



# Response to the Draft Victorian Floodplain Management Strategy

By

Victorian Farmers Federation

August 2014

## Foreword

The Victorian Farmers Federation is Australia's largest state farmer organisation, and the only recognised, consistent voice on issues affecting rural Victoria.

The VFF consists of an elected Board of Directors, a member representative Policy Council to set policy and eight commodity groups representing dairy, grains, livestock, horticulture, chicken meat, pigs, flowers and egg industries.

Farmers are elected by their peers to direct each of the commodity groups and are supported by Melbourne-based staff.

Each VFF member is represented locally by one of the 230 VFF branches across the state and through their commodity representatives at local, district, state and national levels. The VFF also represents farmers' views at many industry and government forums.

A handwritten signature in black ink, appearing to read 'PJS', written in a cursive style.

Peter Tuohey

President

## Executive Summary

The VFF welcomes the opportunity to comment on the Draft Victorian Floodplain Management Strategy. Taking a proactive approach to planning through the Regional Floodplain Management Strategies is to be applauded. Involving the local community in decisions and using their knowledge will help develop solutions which are suited to local conditions.

The VFF is concerned that there remains a lack of clarity around the liability of landholders for private levees which may have third party impacts. The Draft Strategy does not clearly identify liability for flood mitigation infrastructure managed outside of Water Management Schemes. This is impacting on the ability of landholders to make decisions. Farmers need clarity from Government about their responsibilities to be able to make informed decisions.

The VFF is also concerned about the proposed cost-sharing arrangements. The VFF believes that farmers should not be subsidising the cost of urban levees which deliver private benefits for home and business owners. Farmers already pay more in rates compared to other local businesses.

| Type of levee                 | Type of investment  | Cost   | Liability  |
|-------------------------------|---------------------|--|--|
| <b>Urban</b>                  | New                 | Federal government, State government and Local government (equally shared) | s.16 Water Act 1989 (to be changed under s.676 Water Bill 2014)      |
|                               | Maintenance         | Local government   | s.16 Water Act 1989 (to be changed under s.676 Water Bill 2014)      |
| <b>Rural</b>                  | New and maintenance | Private individuals  | s.16 Water Act 1989 (to remain the same under s.676 Water Bill 2014) |
| <b>Environmental Watering</b> | New and maintenance | Federal government and State government                                    | Needs clarification see Recommendation 3                             |

For enquiries about this submission please contact Rachel Astle, Senior Policy Adviser – Water on 03 9207 5522.

## **Overview of recommendations**

### **Recommendation 1**

The VFF calls on the State Government to provide some guidance on the liability of farmers for the third party impacts of building, maintaining and decommissioning private levees.

### **Recommendation 2**

The VFF seeks assurance that landholders who choose to repair or not repair existing private levees are not accountable for unintended consequences.

### **Recommendation 3**

The VFF calls on the State Government to clarify the liability framework for damage from environmental watering.

### **Recommendation 4**

The VFF does not support farmers contributing towards the cost of building or maintaining urban levees.

### **Recommendation 5**

The VFF supports the use of ring levees to protect individual buildings and curtilages as these reduce third party impacts.

### **Recommendation 6**

The VFF seeks assurance that environmental watering will not be used as an opportunity to shift additional costs onto farmers.

### **Recommendation 7**

The VFF calls on the government to ensure that the development of regional floodplain management strategies considers the positive and negative impacts of 'unintentional' levees.

### **Recommendation 8**

The VFF welcomes the development of a new permit system which will enable landholders to maintain existing levees on Crown land which provide private benefits.

### **Recommendation 9**

The VFF calls on the government to ensure the insurance industry reduces premiums where it can be proved that actions have been taken to reduce the impact of flooding.

## Liability for flood mitigation infrastructure (see 13.1.1 Establishing Water Management Schemes)

Based on the material in the Draft Strategy, the VFF has developed the following table to understand the liability for flood mitigation infrastructure:

| Type of levee                 | Responsible Authority                            | Liability provisions                                     |
|-------------------------------|--|--|
| <b>Urban</b>                  | Local Council                                    | Section 16 Water Act 1989                                |
|                               | Local Council managing a Water Management Scheme | Section 676 Water Bill 2014                              |
| <b>Rural</b>                  | Private individuals                              | Section 16 Water Act 1989<br>Section 675 Water Bill 2014 |
| <b>Environmental watering</b> | Federal or State government                      | Needs clarification see Recommendation 3                 |

### Urban Levee Liabilities

The Draft Strategy notes that:

“Proposed changes to Victoria’s water legislation will mean that the liability associated with any failure of flood mitigation infrastructure approved and implemented as a Water Management Scheme will be limited in a similar fashion to the liability that currently applies to a dam managed by a water corporation. Flood mitigation infrastructure managed under other arrangements would be subject to wider criteria for assessing liability.”p.41

Under the *Water Act 1989* Councils are subject to the same liability provisions as individuals. The new legislation clearly identifies that for flood mitigation infrastructure managed as a Water Management Scheme the Council is protected against liability unless it can be proved that there was “intentional or negligent” conduct.

### Private Levee Liabilities

In contrast the legislative framework for private liability is unchanged. The Inquiry into Flood Mitigation Infrastructure in Victoria noted that:

“Liability due to interference with a flow of water (under section 16), was highlighted by several CMAs as an ‘unresolved’ issue for levees.”p.149

“The Committee is not aware of any recent cases where section 16 was applied to damage caused by a levee. It is therefore unclear whether section 16 applies to flood waters from a water course, or whether it applies only to distributed surface water, or both. Nevertheless, the Committee is of the view that liability under section 16 is an issue for the courts to consider.” p.149-150

Whilst recognising that there is a process for seeking redress for damage caused it is unclear when a farmer may expect to be considered liable. This prevents farmers from making decisions to build, maintain or decommission private levees. Farmers need to understand their responsibilities and potential liability before making decisions, not when they are being taken to court.

The Draft Strategy supports the principle of individuals being able to make informed decisions to manage their risk. However it is silent on the liability for private levees. The VFF believes that it is not appropriate for the courts to decide on whether farmers are liable in general. It is the role of government to set out these responsibilities. It is the role of the courts to determine whether and how this applies in a particular situation.

Farmers are required to obtain permits to build and maintain levees from local Councils and Catchment Management Authorities. If a farmer is approved to build a levee and it is maintained to the required standard what is the liability of the authorising body?

#### ***Recommendation 1***

***The VFF calls on the State Government to provide some guidance on the liability of farmers for the third party impacts of building, maintaining and decommissioning private levees.***

There are a number of legacy issues relating to liability which also need to be addressed. These are further complicated by infrastructure and land use changes. For example, in the situation where a landholder repairs an existing levee on private or Crown land and this causes the floodwater to flow in a new direction, towards a property which did not previously exist when the levee was originally built, who is liable? And conversely where a landholder chooses not to repair an existing levee are they liable for third party impacts?

#### ***Recommendation 2***

***The VFF seeks assurance that landholders who choose to repair or not repair existing private levees are not accountable for unintended consequences.***

### **Environmental Water Liabilities**

It is not clear how liability for damage caused by environmental watering is to be assigned. The liability provisions in the Water Act 1989 and the Water Bill 2014 refer to “Authorities” which are then defined as water corporations or catchment management authorities. There is no specific reference to the liability of the Commonwealth or Victorian Environmental Water Holders.

#### ***Recommendation 3***

***The VFF calls on the State Government to clarify the liability framework for damage from environmental watering.***

**Funding for flood mitigation infrastructure (see 13.1.3/13.2.3 Cost-sharing arrangements and 13.1.5 Management arrangements for levees in rural areas)**

Based on the material in the Draft Strategy, the VFF has developed the following table to understand the proposed cost-sharing arrangements for flood mitigation infrastructure:

| Type of levee                 | Type of investment | Cost-sharing arrangement   |
|-------------------------------|--------------------|--|
| <b>Urban</b>                  | New                | Federal government, State government and Local government (equally shared) |
|                               | Maintenance        | Local government   |
| <b>Rural</b>                  | New                | Private individuals  |
|                               | Maintenance        | Private individuals  |
| <b>Environmental watering</b> | New                | Federal government and State government                                    |
|                               | Maintenance        | Federal government and State government                                    |

**Urban Levee Costs**

The proposed cost-sharing arrangements for capital costs of new urban levees are proposed to be shared equally between the Commonwealth government, the State government and the relevant local council, contingent on an ongoing funding commitment from the local council for maintenance.

The Draft Strategy notes that:

“The benefits of avoiding disruption to the functioning of urban areas often extend throughout the region’s economy. Flood mitigation infrastructure intended primarily to benefit urban areas may also deliver benefits to rural areas. For these reasons, it is appropriate that local council raise the necessary revenue from across its municipality.”

p.42 and p.45

The VFF believes that the beneficiaries of a levee need to bear the costs. The beneficiaries of an urban levee will include homes, businesses and public assets located in the town. The VFF does not support farmers paying for the protection of suburban homes and town businesses.

Any attempt to socialise the cost of urban levees through increased rates across the board would further exacerbate the inequalities that farmers already face. VFF analysis shows that farmers are already paying 2 – 5 times more in rates compared to other local businesses.

This argument is supported by the fact that many farmers are paying the full cost of maintaining rural levees that also protect major public assets such as roads, railway lines and power networks. Farmers should not be paying for the cost of maintaining urban levees as well.

#### ***Recommendation 4***

***The VFF does not support farmers contributing towards the cost of building or maintaining urban levees.***

### **Rural Levee Costs**

The Draft Strategy notes that:

“The government will not fund construction of new rural levee systems, or repair flood damage to existing rural levee systems, that primarily provide private benefits.” p.43

The VFF notes that there is no proposed change to the process for constructing and maintaining private levees on private land. Landholders will continue to be responsible for funding. These levees will continue to be regulated through Municipal Planning Schemes.

#### ***Recommendation 5***

***The VFF supports the use of ring levees to protect individual buildings and curtilages as these reduce third party impacts.***

### **Environmental Water Costs**

The Draft Strategy notes that:

“...there may be limited circumstances in which new rural levee systems may be contemplated. For example, they might be necessary for environmental watering or to reduce the risk of avulsions. Therefore, the government will not explicitly rule out the construction of new rural levee systems. Any such levee system would need to be fully evaluated through a flood study that took full account of the associated social, cultural, economic and environmental costs and benefits.” p.43

The VFF notes that environmental watering is not the same as natural riverine or estuarine flooding. The framework for considering the provision of rural levees to protect farmers against the impacts of

environmental watering needs to be focused on the costs and benefits of environmental watering, not the costs and benefits of providing the rural levees.

The cost of providing levees to protect against environmental watering impacts is related to the decision to undertake environmental watering. If the decision to undertake environmental watering has consequences which result in the need to provide levees, then this cost should be borne by the State and Federal governments, as the authorities responsible for environmental watering. Neither farmers nor local Councils should pay. This is a cost incurred as a consequence of delivering a public benefit – the environmental watering. The private benefit of protecting the farmers' assets is only required because of the decision to undertake the environmental watering.

***Recommendation 6***

***The VFF seeks assurance that environmental watering will not be used as an opportunity to shift additional costs onto farmers.***

## Other Comments

### 13.1.6 Essential service providers

Essential services infrastructure can act unintentionally as levees. Where rail and road infrastructure is raised above the floodplain and there is inappropriate drainage design, insufficient drainage capacity or poorly maintained drainage systems flood waters can back up behind the infrastructure. Where irrigation channel banks and river banks have been built up these can also prevent the natural flow of water across the landscape. Floodwater which builds up behind unintentional levee banks ruins crops and affects livelihoods.

The VFF is aware of one situation where the bank of an irrigation channel was operating as an unintentional levee for the nearby town. This bank was not designed or constructed as a levee. The irrigation channel has now been decommissioned and the landowner wishes to fill in the channel and level the bank. It is not clear what process the landholder needs to follow in order to do this nor the implications of doing this.

#### ***Recommendation 7***

***The VFF calls on the government to ensure that the development of regional floodplain management strategies considers the positive and negative impacts of 'unintentional' levees.***

### 13.3.1 A permit system for levee maintenance on Crown Land

The *Inquiry into Flood Mitigation Infrastructure in Victoria* notes that there are two types of rural levees – those which were privately constructed on private land and those which were constructed with government assistance. Some of these were constructed on private land and some on Crown land. It has not been possible to access Crown land in order to maintain these levees.

The development of a simple permit system to enable access will allow those landholders who wish to do so to maintain these levees. The VFF notes that this permit process will be enacted by the *Water Amendment (Flood Mitigation) Act 2014*. This legislation was recently passed and will come into operation before or on 1 March 2015. Similar provisions are also contained in the *Water Bill 2014*, currently being considered in Parliament.

***Recommendation 8***

***The VFF welcomes the development of a new permit system which will enable landholders to maintain existing levees on Crown land which provide private benefits.***

**Chapter 17: Insurance**

The VFF welcomes the government's commitment to work with the insurance industry to ensure that people are able to obtain suitable protection against flood risks and premiums are reduced in recognition of the benefits flood mitigation works deliver.

***Recommendation 9***

***The VFF calls on the government to ensure the insurance industry reduces premiums where it can be proved that actions have been taken to reduce the impact of flooding.***