creek. These issues are being brought to the attention of the NRC in this forum as they demonstrate how significant issues affecting the operation and enforcement of WSP and the achievement of the objectives of the WM Act may not be captured in the s43A Review process. Additionally, given the overlapping roles of government agencies in this area, our client is unclear where these issues are most appropriately raised. These issues have been raised with WaterNSW Central River Operations staff, WaterNSW Licensing (Forbes Office), Department of Planning and Environment – Environment and Heritage Group (EHG), and Natural Resource Access Regulator (NRAR investigation exists for Merrowie Creek). Our client requests that the NRC liaise with those agencies to expediate their investigations and any options they are progressing to address the specific issues raised.

- a. WSPs must seek to clarify the riparian right to natural flooding. While it is accepted that there is no obligation to deliver water to fulfill a riparian right if it is not reasonable to do so, such as in dry or drought (see the NSW Government's Extreme Events policy for the Murray-Darling Basin), the balance of fulfilment of riparian rights and the requirements of ephemeral system or unregulated water source must also be made clear.
- b. Downstream landholders 'riparian rights' to natural flooding have depreciated over the past three decades in the lower sections of the Lachlan Unregulated WSP in part due to:
 - i. Failure to review licence conditions issued under the *Water Act 1912* (primarily in the 1950s to 1970s under very different river operations, management and rules) to ensure they are consistent with the principles of the WM Act and WSP rules, and then appropriately monitored and enforced;



- ii. The increased use of water within the Merrowie Trust area by a fuller utilisation of the rights of the Trust members and by use of water by the Trust members that may not fully comply with the rules.
 - iii. A lack of enforcement of allocations of water to the Merrowie Trust.
 - iv. The failure of the Lachlan Unregulated WSP to ensure, and upstream water allocations to have sufficient regard to, the basic landholder (riparian rights) of the landholders below the Trust Area
- c. The NSW Water Register does not include information regarding structures on floodplain, including their location, volume, ownership, approvals and licence conditions (see paragraph 8 above regarding the recommendations of the Flood Plain Inquiry Report). Specifically, the full conditions are not publicly available as intended, as they were not transferred into the NSW Water Register database during the transition period from *Water Act 1912* to WM Act.
- d. Formal clarification should be provided as to the operational rules around private structures in unregulated water sources (with a replenishment flow allocated in Lachlan Regulated WSP) when translucency and airspace/flood flows occur. Clear rules need to be established and enforced to provide legal board setting heights prior to any Translucent and airspace/flood/surplus/unregulated flow in the Merrowie Creek. Our client submits that in translucency, flood flows and targeted environmental water flows all boards should be removed completely to allow the creek to flow as it would naturally.
- e. Historical non-compliance may have had long-term adverse impacts on downstream environment, and water use (including replenishments, environmental water, Translucent flows and operational surplus). In many instances these adverse impacts have been caused by dropboards either not being fully removed when weir pool level drops below sill, dropboards installed before flow has reached and filled Cuba dam, Tarwong and spilled to Box Creek (as per environmental objectives) or if a few boards are progressively added over a period of time once flow has reached each of the weirs and before filled Cuba Dam. According, non compliances with the rules may in part be due to:
- i. Lack of clarity in the drafting of conditions;
 - ii. Landholders' lack of understanding of conditions;
 - iii. a lack of inspection of works and enforcement of licence conditions;
 - iv. inadequate maintenance of works (eg it may be mechanically difficult to remove drop boards due to condition/ age and silt); and/or
 - v. use of boards or structures outside of licensing conditions.



For example, the operation of the regulator and channel for Murphy's Lake and its implications for the effectiveness of replenishment flows to Cuba Dam appears to be poorly understood/ inconsistently managed.

12. Our client draws the NRC's attention to the Murray-Darling Basin Water Compliance Review (as discussed at page 6 of the Flood Plain Inquiry Report). The MDBA review found that in New South Wales *"[t]he absence of a culture of compliance, organisational instability and limited resourcing have meant that compliance has relied heavily on custom and practice, resulting in a lack of effectiveness, consistency and transparency"*. These issues could be addressed by:
- a. an education program;
 - b. field inspection of every work prior to next replenishment flow;
 - c. a review and validation of licence condition levels by WaterNSW/DPE Water including the marking of levels on all weirs so that the relevant drop board settings are unambiguous; and
 - d. a specific requirement that dropboards must be removed course by course as the level of the water stored by them recedes to the bottom edge of each respective dropboard.

Our client appreciates the NRC's consideration of their concerns raised above and would be grateful if a formal response could be provided including recommendations as to how any concerns considered "out of scope" could be properly progressed.

Yours faithfully

pp

Beatty, Hughes & Associates
ABN 44 273 924 764