

Submission to the **Draft Report of the Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event**

Dr John Cooke, Howard Jones and Barrie MacMillan

1. In making this submission we wish to acknowledge the extensive work undertaken by the Independent Panel. The Draft Report provides a fair and reasoned analysis of what we believed to have occurred during the First Flush Events in 2020.
2. In our First Submission, we had not appreciated the difficulties created through the coincidence of the recent legislative change to Floodplain Harvesting and the First Flush events. We have no reason to argue that this complication was not handled appropriately during the First Flush Events in 2020.
3. We agree with the important finding of the Draft Report that the process adopted was sound and effective and led to some “wonderful outcomes”. We also agree that the NSW Government must take steps to avoid a repeat of some of the aspects of the 2020 Northern Basin First Flush Event in the interests of agency staff, communities and water users.
4. We are concerned that the comment on page 2 of the Draft Report that the “lost opportunities cannot be regained, from social, cultural, economic and environmental perspectives” may not be used in the spirit that was meant. The establishment of the Independent Panel, and the processes that it followed, is the only recent opportunity for the community to vent their frustrations on a range of water management issues in NSW.
5. By adopting a more orderly process in applying Section 324, as would happen through a formal incident management process and addressing other matters raised in this Submission, then the lost community confidence would be recovered.

Observation and Recommendation 1

The Draft Report provides a substantial step towards regaining the trust of the communities. This is evident from the written Submissions and the *Webinar* on 27 July 2020. We would encourage the Independent Panel to find a way to recommend the wider use of Independent Panels, as a means of gaining the trust of communities.

6. Our First Submission drew heavily on the *Northern Basin temporary water restrictions: targets and principles*¹. That Report did not provide a reasonable level of transparency. We stand by our Recommendation that there was a lack of transparency around how the Minister or Delegate addressed the sub-clauses under the *Water Management Act 2000* in allowing the *take of water*. The Draft Report recognises this.
7. In our First Submission we argued that the lack of transparency extended beyond the brief period of the decision process. The lack of transparency extended over the period before, during and after the decision making process. We hold to that position.

¹ For the purpose of this Submission the term *targets and principles* is used as an abbreviation of *Northern Basin temporary water restrictions: targets and principles*.

8. In this Submission, we will build on matters that we raised in our First Submission, largely in the context of the Recommendations in the Draft Report. These matters are that:
 - a) the Minister chose not to oversee responsibility as obligated under Section 324²;
 - b) *DPI-EES* chose not to be involved and hence could not provide a single focus for environmental issues during the First Flush Events;
 - c) the management of future First Flush Events should occur under the framework of a formal Incident Management System³;
 - d) greater emphasis should have been placed on the Reports of Vertessy *et al.*, and the Keelty Report, (the recent ACCC Report is also relevant) that raise the influence that climate change may have on the management imperatives of future events; and
 - e) *Section 324 Temporary Water Restrictions* should be retained in its present form as the prime tool to manage First Flush Events.

The role of Minister in making decisions where there are apt to be winners and losers

9. In the Draft Report it is stated that *The Minister was notified of decisions after they were made but was not involved in the decision making process*⁴. Section 324 *Temporary Water Restrictions* obliges the Minister *if satisfied that it is necessary in the public interest, the Minister may by order in writing direct....to*. Section 324 *Temporary Water Restrictions* is unambiguous. The Minister chose not to oversee the clear role to the Ministry under Section 324.
10. By way of comparison, we would like to draw on how the Government of New South Wales managed bushfires over the past summer season⁵. On a daily basis, the Premier of NSW addressed the citizens of NSW accompanied by relevant Ministers. The Premier then immediately handed the microphone to the Chief Fire Officer, Shane Fitzsimmons, who had the responsibility to report on operational matters. Matters raised by the press, individuals or other Governments were put to rest on a daily basis. The citizens and communities of New South Wales and Australia trusted and respected this process.
11. The Draft Report includes a reference to a recent statement by the NSW Supreme Court of appeal, that is highly relevant to why the Minister should have remained responsible under Section 324. It states;

The section 9 duty is one of imperfect obligation, to be exercised in the public interest, for purposes of serving a wide range of broadly expressed policy objectives of a character that overlap, conflict and are incommensurable with each other... *in most decisions that apply to a large area, there are apt to be winners and losers*... An element of compromise is necessarily involved, e.g. between environmental flows and agricultural users, and this can occur in accordance with and promoting the water management principles⁶.

² Temporary Water Restrictions Section 324 of the Water Management Act

³ *The Australasian Inter-Service Incident Management System*, Australian Fire and Emergency Service Authorities Council 2017. AFAC Ltd

⁴ Draft Report page 36 Management of the Northern Basin Flush Event.

⁵ We use this for the purpose of comparison and are not suggesting magnitude of the events are similar.

⁶ *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14, Leeming JA at [135]-[136], [124] and [139].

12. When executing matters in the public interest, the Minister has the protection of Parliament on one hand and can be held responsible to Parliament on the other. The management of *Section 324 Temporary water restrictions* warrants this level of authority.

Observation and Recommendation 2

It is our view and recommendation that the responsibility for overseeing the management of *Section 324 Temporary water restrictions* should remain with the appropriate Minister.

The actions of DPI-EES- where an element of compromise is necessarily involved.

13. The very important role that the *DPI-EES* has in the management of Water in NSW is recognised in a number of places throughout the Draft Report. It is the entity that brings together and balances the responsibilities of the individual agencies such as *DPIE-Fisheries*, for the purpose of protecting priority environmental sites. The Draft Report includes the statement that: *Notably, the DPI-EES chose to be not routinely included in the decision making process.*⁷ . The reason being a perceived conflict of interest.

14. The Draft Report includes a reference to a recent statement by the NSW Supreme Court of appeal, that is highly relevant to why the *DPI-EES* should have remained involved during the management of the event. The Reference states that;

The section 9 duty is one of imperfect obligation, to be exercised in the public interest, for purposes of serving a wide range of broadly expressed policy objectives of a character that overlap, conflict and are incommensurable with each other... in most decisions that apply to a large area, there are apt to be winners and losers... *An element of compromise is necessarily involved, e.g. between environmental flows and agricultural users, and this can occur in accordance with and promoting the water management principles*⁸.

15. The absence of *DPI-EES* , during the Section 324 discussions, left the incident management team without formal input from, nor oversight of, the entity charged with providing an integrated response to the complex environmental management issues being addressed. This left *DPIE-Fisheries* to respond on the behalf of other agencies.

16. *DPI-EES* had adequate time to make the necessary arrangements to manage *a perceived conflict of interest*. It had been clear for months that there was a very high likelihood of a First Flush Event being triggered. The time to address *a perceived conflict of interest* is before or after the event. But not during the event.

Observation and Recommendation 3

That the Independent Panel recommend that *DPI-EES* be fully engaged in the future management of *Section 324 Temporary water restrictions*.

The management of the event should occur under the framework of a formal Incident Management System

17. The Independent Panel makes a clear distinction between the success of the process in meeting

⁷ Draft Report page 36

⁸ *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14, Leeming JA at [135]-[136], [124] and [139].

water management outcomes, and the failure of the process in meeting its community engagement role. The adoption of a formalised Incident Management System would go a long way to addressing this paradox.

18. Our First Submission raised the importance of adopting a more formal incidence management framework to guide the management of an incident such as the First Flush Event. We outlined a generalised approach on how an incident management approach could be established. The generalised approach in our submission is consistent with the findings of the Draft Report⁹.

19. Having now read the Draft Report it is our view that a formal incident management system should be adopted for future events. We encourage the Independent Panel to Recommend that future events must be managed under a formal incident management system.

Observation and Recommendation 4

That the Independent Panel recommend that future events must be managed under a formal incident management system.

The need to retain Section 324 in its present form

20. The Draft Report argues that the management of First Flush Events should be embedded in other regulatory and policy frameworks¹⁰, such as *Water Sharing Plans*. We agree that the management of the First Flush events must be addressed in the Water Sharing Plans, but we do not agree that Water Sharing Plans should become a replacement or alternative for Section 324. It is our opinion, that the urgency expressed in the NRC Review relating to Northern Basin Waterways should be noted in the Final Report.

Observation and Recommendation 5

That the Independent Panel place a higher emphasis on the urgency expressed in the NRC Review relating to Northern Basin Waterways, and the need to retain *Section 324 Temporary water restrictions* as the prime tool to manage First Flush Events.

21. In our First Submission we noted that it was not transparent whether the Minister or delegate considered the relevant specific condition (*or is subject to specified restrictions*) in deciding to lift the restriction on the *C class licenses*. The Minister or delegate could have decided to lift restrictions:

- a) for a period of less than 3 days (*for a specified period*);
- b) for only A and B Class licenses, but not C Class Licenses (*or is subject to specified restrictions*); or
- c) not at all.

22. Given the Draft Report confirms that the process adopted in 2020 worked well from a technical perspective is justification that Section 324 should be retained. Adoption of a more orderly process in the management of Section 324 events, coupled with a formal incidence management system, would lead to greater community acceptance. The apparent failure of community engagement should be treated as a lesser issue, and is certainly an issue that should be addressed in Water Sharing Plans.

⁹ Draft Report Clause 7.2 page 51.

¹⁰ Recommendation 7 page 5 and in the accompanying Table: cell Water Sharing Plans/Rationale

23. The *WaterNSW Submission*¹¹ to the Independent Review is proposing to introduce reforms with a view to enabling 'Active Management'. *WaterNSW* recognises that achievement of improved management is promulgated on substantial investment and effectiveness of real-time data and processes.
24. The time frame for real-time data is minutes or hours and for Section 324 it is days. The time frame for achieving active management is likely to be months. More and better real-time data, cannot lead to better and fairer decisions unless decisions are able to be managed in a very short time frame. This can only occur if Section 324 is retained.
25. The *WaterNSW Submission* appears to recognise the necessity for retaining Section 324, but has not been definitive. There does not appear to be any agreed definition as to what is meant by "Active Management", either in the *WaterNSW Submission*, or any other Submission.
26. There is an important role for *Water Sharing Plans* in preparing and advising all those likely to be affected by First Flush restrictions on matters that will be addressed under Section 324. Some actions must be undertaken well before it starts to rain¹². Importantly, no water user should rely on being able to have access to water, or to the amount of water that they may feel entitled to. Particular emphasis should be given in *Water Sharing Plans* to plan around;
- a) an *Order* under Section 324 (7) prevailing over the extent of any inconsistency with other parts of the Act; and
 - b) *nothing in this section* (Section 324 (9)) gives rise to a claim for compensation under Division 9 of Part 2 of Chapter 3.
27. The Draft Report has confirmed that the process adopted in 2020 worked from a technical perspective, and on this basis the retention of Section 324 in its present form is justified. The apparent failure of community engagement should be treated as a lesser issue during the period that Section 324 is being enacted. Community engagement in matters relevant to Section 324 are certainly an issue that should be addressed in a *Water Sharing Plan*. Where there is an inconsistency between Section 324 and any other Act or regulation, it is the other Act or Regulation that should be modified to have regard to Section 324.

Observation and Recommendation 6

That the Independent Panel recommends that:

- (a) Section 324 **Temporary water restrictions** remains the key mechanism to manage the technical matters that need to be addressed during First Flush Events; and
- (b) Community engagement matters relevant to Section 324 should be addressed and discussed over a much longer time that allows for integration of other management matters that are the province of *Water Sharing Plans*.

Drought and its management should be integrated with the management of First Flush Events

28. The Draft Report highlights that much good came out of the process adopted in the 2020 Event. We agree with this. We also recognise that the people managing the process came under a lot of personal pressure. The widespread adoption and use of Social Media has increased the level of

¹¹ *WaterNSW June 2020 Submission to the Independent Panel assessment of the management of the Northern Basin First Flush Event.*

¹² Verbal comment *Webinair* on 27 July 2020

pressure on public servants. We encourage the Independent Panel to strengthen its Recommendations around how this pressure and risk to the people managing the process can be reduced. There appears to be no easy solution.

29. Having a formal incident management arrangement would avoid staff having to balance who gets what water, in the context of just a few irrigators getting access to water, and the wider community missing out. It should be the role of the Incident Manager to make a choice between an individual's benefit and the community's benefit. Not having a formal incident management arrangement is likely to be a cause of the undue personal pressure experienced in the recent event.
30. We are not comfortable that it was just the lack of transparency that led to the adverse response of the community towards the process and its outcome. The whole of the area west of the Great Divide in NSW was in drought and had been so for a number of years. The community was suffering as a consequence of drought, as were most water users in western NSW. Financial assistance was available. Our experience is that pressure builds within communities in cases where some farmers receive rain and others don't. This was the case in 2020.
31. The 2020 Event did not occur evenly across all of the area affected by drought. Some individuals were allowed access to water for irrigation by nature of their location and the variable rainfall. Others who were not in an area where it rained were not able to take water. Their drought impacts continued. The existence of Section 324 *Temporary Water Restrictions* may have given false hopes to irrigators.
32. Drought is an enduring feature of the Australian landscape. It has economic, environmental and social impacts on farmers, communities and landscapes¹³. These matters align with the public interest matters as outlined in the *Objects of the Water Management Act 2000 No 92*¹⁴ (Chapter 1, Section 3 (a)-(h)).
33. There may be opportunities to better align drought assistance under the drought fund, with the objectives of the *Water Management Act 2000*, to reduce difficulties in balancing the public interest choices between a large amount of water to one or a few irrigators, or the same amount of water being allocated to address a much large number of people that make up the wider community.

Observation and Recommendation 7

We encourage the Independent Panel to engage with the manager of the Future Drought Fund to address if there is a fairer and more appropriate mechanism for provision of drought assistance, as a means of reducing a perceived reliance on pumping for irrigation purposes during future First Flush events as a drought response measure.

John Cooke



Howard Jones



Barrie MacMillan



End

¹³ <https://minister.awe.gov.au/littleproud/media-releases/building-drought-resilient-australia-future-drought-fund>

¹⁴ <https://legislation.nsw.gov.au/#/view/act/2000/92/chap1/sec3>