

# Investigation into water compliance and enforcement 2007-17

A special report to Parliament  
under section 31 of the  
*Ombudsman Act 1974.*

November 2017



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## Foreword

Water is a vital public asset. It is also a scarce public resource in Australia. Regulating how water can be accessed and used is necessarily a matter of intense public interest.

This standpoint was ideally captured in the *Water Management Act 2000* that fundamentally changed water regulation in NSW. A central plank of the Act was that enforcement of the new principles and rules was an essential element of effective water management.

From 2006 onwards the NSW Ombudsman's office has received complaints and public interest disclosures alleging that the water management principles and rules were not being properly complied with and enforced. We have undertaken three prior investigations into those complaints and disclosures that resulted in reports to Government and the Minister. We are now undertaking a fourth investigation, once again triggered by complaints from the public and public interest disclosures from officials working in the agencies charged with administering the legislation.

We are midway through the current investigation. We have already examined an extensive range of agency records and conducted formal hearings under the *Ombudsman Act 1974*. This progress report to the Parliament on the current investigation is prompted by a few considerations. Our inquiry is one of a number that are underway at present into similar issues. Action is currently being taken by the NSW Government to change the administrative structure for water management. Our investigation will also be continued by a new Ombudsman appointed to commence in December 2017.

In that setting it is appropriate to advise Parliament, Government and the public of the progress and direction of our current investigation. The concerns that we raised in the earlier investigations continue to be a strong theme in the current investigation, and are summarised in this progress report. Two recurring issues are whether the water compliance and enforcement function has been properly understood, supported and resourced within Government, and whether the function has suffered rather than benefitted from a frequent history of administrative restructuring. This progress report does not make findings or express concluded opinions on the issues that we are currently investigating.



Professor John McMillan AO  
**Acting Ombudsman**

November 2017

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# 1. Introduction

There is currently intense Government and public scrutiny of the administration of surface and ground water resources in NSW, including the enforcement of compliance with water legislation. This was prompted in part by the airing of the ABC's Four Corners program *Pumped* on 24 July 2017.

In 2016 my office commenced its fourth formal investigation in the past ten years into water compliance and enforcement issues. The investigations were conducted under s 13 of the *Ombudsman Act 1974* and involved the use of our powers pursuant to the *Royal Commissions Act 1923*.

Our fourth investigation is ongoing. This progress report is prompted by a number of factors: there is strong public interest in water compliance issues sparked by the Four Corners program; following that program the Government appointed Mr Ken Matthews AO to conduct an investigation and prepare an interim report; other concurrent inquiries are being conducted into water compliance and enforcement; and it is important to place on the public record the key findings from the past Ombudsman investigations into similar water compliance and enforcement issues. The historical perspective and valuable insights that my office can provide from its three former investigations over a ten year period are relevant to the matters currently being considered by Government in response to the problems identified and recommendations made by the Matthews interim report.

This progress report explains the background to our current investigation, the nature of the allegations being investigated, the procedural steps undertaken so far, the work required to complete the investigation and the projected date of completion. The new Ombudsman, whose appointment commences in December this year, will take over carriage of the investigation at that time.

The earlier Ombudsman investigations examined individual compliance cases and made broad observations about the conduct of compliance and enforcement functions under the *Water Management Act 2000* and the *Water Act 1912*. The current investigation is similar in nature. The reports from the three earlier investigations were provided to the relevant Minister and the Department, and were not published. It is expected that the final report on the current investigation will be tabled in the Parliament and published.

## 2. The state of play in 2017

### 2.1. Allegations made in the ABC Four Corners program

The ABC program, *Pumped*, broadcast allegations of widespread non-compliance with NSW water legislation, particularly in the Barwon-Darling River system in Northern NSW. Specifically, the allegations in the program were that:

- certain irrigators had pumped water from the Barwon-Darling River system during periods when pumping was not permitted or in quantities significantly greater than their entitlements
- water purchased with taxpayer funds for environmental protection purposes was being accessed by irrigators for private use
- meter tampering was common in the region, and
- compliance and enforcement efforts by the water regulator were ineffective.

## 2.2. Government response to the ABC Four Corners program – the Matthews inquiry

On 26 July 2017, in response to the allegations in the Four Corners program, the Minister for Primary Industries, Regional Water, and Trade and Industry, the Hon Niall Blair, MLC, announced the appointment of Mr Matthews to conduct an independent investigation into the issues raised in the program.<sup>1</sup> On 2 August 2017, Mr Matthews commenced his investigation.<sup>2</sup>

On 8 September 2017, Mr Matthews concluded his initial investigation and released an interim report.<sup>3</sup> The principal finding of the interim report was that ‘the water-related compliance and enforcement arrangements in NSW have been ineffectual and require significant and urgent improvement’.<sup>4</sup> In particular, the report found that:

- the overall standard of NSW compliance and enforcement work has been poor
- arrangements for metering, monitoring and measurement of water extractions, especially in the Barwon–Darling River system, are not at the standard required for sound water management and expected by the community
- certain individual cases of alleged non-compliance have remained unresolved for far too long, and
- there is little transparency to members of the public of water regulation arrangements in NSW, including the compliance and enforcement arrangements that underpin public confidence.<sup>5</sup>

The findings are largely similar to the findings of our earlier investigations that were reported to the relevant Minister and the Department.

The Matthews interim report went on to recommend the urgent initiation of a ‘Water Management Compliance Improvement Package’, and included suggestions for:

- strategic structural improvements for the relevant Ministers to consider (the ministerial package), and
- a wide range of administrative and operational improvements for the Department of Industry to consider (the administrative and operational reforms).<sup>6</sup>

The ministerial package involved a recommendation for the consolidation of all compliance and enforcement functions currently dispersed between Water NSW and the Department of Primary Industries Water (DPI Water). The aim would be to have all water compliance responsibility located under the leadership of a single, discrete, decision-making body.

The administrative and operational reforms involved recommendations around three key principles to ensure that future systems are:

- more transparent
- more independent, and
- considerably more effective than the current system.<sup>7</sup>

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1. Media Statement, Niall Blair, Minister for Primary Industries, Regional Water, and Trade and Industry, 26 July 2017.

2. NSW Department of Industry, Media Release “Statement from Ken Matthews”, 2 August 2017.

3. NSW Department of Industry, Media Release “Ken Matthews’ statement on interim report”, 11 September 2017.

4. Report, *Independent Investigation into NSW Water Management and Compliance*, Ken Matthews, 8 September 2017, p.4.

5. Report, *Independent Investigation Into NSW Water Management and Compliance*, Ken Matthews, 8 September 2017, p.4.

6. Report, *Independent Investigation Into NSW Water Management and Compliance*, Ken Matthews, 8 September 2017, p.4.

7. Report, *Independent Investigation into NSW Water Management and Compliance*, Ken Matthews, 8 September 2017, p.4.

## 2.3. NSW Government response to the Matthews interim report

In response to the Matthews interim report and recommendations, the Secretary of the Department of Industry indicated that the following measures would be put in place:<sup>8</sup>

- an internal investigative task force has been established to determine action to be taken in relation to the specific allegations of non-compliant and illegal activities referred to in the Matthews interim report Terms of Reference<sup>9</sup> (in consultation with the Independent Commission Against Corruption (ICAC))
- policy changes will take effect, including a ‘no meter, no pump’ policy for all Category 1 water users in NSW within the next 12 months and more stringent metering settings for other water licence holders
- consultation will commence in relation to potential legislative changes to implement the basin-wide policy and structural recommendations
- an externally run ‘Speak Up’ service will be established within the Department of Industry for staff and members of the public to lodge anonymous reports of maladministration or unprofessional conduct, with matters to be assigned to independent investigators
- an internal training program on ethics is to be established
- a new stakeholder and community engagement and consultation framework is to be implemented
- a new Natural Resource Asset Division within the Department of Industry is to be created that will consolidate the DPI Water and Crown Lands divisions, and
- a new Chief Natural Resources Regulator is to be created as part of the newly consolidated Crown Lands and Water division (potentially to be governed by an independent three person board).

## 2.4. Other current inquiries into water-related matters

A number of other reviews and investigations into water-related matters, prompted by the Four Corners program, are currently underway, including:

- ICAC is examining the allegations raised by the Four Corners program pursuant to a referral by the Secretary of the Department of Industry and self-referral from the former Deputy Director General of the Department of Primary Industries.
- The Murray–Darling Basin Authority Basin-wide Water Compliance Review is conducting a strategic review of State and territory-based compliance and enforcement regimes in the Murray-Darling Basin.
- The Commonwealth Senate Rural and Regional Affairs and Transport References Committee is conducting an inquiry into the integrity of the water market in the Murray-Darling Basin, and is due to report by 5 December 2017.<sup>10</sup>

There is a potential overlap in the issues being examined by our office and in the Matthews investigation and by ICAC. We have consulted with and are cooperating with those two inquiries.

8. Emails from Simon Smith, Secretary of the Department of Industry, to the NSW Ombudsman, 29 September 2017.

9. Report, *Independent Investigation into NSW Water Management and Compliance*, Ken Matthews, 8 September 2017, p.46.

10. Parliament of Australia [www.aph.gov.au](http://www.aph.gov.au), accessed on 3 October 2017.

## 3. Water management legislative and administrative framework

### 3.1. Legislation

The two main items of legislation governing the management of water sources in NSW are the *Water Management Act 2000* and the *Water Act 1912*.

Prior to the commencement of the *Water Management Act*, the *Water Act* created a 'riparian right' by allowing unlimited development of farm dams for stock and domestic purposes, provided each dam was below seven mega litres (ML).<sup>11</sup> Restrictions applied to dams on rivers for irrigation purposes.

The *Water Management Act* is gradually replacing the *Water Act*. The *Water Management Act* provides that, subject to limited exceptions, that rights to the control, use and flow of water in NSW are the 'State's water rights' and are vested in the Crown.<sup>12</sup> Any right that the owner of riparian land would have at common law with respect to the flow of any river, estuary or lake through or past the land, or to the taking or using of water from any such river, estuary or lake, is abolished.<sup>13</sup> The effect is that the right to use water is now governed by the licensing and other processes set out in the *Water Management Act*.

The *Water Management Act* manages the State's water sources through water sharing plans. These set out the rules for sharing water, in particular water sources between water users and the environment, and for the trading of water in and between water sources.<sup>14</sup> The plans provide water users with a clear picture of when and how water will be available for extraction as well as protecting the fundamental environmental health of the water source and ensures it is sustainable in the long-term.<sup>15</sup> The intention of water sharing plans is to provide water users with perpetual access licences, equitable conditions and increased opportunities to trade water as a commodity separate from the land.<sup>16</sup>

There is still some water in NSW that is not covered by a water sharing plan and remains regulated by the *Water Act*. This includes some rivers, lakes and groundwater aquifers.

An important feature of the *Water Management Act* is that it establishes a comprehensive framework for the investigation and enforcement of a range of offences under the Act. The Minister may appoint authorised officers who have powers to require information, answers or records and enter and search premises. Powers under the *Water Management Act* can be used in relation to *Water Act* matters.

The *Water Management Act* establishes a range of offences relating to:

- access licences and taking water: specifically, it is an offence to take water
  - without an access licence
  - in contravention of any term or condition of the license
  - for which there is no, or insufficient, water allocation
  - otherwise than by or from a water supply work or extraction point nominated in an access license.

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11. This was allowed under section 7 of the *Water Act*. Section 7 of the *Water Act* was repealed on 1 January 2001.

12. Section 392 of the *Water Management Act 2000*.

13. Section 393 of the *Water Management Act 2000*.

14. [https://www.nswfarmers.org.au/\\_data/assets/pdf\\_file/0016/34603/What-is-the-Aquifer-Interference-Policy-v1\\_0.pdf](https://www.nswfarmers.org.au/_data/assets/pdf_file/0016/34603/What-is-the-Aquifer-Interference-Policy-v1_0.pdf), pp.4-5, accessed on 3 October 2017.

15. <http://www.water.nsw.gov.au/water-management/water-sharing/how-water-sharing-plans-work>, accessed on 3 October 2017.

16. *Ibid.*

- approvals: specifically, it is an offence to:
  - fraudulently obtain an access license certificate
  - use water without a water use approval
  - construct or use a water supply work (e.g. a dam) and a drainage work without approval
  - carry out controlled activity and aquifer interference activity without approval
  - contravene the terms and conditions of an approval
  - fail to install or maintain metering equipment and keep records
  - take water when metering equipment is not working
  - tamper with a meter.

The Water Management Act sets out a range of enforcement outcomes to control unlawful works and activities. An authorised officer may:

- issue a stop work order regarding unlawful construction or use of a water management work, controlled activity or aquifer interference activity
- order the removal, demolition, modification or dismantling of an unlawful water management work
- issue a temporary stop work order to protect the public interest
- issue a penalty infringement notice, or
- apply to the Land and Environment Court to grant an injunction to restrain an unlawful work or activity.

New and higher penalties were inserted into the Water Management Act in 2008. Maximum fines for Tier 1 offences for a body corporate are now \$2.2 million, and for individuals are a fine of up to \$1 million and two years imprisonment. Maximum penalties for Tier 2 offences are \$1 million for a body corporate and \$250,000 for an individual.<sup>17</sup> Some offences relating to unlawfully taking water were also strengthened by new intentional, negligent and reckless conduct elements.

The intent of these amendments was to emphasise that water theft was a serious matter that would be punished. This was expressed by the Parliamentary Secretary in the second reading speech for the Water Management Amendment Bill 2008:

*The next item is increased fines and penalties. With New South Wales suffering from the worst drought on record, it is critical that water is used by those lawfully entitled, and extracted according to licence conditions. Water theft directly reduces the water available to users and the environment. To put it simply – water theft is not a victimless crime. That is why I am proposing to introduce new maximum penalties for offences under the Act. This will send a strong message that stealing water is now regarded as a serious crime against property and a serious crime against the environment. Stock theft has traditionally been regarded as a low act in the bush. These new penalties send the message that taking water illegally should be regarded the same way.<sup>18</sup>*

## 3.2. The agencies responsible for managing water resources

Over the past two decades the administration of functions related to water management and regulation have been restructured and moved between different government agencies close to twenty times. At least eight of those changes in the last fifteen years were major restructures that resulted

17. Section 363B of the *Water Management Act 2000*.

18. Second Reading Speech, Water Management Amendment Bill 2008, (NSW), Legislative Council, 22 October 2008 (Penny Sharpe, Parliamentary Secretary).

in substantial staff relocations and retrenchments, carving up of functions, splitting of departments, amalgamation of units and establishment of new agencies. Since 2003 when the Department of Land and Water Conservation was abolished, there has been a restructure involving water management functions approximately every two years.

The opinion of the Ombudsman's office is that the impact of these changes on staff, loss of expertise and corporate knowledge, disruptions to systems and strategy, and continuity of service delivery, have been devastating. The efficiency of water regulation, compliance and enforcement has been substantially impaired. We trace the history of water compliance and enforcement functions within this broader context in section 6.2. The agency restructures that have occurred between 1995 to 2017 are listed in Appendix 1.

The current Ombudsman investigation is focussed on activities that principally occurred in the period from 2014 to 2017. During this period the responsibility for managing the State's surface water and groundwater resources rested with DPI Water within the Department of Industry. DPI Water was established in 2014, and is the successor of the NSW Office of Water (NOW). NOW was located in the Department of Environment, Climate Change and Water (DECCW) prior to its abolition in April 2011, and then in the Department of Industry, Trade & Investment, Regional Infrastructure & Services. NOW was renamed DPI Water in 2014.

Between 2014 and July 2016, DPI Water had a comprehensive range of water management functions that included policy-setting, water planning, implementation of interstate programs, surface water and groundwater management, regulation, compliance and enforcement, water information and modelling. On 1 July 2016, some of DPI Water's functions (including a number of compliance and enforcement functions with respect to part of the water market) were transferred to a State Owned Corporation, Water NSW. This restructure and realignment of functions was referred to as the Water Transformation Project (Transformation), and was implemented by the *Water NSW Amendment (Staff Transfers) Act 2016* and through amendment of Water NSW's Operating Licences to confer relevant functions.

After the Transformation, DPI Water retained: all policy setting functions; regulatory responsibility for issuing licences and approvals to major utilities, water supply authorities, local water utilities, irrigation corporations and government agencies; and responsibility for State significant development, activities requiring approvals under mining legislation, controlled activity approvals, aquifer interference approvals, floodplain harvesting licences and approvals and licences related to Aboriginal water users. Compliance and enforcement was split between DPI Water and Water NSW. DPI Water retained the function of enforcing compliance for all the entities it licensed.

Water NSW discharged a range of operational type functions, including some regulatory functions and the responsibility for enforcing the compliance of licence holders to whom it issued licences, such as irrigators and farmers. Water NSW took on 70% of the overall compliance responsibility<sup>19</sup>. Water NSW also took over water quality monitoring, algal management, water efficiency, hydrometric assessment, metering operations and customer transactions. The Transformation resulted in the addition of 225 positions to Water NSW.<sup>20</sup>

Following the Matthews interim report, on 19 September 2017 a new Natural Resource Asset Division within the Department of Industry was created bringing together Crown Lands and DPI Water. Government is also considering the establishment of a new and independent Natural Resource Access Regulator led by a Chief Natural Resource Regulator, which will consolidate the enforcement functions that were split between DPI Water and Water NSW on 1 July 2016.

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19. Information received from DPI Water on 21 April 2017.

20. Information received from Water NSW on 29 June 2017.

## 4. Our current investigation

### 4.1. Background to our current investigation

Over several weeks from the middle of June 2016 we were contacted by several DPI Water staff who expressed wide ranging concerns about DPI Water's performance of its statutory compliance and enforcement functions. Those staff members alleged that:

- The Strategic Investigation Unit (SIU) within DPI Water had been scaled down and rendered ineffectual by a staffing reduction from the original staff of 12 officers down to six in the months preceding the Transformation. Four officers were transferred to Water NSW and there was no longer a unit comparable to the SIU in DPI Water.
- Staff members' delegations to take enforcement action were removed, which impeded DPI Water's ability to take timely and appropriate enforcement action.
- Senior DPI Water executives were alleged to have improperly directed SIU staff that were 'authorised officers' under the Water Management Act, not to take enforcement action in relation to an alleged offence of unlawfully modifying and significantly enlarging a dam.
- No enforcement action had been taken on unlicensed dams that contained large volumes of water and were being used for irrigation purposes without the required water access licences or water allocations in a water sharing plan area.
- The transfer of some compliance and enforcement functions to Water NSW under the Transformation was having a debilitating effect on the conduct of enforcement activities across the State.
- There were systemic failures by senior management, in both past and current regimes, to take action on water compliance matters.

The information from the staff members met the criteria for public interest disclosures (PIDs) under the *Public Interest Disclosures Act 1994* (the PID Act).

At the beginning of June 2016 the Ombudsman also received a complaint from a member of the public stating that DPI Water was not taking adequate action on his allegations of potentially large-scale water theft by a local cotton farmer.

Based on the seriousness of these allegations and our prior knowledge of systemic failures in water compliance and enforcement, the Ombudsman decided to commence a formal 'own motion' investigation under s 13 of the Ombudsman Act. On 25 July 2016 a Deputy Ombudsman issued a notice of investigation under s 16 of the Ombudsman Act to the Secretary of the Department of Industry. The investigation was described as follows:

The acts and/or omissions of the Department of Industry, (Department of Primary Industries -Water) in carrying out functions related to the administration of the *Water Act 1912* and the *Water Management Act 2000*, in particular but not limited to:

- whether the compliance and enforcement policies and procedures of the Department of Primary Industries-Water have been applied in relation to certain approvals, licences and alleged unlawful constructions.
- whether the *Water Act 1912* and the *Water Management Act 2000* have been enforced in response to breaches of that legislation.

We received similar allegations against Water NSW after certain compliance functions were transferred to it under the Transformation. Some of the individual compliance matters we were examining had also been transferred to Water NSW. Accordingly, in May 2017 we commenced a formal investigation into Water NSW into the same conduct.

## 4.2. Progress to date

When the Four Corners program aired in July 2017 our investigation was well advanced. The following had occurred:

- recorded interviews had been conducted with a number of current and former DPI Water staff
- we had received documentation and compliance files on three individual compliance cases from both DPI Water and Water NSW
- DPI Water and Water NSW had been required to provide answers to specific questions
- we had met with the Secretary of Industry to brief him about the conduct of the investigation (in February 2017)
- we had reported one matter to the ICAC, due to evidence of possible corruption (April 2017)
- we had engaged an expert from the University of NSW to review and provide a report on one compliance case that was particularly technical, and
- we had completed a preliminary analysis of the available evidence and identified the need to conduct compulsory hearings under the Ombudsman Act.

After the Four Corners program we liaised with both the Matthews inquiry and ICAC to avoid potential prejudice to our concurrent and overlapping investigations. Our particular concerns were that the investigation of possible corruption incidents by ICAC should not be prejudiced by any witness examination that we undertook; and that the Matthews inquiry should recognise that interviews with, and the examination of, witnesses by the Ombudsman has formal statutory inquiry powers and can extend legal protection to witnesses. The timetable we adopted for the examination of witnesses at private hearings was adjusted to take account of those considerations. We have also shared relevant information with the Matthews inquiry and ICAC.

In September 2017 we conducted hearings at which five witnesses were summoned pursuant to the Royal Commissions Act to provide evidence under oath. Following those hearings we met with the Secretary of Industry to provide advice about our ongoing investigation. An initial impression we conveyed to the Secretary was that the witnesses we had examined had acted with integrity and in the public interest in making PIDs to our office. We reminded the Secretary of the Department's obligations under the PID Act to ensure adequate protection for staff members who made disclosures and that the PID Act protected staff against reprisal.

## 4.3. Next steps in the investigation

Further witness examination has taken place in hearings in November 2017. This includes the examination of witnesses that had been deferred following consultation with ICAC.

Any individual who may be the subject of adverse comment in a subsequent Ombudsman report will be given the opportunity to make a submission, as required by s 24(2) of the Ombudsman Act. The heads of the two agencies the subject of the investigation will similarly be advised of our preliminary findings and recommendations and given the opportunity to make submissions and to correct any errors of fact. Before a final report is issued to the agencies the responsible Minister will be informed and given the opportunity to consult as required by s 25 of the Ombudsman Act.

These procedural fairness and consultation steps mean that a final report on the current investigation is unlikely to be concluded before April 2018. The new Ombudsman may decide to make the final report as a special report to Parliament under s 31 of the Ombudsman Act.

This ongoing investigation includes an in-depth examination of the following:

- three individual compliance matters handled by either DPI Water or Water NSW
- the impact of the Transformation on the exercise of compliance and enforcement functions, and
- the concerns that the SIU was depleted by staffing reductions and cumbersome approval processes prior to the Transformation.

## 5. Earlier Ombudsman investigations

The following discussion summarises the main issues relevant to water compliance and enforcement identified in our three earlier investigations. As noted above, the reports of those investigations were provided to the Department and the responsible Ministers but were not published.

Each investigation report made recommendations and suggestions for change. Most of these were accepted by Government and undertakings were given to improve compliance and enforcement administration. This did not always occur and implementation problems and new issues were uncovered in subsequent investigations. Our general impression is that significant improvements occurred in the conduct of enforcement investigations where our recommendations were implemented, particularly after the establishment of the SIU in 2013. However, some issues that we identified and reported on in past investigations have not been resolved and unsatisfactory conduct has re-occurred.

### 5.1. First Ombudsman investigation (2009)

In 2007 we received a complaint that the Department responsible for water management at the time<sup>21</sup> had failed to take appropriate action in relation to unlawful farm dams allegedly constructed on a permanently flowing creek or river. The complainant, who owned the property downstream of the dams, had raised the issue with the Department as early as 2003-04.

We investigated the complaint and made a report under s 26 of the Ombudsman Act to the Department and the relevant Minister in 2009. We concluded that no dam capable of holding water existed on the creek prior to 2002, and the existing dams were therefore unlawful. Ample evidence to support that finding was either available or readily accessible to the Department had it properly investigated the complainant's concerns and taken appropriate action to enforce the law.

We recommended that the Department review all available evidence of illegal water works at the property in question and take appropriate compliance action. In our view a direction issued to the owner of that property in relation to one of the dams was inadequate, and we recommended that the Department review the direction. The Department agreed to comply with these recommendations. It also agreed to pay compensation to the complainant for detriment arising out from the Department's failure to take appropriate enforcement action against the other property owner.

In 2010 the Department advised us that it had reviewed all the evidence as to the lawfulness of the dams and concluded there was insufficient evidence available to determine whether the dams, or the direction to modify one of the dams, were lawful. Accordingly, no further action would be taken by the Department.

Some of the systemic observations and recommendations in our report to the Minister and the Department – in particular about under-resourcing – are taken up below in section 6.3.

21. Department of Natural Resources and then Department of Water and Energy.

## 5.2. Second Ombudsman investigation (2012)

In 2012 we received and investigated a complaint from another downstream neighbour of the same property, alleging that no appropriate compliance action was taken on further illegal dam construction that he had reported to the Department in January 2010. This investigation was combined with the third investigation (below) and a combined report was made to the Department and the Minister in 2013.

The complainant also advised the Department that following heavy rain sometime in February-March 2012, the main body of the creek again flowed over the top of the centre of the dam with the result that a large section of the front wall of the dam collapsed and a wall of water and debris flowed down the creek. This resulted in a large body of water washing over the complainant's access bridge, completely obstructing the access into his residence. An inspection by compliance officers confirmed that the dam had failed.

The complainant said that the lack of action by Departmental staff on both this matter and on previous dams constructed on the creek had significantly affected both him and his family.

The enlargement of the dam had been reported to the Department in January 2010, but a site inspection and investigation occurred only six months later in June 2010. The dam had been subject of a recommendation in our first investigation that the Department review its original direction in relation to the dam.

The Department's investigation of the complaint found that the capacity of the dam had been increased from 0.5 ML (the size of the dam during our first investigation) to 11.3 ML. A subsequent inspection by the Department in 2012 revealed the dam had an even greater capacity of about 14 ML, but was subsequently reduced to 7 ML. The reduction in capacity was due to the lowering of the trickle pipes and not the reduction in the size of the dam wall.

The Department's investigation found evidence of four unlawful works on the creek as well as evidence of excavation into the bed and banks of the creek. These works would require a controlled activity approval, which was also not in place. Another dam on the property that had been the subject of the 2009 investigation had been increased in size from about 1.5 ML to over 5 ML.

The Department's investigation was followed by protracted discussions between the compliance and legal sections of the Department and the Crown Solicitors Office (CSO). Nearly three years after the initial investigation by compliance officers had commenced, a draft direction was issued to the owner requiring the removal of one dam and the remediation of the site. This delay was particularly concerning as the breach was classified as high risk and the initial construction of the dam was unlawful yet it was now 22 times larger.

We concluded that the matter had been characterised by continual delays within the Department, without firm decisions being made. An initial delay of several months in allocating the breach to a compliance officer was followed by further delays during protracted discussions between the compliance and legal sections about the appropriate course of action.

In 2013 we were advised that a summons was filed in the Land and Environment Court on the owners of the property. They were charged with offences under s 91E of the Water Management Act for carrying out a controlled activity in, on or under waterfront land without a controlled activity approval. They pleaded guilty and were ordered to pay fines of over \$90,000 and the prosecutor's legal costs.

This outcome was approximately ten years after the owner's activities were first reported to the Department by a complainant, and four years after we made recommendations that the Department accepted. During that time the owner of the property not only continued to utilise the unlawful constructions but had considerably expanded them in size and capacity.

This case highlighted serious systemic issues with the Department's conduct of its compliance and enforcement functions. There is further discussion of our investigation and report in section 6.3.

### 5.3. Third Ombudsman investigation (2013)

In 2011 we received several PIDs from staff of the NSW Office of Water (NOW) as well as complaints and information from a number of individuals, community groups and non-government organisations. The disclosures and complaints concerned a range of conduct relating to the way NOW conducted its core functions in regulating water sources, about decision making in the Major Projects, Mines and Assessment Unit, and of severe delays in handling applications for water licences.

We conducted an investigation into the acts and/or omissions of NOW in carrying out functions related to the administration of the Water Act and the Water Management Act, in particular but not limited to the adequacy of:

- the communication by NOW of technical data prepared by the Major Projects, Mines and Assessment Unit and other units of NOW to properly inform decision making in relation to major and State significant projects
- the carrying out of compliance and enforcement functions by NOW in relation to access approvals and licences.

We interviewed over twenty NOW officers and a number of stakeholders, including non-government organisations representing affected parties. We also received sworn evidence from witnesses in formal hearings conducted in accordance with s 19 of the Ombudsman Act, which confers on the Ombudsman certain powers under the Royal Commissions Act. The investigation canvassed compliance and enforcement matters, delays in processing licence applications, the processing of development applications for major projects, the recording of meetings with proponents of major projects, the structure and resourcing of NOW, and specific alleged breaches of the Water Management Act and the Water Act. The two case studies summarised below are illustrative of the compliance and enforcement concerns detailed in section 6.3.

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#### CASE STUDY 1. GWYDR

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In 2010 NOW received allegations that large amounts of water had been unlawfully diverted upstream of a water metering device on the Gwydr River. Compliance officers inspected the property and a stop work order was issued. A brief of evidence was prepared and forwarded to the NOW legal unit in late 2010. By early 2012 no further action had been taken and no response had been provided from the legal unit to the compliance unit, despite the fact further similar incidents had occurred and were being investigated.

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#### CASE STUDY 2. SAND MINING

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A community organisation complained that a sand mining company had extracted water for which the company was not licensed and that NOW had failed to take effective enforcement action. We received further information by way of a PID from a NOW employee alleging that the company was responsible for a severe drop in the underground water levels in the area of the mine, which significantly reduced the amount of water available to other landowners.

The allegations were investigated by a NOW compliance officer in late 2010. An extensive brief of evidence was compiled and submitted to the legal unit in mid-2011. The advice on prosecution was received seventeen months after the matter was initially given to the compliance unit officer. We were subsequently advised by NOW that in accordance with the CSO's legal advice, no action was taken against the company due to difficulties in quantifying the amount of water alleged to have been unlawfully taken.

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## 6. Water compliance and enforcement arrangements – a short history

This section briefly summarises the major changes in compliance and enforcement arrangements in NSW between 2004 to 2017. It commences with an explanation of the difference between compliance and enforcement (which is the focus of this report) and the broader concept of regulation.

### 6.1. The scope of compliance and enforcement

Water regulation is understood to include a broad range of activities related to managing access to water resources. This can include licensing, approvals and planning, development of water sharing plans and floodplain management plans, policy development and legislative reform, education programs, management of proactive audit and enforcement programs, legislative enforcement and the investigation of breaches of water legislation.

Compliance and enforcement is understood to be the sharp end of regulation, namely, the investigation of alleged breaches of water legislation and enforcement action to compel legislative compliance. This spans proactive monitoring, investigative, evidence gathering and enforcement processes, and can include a wide spectrum of activities ranging through advisory letters, warning letters, stop work orders, remediation directions, license suspensions, license cancellations, penalty notices and prosecutions.

### 6.2. The history of water compliance and enforcement

The potted history of water regulation and reform in NSW is relevant to the measures that have been implemented within Government following the Four Corners program and the Matthews interim report.

#### 2004

The Water Management Act commenced in 2000. The Department of Natural Resources was responsible for water at this time, and was moving from a traditional role of facilitating water access to farmers to a new role under the Act of an enforcer of water access requirements. This necessitated the establishment of a dedicated compliance function. From 2004 until mid-2006 the Department (and predecessors) had seven regions each headed by a Regional Director who reported to the Director-General. All regions had compliance officers who reported to a Compliance Manager. There was also a Head Office Compliance Branch with eight compliance officers and a General Manager.

In 2004 a National Water Initiative (NWI) was adopted by the Council of Australian Governments (COAG). State Governments made commitments under the NWI to:

- prepare comprehensive water plans
- achieve sustainable water use in over-allocated or stressed water systems
- introduce registers of water rights and standards for water accounting
- expand trade in water rights
- improve pricing for water storage and delivery, and
- better manage urban water demands.<sup>22</sup>

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22. <http://www.agriculture.gov.au/water/policy/nwi>, accessed 18 October 2017.

## 2007

In mid-2006 the Department of Natural Resources was centralised and the regional structure abolished. Licensing and compliance functions were separated to reduce the risk of regulatory capture and to improve consistency in respect of compliance decision-making across different regions. A Director Compliance Operations was appointed in place of the regional structure.

The Department of Natural Resources was abolished in April 2007, and its functions split between the Department of Water and Energy (with two Compliance Managers) and the Department of Environment and Climate Change (with the remaining compliance managers reporting to the Executive Director Compliance, Licensing and Corporate Support). In December 2007 the Compliance Branch in the Department of Environment and Climate Change was transferred to Water Legal and Compliance, reporting to the Executive Director Water Legal and Compliance. At this time there were ten water compliance officers in the Department, supported by a number of lawyers in the legal unit.

The Department conducted an internal review of its compliance function in November 2007. This identified problems to do with structure, budgeting, business planning and the electronic database, and under-resourcing of education, training, monitoring and investigations.

## 2008/2009

In 2008 the NOW was created within the Department of Environment and Climate Change, headed by a Commissioner of Water. The Office included a Compliance Operations Branch that was headed by a Director of Compliance Operations (appointed in 2009). The Branch had two compliance teams (of eight compliance officers when fully staffed) responsible for the north and south of the State, each headed by a manager. The Branch was responsible for investigating breaches of legislation and making recommendations for prosecutions to the legal services branch. Also reporting to the Director of Compliance were four strategy and policy officers who were responsible for education and audit coordination, strategy, policy and systems. The intent of this restructure was to separate the operational compliance teams from the strategy and policy teams, while fostering cooperation between compliance and licensing staff.

## 2012/2013

Another internal restructure occurred in the second half of 2012. The licensing and compliance functions were combined in March 2013 into a Water Regulation Group, headed by a Deputy Commissioner, Water Regulation. The separate positions of licensing and compliance officer were replaced by a generic position of water regulatory officer. There were as many as 40-50 water regulatory staff around the State. These officers would undertake 'cradle to grave' regulation, through writing licence conditions, monitoring compliance and enforcing compliance.

A specialised investigation team, modelled on a similar arrangement in the Environment Protection Authority, was to focus on investigating and enforcing serious breaches (the SIU). This arrangement is commonly referred to within the agency as the water regulatory model of compliance.

The SIU was to focus on investigating and enforcing breaches. It was staffed by seven investigators, one senior investigator, one manager and one risk assessor. The SIU reported to the Director, Monitoring and Investigations Branch. The Branch incorporated a proactive monitoring role funded through Commonwealth money under the National Framework for Compliance and Enforcement for Water Resource Management (NEF).<sup>23</sup> It was expected that this injection of funds, which was to be available until October 2016, would enhance the agency's compliance function. Some of the existing positions in the SIU were funded through the NEF.

23. The NEF was agreed to in December 2009 under the National Water Initiative.

## 2014-2016

The Department of Industry, Skills & Regional Development was established in 2014. The water related functions of NOW were transferred to the new department and were renamed DPI Water. The position of Water Commissioner was abolished at the same time, and from January 2015 DPI Water was headed by a Deputy Director General. The compliance and enforcement arrangements remained largely the same until the lead up to the Transformation.

## 2016

The Transformation occurred on 1 July 2016 and involved a realignment of functions between DPI Water and the newly-created Water NSW. Significantly, all licensing functions, other than corporate licensing such as major utilities and mining, became the responsibility of Water NSW. It was also responsible for compliance and enforcement in relation to the entities it licensed. DPI Water retained compliance responsibility in relation to other parts of the water market. It was estimated that approximately 70% of the compliance workload was shifted to Water NSW; 64 officers from the water regulatory group in DPI Water, including four SIU officers, were transferred to Water NSW<sup>24</sup>. Two former SIU officers remained with DPI Water and were absorbed into water regulation<sup>25</sup>.

## 2017

Following the Matthews interim report the compliance functions of Water NSW and DPI Water are proposed to be consolidated and moved into a newly-created Crown Lands and Water division within the Department of Industry. A new Chief Natural Resources Regulator has been appointed.

### **6.3. Historical concerns about the conduct of water compliance and enforcement**

This section outlines the concerns that were raised in our two earlier reports that were made to the Minister and the Department in 2009 and 2013 respectively. To the extent that any concerns stem from the present investigation they are expressed as tentative views only and will be re-assessed in the ongoing investigation and reporting. As pointed out, this progress report does not make findings or express concluded opinions on the issues that we are currently investigating.

#### **6.3.1. Compliance resourcing**

The number of staff carrying out proactive compliance investigations and enforcement has fluctuated over the years, from a maximum of sixteen to as few as six in the months prior to the Transformation and transfer of functions to Water NSW on 1 July 2016. The Ombudsman's office has been raising the issue of inadequate compliance resourcing since 2009.

At the time of our first investigation in 2008 the Department of Water and Energy engaged Deloitte to provide an objective assessment of the resources required to provide reasonable levels of service in compliance. The review identified serious under-resourcing and noted that only high priority items were being addressed, and that many medium and low risk matters were sidelined. The Deloitte report found the low level of compliance activity was inadequate to effectively police and enforce water legislation across the State.

Our first report to the Director General of the Department in 2009 expressed concern with the level of compliance resourcing, notwithstanding a number of departmental initiatives at that time to increase compliance capacity. We observed that a resourcing level of ten compliance officers was seriously inadequate to ensure proper protection of the State's increasingly scarce and valuable water resources.

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24. Information provided by DPI Water on 21 April 2017

25. Information provided by DPI Water on 21 April 2017

The Department was receiving approximately 600 breach allegations a year and only 20% of those were being investigated.<sup>26</sup>

We recommended that the Department take appropriate action to properly resource its compliance branch, including its education, auditing and monitoring functions, as well as take action to upgrade its compliance database. The Department subsequently filled all vacant compliance related positions, and committed to developing an external education strategy and implementing an audit program to target high risk compliance areas. A review and upgrade of the compliance database was budgeted for completion in the following financial year.

We again raised the resourcing issue in a submission by the Ombudsman to the NSW Parliamentary Inquiry into Coal Seam Gas in September 2011, which commented:

*Our inquiries have also identified concerns about the adequacy of resources for compliance and enforcement activities. I understand that exploration and extraction of coal seam gas has significant impacts upon available water resources and the Office of Water has responsibility for enforcing the provisions of the Water Management Act 2000. However, we understand there are fewer than 20 officers in the Office of Water who perform a compliance or enforcement function in relation to water in NSW. Given the breadth of responsibilities and the geographical spread of water related matters across NSW, it is difficult to see this as adequate for ensuring appropriately robust compliance and enforcement.*<sup>27</sup>

In 2011, eight compliance officers were allocated to each of the north and south regions. However, there were multiple personnel issues that resulted in at least four compliance officers being on long-term leave and workers compensation. This issue is discussed in more detail in section 6.3.3.

In 2012 NOW started receiving Commonwealth funding under the NEF. The objective of the NEF was to provide a nationally consistent approach to water regulation, compliance and enforcement within each jurisdiction,<sup>28</sup> including:

- robust compliance standards and enforcement strategies
- consistent offences, penalties and evidentiary provisions
- regular and consistent public reporting
- raised public awareness, and
- increased monitoring and compliance action.

DPI Water obtained NEF funding of \$16.7 million over five years (ending in October 2016).<sup>29</sup> This was used to support the employment of 19 full-time employees who were “deployed to develop improved strategies for compliance, expand the compliance education program and expand compliance monitoring activities”.<sup>30</sup>

Not all NEF funding was used in reactive compliance investigations, as illustrated by SIU staffing figures. It appears that the SIU initially comprised eight investigators (seven investigation officers and one senior investigation officer), three monitoring officers, supported by one manager and one director. This small specialised team of up to 12 officers was fully dedicated to investigating breaches and taking enforcement action, including preparing briefs for prosecutions. The SIU was supported by a pool of 40-50 water regulation officers, who were expected to undertake some compliance activities following the establishment of the water regulatory model. However, the major part of the compliance work was undertaken by the SIU officers.

26. Information provided by the Department of Water and Energy to our investigation.

27. NSW Ombudsman letter to the NSW Parliament *Coal Seam Gas Inquiry*, NSW, 19 September 2011.

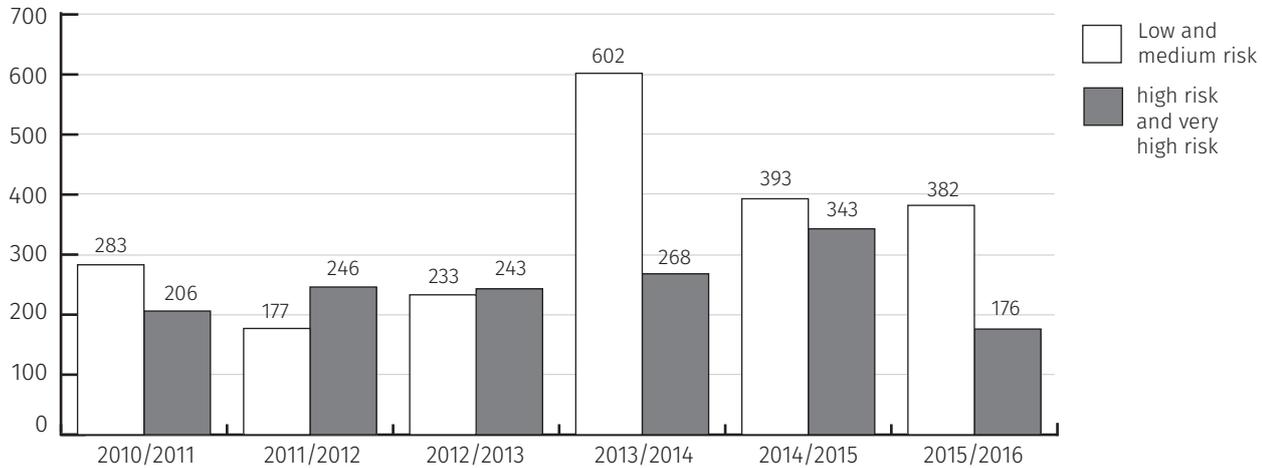
28. NSW Department of Trade and Investment, Regional Infrastructure and Services, Annual Report 2010-11, 31 October 2011, p.35.

29. NSW Department of Trade and Investment, Regional Infrastructure and Services, Annual Report 2011-12, 31 October 2012, p.32.

30. Synergies Economic Consulting, *DPI Water Expenditure Review*, January 2016, p.95.

Analysis of monthly workload reports shows that SIU staff handled 65%-75% of all alleged breaches and 100% of high/very high risk matters.<sup>31</sup> On average, high/very high risk reports represent 40% of all breach reports received by the agency (fluctuating between 27-53%). Figure 1 gives the number of breach reports from 2010-16.

**Figure 1. Number of alleged water legislation breaches 2010-16<sup>32</sup>**



While all water regulation officers were expected to undertake some compliance activities, many who were questioned by the Ombudsman’s office said they were ill-equipped and unsupported to undertake investigations and had to be accompanied and mentored by SIU staff, which further stretched that unit’s resources.

Our 2013 investigation report we noted that while the restructure within the Water Regulation Group may have increased the total number of officers with some responsibility for compliance activities, we were concerned that not all those officers had been given relevant training or had experience in dealing with compliance and investigations. We concluded that rather than increasing the compliance resources, the water regulatory model meant that licensing officers were required to perform a compliance function in addition to their licensing function. We expressed grave concerns for the long term viability of water compliance and enforcement, should resources be reduced and additional roles be given to licensing officers unqualified to conduct investigations to an acceptable standard.

The 2013 Ombudsman report welcomed the planned creation of the SIU but noted that the intended staffing of the unit was heavily supported by the Commonwealth NEF funding. We expressed concern about the ability of the agency to perform its compliance function after NEF funding ended in 2016 and observed that this uncertainty endangered the long term viability of the SIU.

We compared the resourcing of compliance and enforcement functions across a range of government agencies and noted that there were notably fewer compliance officers in NOW than in some other agencies. Our report noted:

For example, many small local councils had more compliance and enforcement personnel than NOW. A sample of some councils and their compliance and enforcement numbers are:

- City of Sydney Council - 95 parking rangers and 35 ordinance (enforcement) rangers.<sup>33</sup> City of Sydney Council covers an area of approximately 27 square kilometres and services a population of around 182,000 people.

31. Based on monthly work load reports provided by DPI Water.

32. Based on information provided by DPI Water.

33. Email from City of Sydney Council of 5 February 2013.

- City of Canada Bay Council – 6 enforcement officers and 3 compliance officers.<sup>34</sup> Canada Bay Council covers an area of approximately 20 square kilometres and services a population of around 79,000 people.
- Sutherland Shire Council – 13 compliance officers and 13 enforcement officers.<sup>35</sup> Sutherland Shire Council covers an area of approximately 334 square kilometres and services a population of around 220,000 people.

The ANU and UNSW Faculties of Law were commissioned by NOW under the NEF to survey approximately 4,000 NSW water licence holders between September 2012 and January 2013 to obtain their views and experiences of compliance and enforcement. The survey aimed to identify opportunities for more efficient and effective regulation of water extraction in NSW, as little was known about the success or otherwise of regulatory endeavours. The survey results lend support to the conclusion that NOW's compliance and enforcement function was under-resourced. The survey found there was little interaction between compliance officers and water users and a low level of awareness of compliance officers working in the water users' regions.

The survey report published in February 2015 noted:

*The provision of a visible and active inspectoral presence is an important component of regulatory deterrence. Compliance officers can also build goodwill with the regulated community and, where appropriate, provide assistance in how to achieve compliance. At this time, there were 14 compliance officers and 8 monitoring officers working for NOW in NSW. Most survey respondents report limited knowledge of those NOW compliance officers.<sup>36</sup>*

Overall, only 15% of respondents reported that a NOW compliance officer had conducted an inspection of their property.

One senior NOW officer who was interviewed during our 2013 investigation told us that there were many unlicensed structures in NSW of which the agency was aware:

*I use a couple of examples in relation to dams. I know of a number of dams that are quite big – hundred mega litres, 200 mega litres, et cetera, that exceed their harvestable right. And that we've highlighted to the Department saying what is going to occur with these because they're in water sharing plan areas. Some of those areas are embargoed so you can't transfer water. So they need, in my opinion, to be modified or removed to comply with their harvestable right if they can't get them licensed. ... So the brief's been prepared, we've said, well, what do you want to do with them because it's going to set a precedent if you don't do anything with this hundred mega litres, well don't worry about the 50 mega litre dam up the road if we're not going to do anything. Now, to date, nothing's happened with those. ... But, again, those structures are depriving somebody, whether it's stock and domestic, basically landholder rights or either people that have actually gone through the right process. ... But there are a lot of them across the State.*

Although it would not be reasonable to expect that all breaches are or can be detected, the evidence of this officer raised a significant concern about the effectiveness of the compliance effort.

Other NOW staff told us during our 2013 investigation that NOW had placed severe restrictions on funding for investigations and that but for the Commonwealth NEF funding the agency would struggle to deliver a compliance program at all. A number of staff advised us that an overall lack of funding limited their ability to conduct investigations, in particular those that raised complex technical issues requiring access to experts or technical resources. The agency was unable at that time to provide accurate figures in relation to its prosecution and enforcement costs.

34. Information provided by City of Canada Bay Council, via telephone 5 February 2013.

35. Information provided by Sutherland Shire Council, via telephone 1 February 2013.

36. Water extraction in NSW: Stakeholder views and experience of compliance and enforcement, A report of a survey of water users, February 2015.

### 6.3.2. Compliance funding arrangements

NSW has a total cost recovery model to fund water management services. The services provided to stakeholders and clients in NSW are recovered through the prices they are charged.

The Independent Pricing and Regulatory Tribunal of NSW (IPART) determines the maximum prices for the monopoly water management services provided by the Water Administration Ministerial Corporation (WAMC).<sup>37</sup> IPART conducts a detailed financial analysis for the purposes of preparing its determinations.

The DPI Water September 2015 Submission to IPART provided comparative details of actual expenditure and IPART-determined expenditure for compliance management for five years from 2012 to 2016. The comparison in Table 1 shows that compliance expenditure was on average annually \$1.9M less than the IPART figure and close to \$10M less for the five year period between 2012 and 2016.

**Table 1. Compliance Management expenditure and IPART funding in million<sup>38</sup>**

2012		2013		2014		2015		2016		TOTAL	
Actual	IPART										
3.849	5.436	3.932	5.824	3.805	5.960	4.275	6.137	4.014	6.131	19.875	29.488

DPI Water explained in its submission that the expenditure for compliance management was below forecast due to supplementary Commonwealth funding, which supported the funding for an additional 19 staff for 5 years concluding in October 2016.<sup>39</sup>

IPART engaged Synergies Economic Consulting to conduct a review of the efficiency of DPI Water's actual and forecast expenditure over the period 2012-21. The review was commissioned to inform IPART's 2016 determination of water management prices.

The Synergies report identified significant variations in actual and allowed expenditure at a number of activity levels, including compliance management. The Synergies report noted that in "its 2011 decision IPART obtained assurances from DPI Water that its forecast compliance activity costs were net of any external funding".

In its 2011 final determination IPART said:

*We note that under the National Framework for Water Compliance and Enforcement, the Commonwealth has agreed to fund additional compliance activities in the States. As outlined above, additional compliance activity is one of the drivers behind NOW's forecast increase in operating expenditure. However, since the release of our Draft Report, NOW has provided us with assurance that its forecast compliance costs are over and above any forthcoming Commonwealth funding of further compliance activities in NSW, and that there is therefore no 'double count' between NOW's proposed and any future Commonwealth funded compliance costs.<sup>40</sup>*

37. The Water Administration Ministerial Corporation is the statutory body under the Water Management Act 2000 responsible for water management in NSW. Its water planning and management activities were until 1 July 2016 delivered by DPI Water and are currently delivered by Water NSW.

38. DPI Water Submission to IPART for prices from 1 July 2016, September 2015, p.54.

39. DPI Water Submission to IPART for prices from 1 July 2016, September 2015, p.73.

40. IPART, *Review of prices for the Water Administration Ministerial Corporation for the NSW Office of Water, from 1 July 2011*, Final Report, February 2011, p.61.

Synergies sought an explanation from DPI Water, which provided the following response:

*[W]hen setting its compliance budget for the last determination, [DPI Water] made the assumption that additional staff would be recruited to undertake the funded work, as was the traditional position. In the event, the Water Regulation team resourced the funded activities from its current resources thereby reducing the level of resources available to undertake activities funded through water management charges.<sup>41</sup>*

The Synergies report records that DPI Water's explanation did not allay concern about 'apparent double recovery of costs'. The report noted:

*If DPI Water has delivered the Commonwealth-funded work through using its existing workforce, as opposed to hiring additional resources, then this implies fewer resources available to work on 'business as usual' compliance activities that were factored into NOW's 2009 submission. Yet DPI Water's prices were formulated on the basis of this 'business as usual' program of work, and hence it has been compensated for this work through water management charges.*

*This highlights the need for transparent, separable cost accounting and reporting of external revenue against each of the water management activities. While DPI Water has given assurances that its proposed revenue needs are net of any external funding, the optics of this could be improved.<sup>42</sup>*

The Synergies report made the following findings:

*DPI Water's total operating costs, net of external funding, have reduced over the current period. Without more detailed information about the IPART allowed and actual costs and offsets from external funding at an activity level, it is difficult to draw any conclusions about the underlying efficiency of past expenditure. Without this transparency, concerns will arise about double-counting of external funding, as demonstrated for compliance above.*

*We are also concerned about DPI Water's ongoing difficulties in forecasting, managing and reporting costs at an activity level, as demonstrated by the number of activities for which there has been a significant variance between forecast cost and IPART allowed cost. While DPI Water has presented sound justification for some of these variances, the misallocation of costs across activity codes has been a systemic problem.<sup>43</sup>*

In its final report of June 2016 IPART noted that DPI Water should report annually to IPART on its external funding by activity to address stakeholder concerns and increase transparency.<sup>44</sup>

We are examining concerns raised by the IPART reports in the current investigation.

### 6.3.3. Competence and standard of investigations

During our first investigation from 2006 to 2009, the Department's compliance function was in disarray. There were no adequate policies, no proactive monitoring of compliance, no adequate system for logging and responding to alleged breach reports, no compliance strategy, and poor record keeping and custody of evidence practices.

Following our investigation report in 2009 and the Department receiving compliance funding under the NEF, the Department progressively developed a compliance policy and a number of guidance documents on the following:

- the use of authorised officer powers

41. DPI Water Expenditure Review, Final Report prepared for IPART, Synergies Economic Consulting Pty Ltd, January 2016, p.109.

42. Ibid, p.110.

43. Ibid, p.111.

44. Review of prices for the Water Administration Ministerial Corporation from 1 July 2016 Water, IPART NSW – Final Report June 2016, p. 40.

- the use of compliance notebooks, contemporaneous notes, evidence handling, and seizing and storing exhibits
- the taking of enforcement actions and the issue of penalty notices
- court procedures and giving evidence
- the use of the compliance database, and
- the use of online mapping tools.

The adequacy of compliance practices and the competence of compliance officers was a continuing concern addressed in our third investigation from 2011 to 2013. Our investigation report in 2013 was critical of excessive delays in completing investigations and taking enforcement and prosecution action and of matters that were not being sufficiently prepared before the relevant statute of limitation periods expired. Poor communication between compliance and legal staff was a particular area of concern. Delay caused by defective briefs of evidence had long been an issue. Our report noted examples of signed witness statements not being obtained, interviews with suspects not being recorded appropriately, statements/affidavits not being formatted correctly for the relevant courts and incomplete briefs of evidence being prepared.

We saw little evidence of adequate management oversight or response. Collectively, these problems had resulted in delays in taking enforcement action and the failure of prosecutions. This was a wasteful use of departmental resources and resulted in missed opportunities to properly regulate water use within NSW. These failures potentially affected the integrity and reputation of the Department and undermined public confidence in the water regulation system.

We suggested that placing a legal officer in the compliance and enforcement unit would assist in preparing briefs of evidence and assessing, at an early stage, whether there was sufficient evidence to prosecute alleged breaches of the legislation. To address these concerns NOW entered into an MOU with the CSO that established maximum timeframes from date of referral to receipt of formal advice on prospects for prosecution. The CSO was to provide feedback on the quality of briefs received, and to develop an investigations manual and provide training to all investigations staff.

The 2013 report noted that no automated system was in place to track the performance of compliance or to alert senior executive staff about delays. Our view was that regular performance audits would assist in avoiding delayed investigations and improving their quality.

We noted instances where compliance and enforcement officers with minimal qualifications or experience were allocated complex investigations that required them to negotiate with corporate lawyers and senior staff of large multinational corporations. One officer told us he felt intimidated and ill-equipped for this work. Other officers told us they had been transferred from dealing with native vegetation issues to water compliance in 2007, describing the transfer as sudden and communicated by overnight emails without warning or preparation. The officers indicated they were not provided training or guidance for this transition and change in duties. It was clear to us that a number of compliance officers had been transferred to positions they preferred not to be in and were unqualified for. Some officers we interviewed informed us that they lacked technical expertise for investigating water offences and had difficulty understanding the various scientific issues.

One senior manager told us:

*I think a lot of – a number of the people in the compliance branch did not start their careers as compliance officers. And it wasn't necessarily through personal choice that they were put into a compliance role, and I'm talking like numbers of years ago.*

*I don't know that it's necessarily the amount of training that is the critical factor in performance or lack of performance. It's inherent skills and ability to do the job.*

Another senior officer described the situation in the following terms:

*Going back in time, my understanding is that the officers that we – some of the officers we currently have were formerly licensing officers or had a different role in the former organisations, and were basically press-ganged into becoming compliance officers. So a number of those were, in my opinion, not well suited to investigation and compliance work.*

There was consensus among senior managers we interviewed that the skills and attributes of compliance staff were variable. When asked about the competency levels of compliance staff one senior officer said:

*I think it is fairly variable. In the south, which I'm more familiar with, and I had officers who were very competent, very able to go out and conduct investigations. They had the right personality to be able to do that without seeing it as problematic or difficult. They could go out and ask questions in a very casual way, where some of – some of our officers in having to go and talk to a landholder or ask questions, they found that very confronting. They found it very difficult to do that type of work. ... But there are some that have excellent investigation skills and have a lot of drive and initiative. When they find a problem that prevents them from going a bit further, they find a way around that and they will come to me with options as to how they will overcome that hurdle. And we have developed some much more sophisticated skills in investigation with those people. The others – when I first joined the group, they didn't really seem to know how to do their job.*

Conducting effective investigations into legislative compliance requires particular knowledge, skills and personal attributes. The view expressed in our 2013 report was that NOW management failed to recognise the importance of investigation staff understanding the scope and limitations on their powers, and having the knowledge and skills to gather admissible evidence sufficient to establish the elements of offences to the standards required by courts. The plan to have licensing officers carrying out compliance investigations could exacerbate this weakness. It is likely those officers would have competing (and potentially conflicting) priorities and would lack specific investigation skills. At this time, NOW had a large backlog in licence applications, which would remain unresolved if licensing officers were given additional compliance duties. We considered there had been a pattern of directing staff to perform investigative functions without first providing them with adequate training and support.

NOW reviewed and updated some of its existing policies, practices and procedures in response to our 2013 investigation report. NOW undertook to monitor and audit whether the policies were being followed and to support staff through training. Guidance was developed on managing alleged breaches and preparing briefs.

We also recommended that a skills audit be conducted to identify any deficiencies in the knowledge, training and expertise of existing staff. NOW advised us that a skills survey was conducted to identify gaps and a compliance stream of a Certificate IV course was rolled out to 56 water regulation staff. This was a welcome development, but may not have been sufficient to equip staff with the technical knowledge to make the complex assessment of evidence required in investigating breaches of water legislation. We considered that a more sophisticated training program was needed.

After the creation of the SIU a number of highly qualified investigation staff were recruited into the dedicated compliance positions within the Monitoring and Investigation Branch and specific training in conducting investigations into breaches of water legislation was developed by the branch.

#### **6.3.4. The effectiveness of compliance and enforcement**

In 2010, NOW implemented a risk assessment process to categorise all alleged breaches in terms of risk priority (very low, low, medium, high and very high). All breaches and compliance investigations were managed through the Compliance Incident Reporting and Management System (CIRaM). The risk categorisation of alleged breaches was periodically reviewed to ensure consistency.

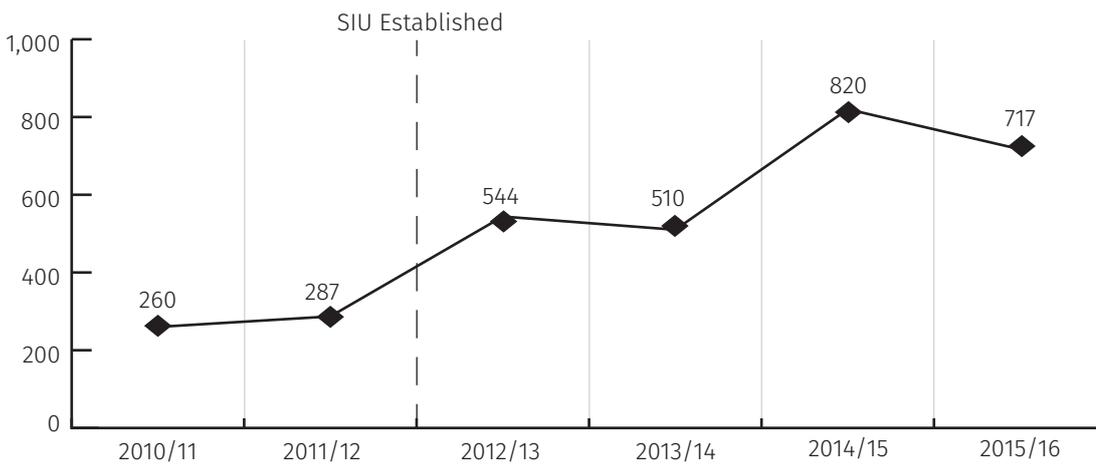
Prior to the adoption of the water regulatory model of compliance and the formation of SIU in 2013, any alleged breached rated below ‘very high’ and ‘high risk’ was not being investigated. At the time of our first investigation report in 2009 only around 20% of alleged breaches were investigated.

The intention of the water regulatory model was to enable the SIU to focus on higher risk matters, while water regulatory officers would investigate and take action on lower level matters. It was envisaged that the SIU would assist water regulatory staff with investigations and have a mentoring role where needed.

Risk-based enforcement programs work on the principle that the type of compliance action chosen will reflect both the degree of risk and the impact of statutory non-compliance on the regulatory agency’s ability to achieve its objectives.<sup>45</sup> Limited compliance resources can then be targeted on areas of greatest risk as evaluated by the agency. The outcomes and risk-based approach to regulation was endorsed generally by the NSW Government in 2012.

An analysis of enforcement actions taken in the six year period 2010-16 shows that enforcement activity increased significantly after the SIU was established in 2013. As Figure 2 shows, the average total enforcement actions taken after the creation of the SIU doubled compared to the preceding two year period 2010-12.

**Figure 2. Enforcement actions taken 2010-16<sup>46</sup>**



An analysis of 2014-15 statistics shows that the SIU undertook 55% of all enforcement actions and up to 90-100% (or 70% on average) of the higher end actions, while water regulatory officers spread across four regions undertook 45% of enforcement actions in the lower end of the spectrum – such as advisory letters. The figures for the year 2014-15 (see also Figures 3 and 4) are:

- 761 alleged breach reports were received; of these, 343 (45%) were categorised as high and very high risk (evenly split)<sup>47</sup>
- 820 enforcement actions were taken for matters that were investigated by the SIU and water regulation staff in the four regions; in addition 442 matters were investigated but no action was deemed to be required<sup>48</sup>

45. Gunningham, Neil: Enforcing Environmental Regulation, *Journal of Environmental Law* 23:2 (2011), p. 174.

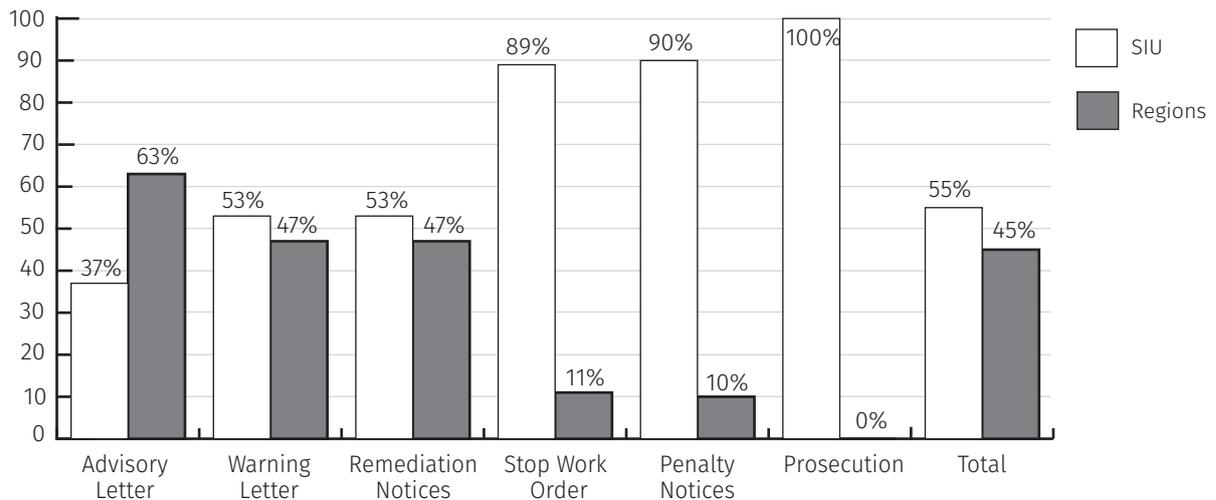
46. Based on information published in the Questions and Answers No. 122 on 14 September 2017 by the Legislative Council.

47. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015, p.1.

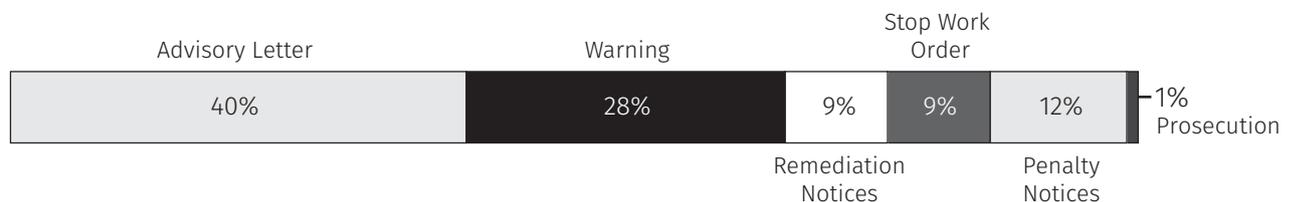
48. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015, p.1.

- of the 820 enforcement actions taken: 40% were advisory letters, 28% were warning letters, 9% were stop work orders, 9% were remediation notices, 12% were penalty infringement notices, and prosecutions were under 1%<sup>49</sup>
- the SIU undertook around 55% of enforcement actions and a much higher proportion in the upper end of the spectrum – specifically, the SIU issued 89% of stop work orders, 90% of penalty infringement notices and 100% of prosecution referrals<sup>50</sup>, and
- around 63% of advisory letters were sent out by the regions.<sup>51</sup>

**Figure 3. Summary of enforcement actions by DPI Water (SIU and Regions) 2014-15.**<sup>52</sup>



**Figure 4. Distribution of enforcement actions 2014-15**<sup>53</sup>



The workload for 2014-15 was chosen as it reflects a period after the SIU was well-established, but before its staffing was reduced in the months prior to the Transformation. As illustrated in Figure 2, compliance activities declined from that time. The impact of the Transformation on enforcement outcomes is further discussed below in section 6.3.5.

The number and types of enforcement outcomes in 2014-15 are consistent with the intention that the SIU would undertake enforcement in relation to high and very high risk and complex matters. The enforcement outcomes in this period indicate that having a specialist dedicated investigation unit to target higher risk breaches was effective. Furthermore this occurred in a period when, in our view, the compliance function was under-resourced. The agency's limited resources were being targeted more effectively to improve enforcement outcomes compared to earlier years.

49. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015, p.8.

50. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015, p.7.

51. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015, p.7.

52. Water Regulations Group Monthly Workload Report, 1 July 2014-30 June 2015. (Note: total % figures are rounded to the nearest whole number).

53. Based on Water Regulations Group Monthly Workload Report, 1 July 2014 - 30 June 2015.

Our 2013 investigation report noted that the prosecution of offences under the Water Management Act and the Water Act was infrequent. Among the reasons earlier noted were problems in the quality of prosecution briefs, poor communication between legal and compliance staff, lack of resourcing, complex evidentiary requirements and the absence of clear policies, practices and procedures for processing briefs. We recommended that NOW set timeframes for finalising investigations and assessing briefs of evidence, and require mandatory reporting to the Commissioner of breaches that were unable to be prosecuted due to a statutory limitation period lapsing.

This recommendation was accepted. NOW advised us that it developed a 'managing alleged breaches' document that incorporated this recommendation. An automated case management report was developed to provide the data necessary for managers to track progress against required timeframes. Set timeframes were established for the SIU to assess briefs of evidence. A monthly reporting framework for all matters under investigation by the SIU was also established.

### **6.3.5. Organisational culture and the impact of restructures**

Prior to 2000, compliance activity was undertaken in relation to water access and licensing, particularly through the enforcement of licence conditions, but there was no formal, dedicated, compliance unit. The changes that occurred after the passage of the *Water Management Act 2000* required the Department, which previously saw itself as a facilitator to farmers, to assume a regulatory role. The problems it encountered in taking on this function were reflected in the Department's handling of a case that was the subject of our first investigation report in 2009. The report noted that there was no clear strategic plan at the time on how to deal with the change and how to integrate the compliance function with the Department's other roles. In such a climate, compliance officers were left to contend with the pre-existing culture without support from senior management.

We also identified close ties between regulated parties and officers who were providing technical assistance and negotiating compliance outcomes. This led to a heightened risk of regulatory capture, marked by favouritism or selective non-enforcement.

The subsequent separation of licensing and compliance in 2008 was partly in response to these findings. Notwithstanding this history, licensing and compliance were brought together again in 2013 when the water regulation group was formally established.

When we interviewed the Commissioner for Water in 2012 during our third investigation he confirmed that the agency had come from a culture of very little compliance:

*I'm talking about 15, 20 years ago, where the general feeling of the irrigators was, well, if we can get water, we're just taking it off the Government, and those sorts of issues. It was almost like a sport. Now through the National Water Initiative and other initiatives introduced in New South Wales, we've created property rights for water. So if people are stealing that water, then they're stealing it from effectively their neighbours who have an equal property right or reducing the reliability of that. So by and large there is now substantial expectation by industry that our – there will be a stronger compliance activity across the State, and that was particularly the case during the current – during the drought, where you know, there was very limited water to go around, and so if someone was stealing it, they were getting competitive advantage and they were effectively taking it from their neighbour. I think what that's done is changed the whole paradigm within which we operate and there is now a higher expectation on our compliance officers to undertake compliance activities.*

One senior officer who gave evidence described the situation in the following terms:

*Going back in time, my understanding is that the officers that we – some of the officers we currently have were formerly licensing officers or had a different role in the former organisations, and were basically press-ganged into becoming compliance officers. So a number of those were, in my opinion, not well suited to investigation and compliance work.*

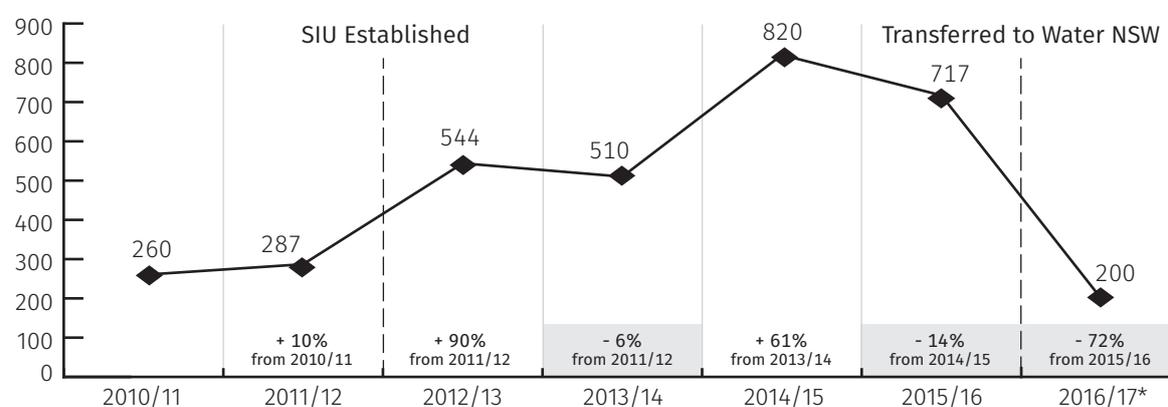
The difficulties arising from this cultural change were coupled with other problems. These included staff with no relevant background or interest in compliance work being reassigned to this task. The consequence was that carrying out a comprehensive and robust compliance program would be an uphill and long-term battle for the agency.

Evidence given to our third investigation suggested that certain sections of NOW had historically experienced significant morale problems. The NOW staff we interviewed referred in one way or another to their workplace being riddled with internecine rivalries. There were claims of nepotism and bullying and reports that up to a quarter of all compliance officers were on sick leave at any given time. The available evidence demonstrated that NOW had experienced significant staffing issues over recent years, particularly a lack of consistency between the north and south regions in terms of staff competence and outputs.

Frequent restructures had, in our view, a significant detrimental effect on the ability of the agency to deliver an effective compliance and enforcement program. The frequent changes led to a loss of corporate knowledge and productivity and low morale, which hampered the Department's ability to foster a positive culture and mature systems.

The impact of the Transformation on compliance and enforcement is a subject of our current investigation. For the moment, we note that publicly available information indicates that the inevitable disruption brought about by a major restructure and re-alignment of functions has had a significant negative impact on compliance and enforcement outcomes in the first twelve months post-Transformation. As shown in Figure 5, there was a 72% drop in total enforcement actions taken in 2016/17 compared to the previous year; an 80-85% drop in penalty infringement notices issued compared to the two preceding years; and an approximate 80% drop in warning letters. No prosecutions have occurred in the first twelve months post-Transformation.

**Figure 5. Enforcement actions taken annually from 2010–17<sup>54</sup>**



\* The 2016/17 (1 July 2016–30 June 2017) show composite data from DPI Water and Water NSW following the transfer of functions from DPI Water to Water NSW on 1 July 2016. Around 70% of compliance and enforcement was transferred to Water NSW.

However, recent information provided by Water NSW indicates that significant steps have been taken by Water NSW to resource and perform the compliance function. Water NSW advised that it has engaged a number of experienced investigators since 1 July 2017 leading to a significant increase in enforcement outcomes in the four months to 3 November 2017. The adjusted number of enforcement outcomes for the period 1 July 2016 to 3 November 2017 as provided by Water NSW is:

- 115 – formal warnings
- 192 – advisory letters

54. Based on information published in the Questions and Answers No. 122 on 14 September 2017 by the Legislative Council.

- 274 – no action
- 105 – Penalty Infringement Notices
- 12 – Prosecutions<sup>55</sup>
- 63 – statutory directions
- 187 – others<sup>56</sup>

### 6.3.6. Other compliance concerns

Our 2013 investigation report identified a potential conflict in combining the roles of industry promotion, licence issuing and regulatory action in one agency (at the time the Department of Trade and Investment, Regional Infrastructure and Services). There could be an inherent conflict if regulatory and enforcement functions were not adequately separated from the promotion of industry and investment. We recommended that the Government consider transferring functions relating to the enforcement of the Water Management Act and the Water Act from the Department of Industry to an independent external agency such as the Environmental Protection Authority. As an interim measure we recommended the Department act immediately to ensure an appropriate separation between NOW's regulatory functions and the Department's industry and investment promotion functions.

NOW did not support this recommendation and advised:

- Close cooperation between policy, licensing and compliance was required to ensure the objectives of the regulatory framework were attained. Separating enforcement from other compliance responsibilities would be counter-productive and potentially undermine the desired water management outcomes that the compliance program seeks to achieve.
- The SIU model aimed to develop a more strategic, risk-based approach to compliance, as a move away from responding to breach reports.
- NOW was confident that the Water Regulation Model would deliver an autonomous compliance program. The SIU was intended to operate independently from the broader water regulation function as a stand-alone unit.
- Service Level Agreements (SLA) were to be put in place between the SIU and the water regulation operational areas. The SLAs would be monitored by senior staff.
- A review would be conducted of the policies, procedures and guidelines in relation to autonomy and avoidance of conflicts of interest in the exercise of NOW's regulatory function.

We also recommended in 2013 that the Government consider establishing a water regulatory unit within an independent agency (such as the Environmental Protection Authority) to carry out investigation of offences under the Water Management Act and the Water Act. We recommended that any such a unit:

- be adequately funded to perform its responsibilities
- be staffed by qualified experienced persons with investigative experience in dealing with offences where the burden of proof is beyond reasonable doubt
- appoint experienced and qualified legal officers to deal solely with water issues within the Water Regulatory Unit, and

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55. The '12 – prosecutions' are on-going matters that include a prosecution in their case history, so a related action may have been necessary during the reporting period for the purposes of enforcing a judgment or order made preceding the reporting period.

56. 'Others' includes a range of entries into the WaterNSW compliance database covering informal education/advice correspondence; referrals to other compliance bodies such as local councils; etc. As such this total of 187 are not additional 'enforcement actions' (in the same way that '274 – no action' are not enforcement actions) but are relevant as they generally amount to preventative actions or potentially led to other authorities taking action.

- consider implementing policies, procedures and practices that include funding for compliance and enforcement activities, to be supplemented by compliance and enforcement fees applied to all water licences and approvals.

NOW was of the view that the compliance function was adequately resourced when the NEF resources were taken into consideration. It acknowledged that these resources would need to be maintained beyond the Commonwealth funding period which expired in 2016; NOW undertook to seek to maintain or increase the level of resourcing in its submission to IPART's 2015/16 Determination. It also agreed to review and provide advice to the Government about options for enhancing funding for compliance and enforcement activities, but noted that:

- legislation enabled NOW to recover certain costs associated with a successful prosecution and in particular enabled recovery of certain costs and expenses in relation to the investigation of an offence, and
- NOW's activities were subject to determinations by IPART, which set water prices for consumers at levels that already factored in NOW's compliance and enforcement costs, and that this framework imposed constraints on NOW's ability to impose additional compliance fees without legislative amendment.<sup>57</sup>

We recommended that the Government, with particular input from all agencies that share responsibilities for water management and regulation in NSW, consider conducting a comprehensive review of the water regulatory system. That review should:

- seek the input of industry groups and affected parties into best practice environmental conditions to be applied to approvals and licences under the Water Management Act and the Water Act
- consider the introduction of a system of implied consent for licensing applications for ground water, surface water and controlled works, to include automatic approval in the event an applicant had not been advised otherwise within a specified period, and
- consider introducing an incentive based system for compliance with environmental conditions in approvals and licences, to include:
  - a rating system for compliance by corporate and individual entities that categorised compliance levels as 'below compliance', 'compliant' or 'above accepted compliance levels'
  - reduced licence fees for organisations and individuals exceeding minimum compliance requirements
  - annual self-certification of compliance, requiring licence and approval holders to certify they have maintained licence or approval conditions
  - public listing of acknowledgement of compliance where a corporate or individual entity exceeds the minimum standards over a certified period
  - public listing of non-compliant entities, and
  - resources for compliance and enforcement to be targeted at non-compliant and minimally compliant entities.

NOW did not agree that a comprehensive review was required and its submission in reply to our office stated that this would be extremely broad and resource intensive in circumstances where there was no evidence of failure in relation to many compliance components. However, NOW acknowledged there were areas that may have warranted risk assessment and targeted review either because there were known issues or because there were emerging risks or opportunities, for example:

- management of water accounts

57. Department of Trade and Investment Regional Infrastructure and Services response to Ombudsman Statement of Provisional Findings and Recommendations dated 31 May 2013.

- incentivising compliance
- metering requirements, and
- extractive industry regulatory frameworks.

## 7. Conclusions

This office has maintained a long term interest in the management of the water resources in NSW. We are currently engaged in our fourth formal investigation into water regulation issues since 2007.

The issues highlighted in the current investigation are strikingly similar to the ones we found in our previous investigations. Reports into the earlier investigations were not made public as we received assurances from the relevant Department responsible for water regulation at the time that our concerns and recommendations would be considered and appropriate action taken. While in each case certain actions were taken to address many of the concerns we had raised, for a range of reasons the underlying structural and systemic problems were either not properly addressed, or if addressed initially, the impetus was not maintained. These reasons included:

- chronic under-resourcing of the compliance and enforcement roles
- the constant stream of restructures and transfers of water regulation responsibilities (seven times since 2007) that resulted in significant staff turnover, loss of corporate memory and poor staff morale, and
- a clash of cultures between a customer service focus and enforcement obligations, referred to in more detail below.

The insights gained from our earlier investigations demonstrate that the effectiveness of carrying out compliance and enforcement functions has been compromised by a deep cultural clash between a strong focus on customer service to water users on the one hand and the compliance and enforcement activities necessary to maintain the viability and integrity of the water market on the other. Both objectives are important and in the public interest, yet the existence and/or implications of this cultural clash do not appear to have been recognised or properly addressed. The potential conflict in combining industry promotion, licensing and regulation in one agency we identified in our 2013 investigation has not been addressed until this year in response to the Mathews report. We are concerned, however, that more thought may need to be given to how customer service principles can be applied in the enforcement context without undermining the objects of the legislative framework. It is anticipated that this issue will be addressed in our final report in the first quarter of 2018.

To avoid the failures of the past as detailed in this report, it is vital that any water compliance and enforcement effort is adequately funded and resourced and staffed by qualified experienced persons with investigative experience in dealing with offences where the burden of proof is beyond reasonable doubt. It is equally important that investigators are supported by, and have easy access to, water experts and legal officers experienced in water issues. The expertise that was developed by DPI Water and the SIU in particular should not be lost. Strong leadership support and a clear mandate from Government are paramount to the success of any future compliance model.

The current actions taken by Government to establish a Chief Natural Resources Regulator to be governed by an independent three person board appear to be a positive development.

On a final note, it is important to place on the record that much of the evidence we obtained in our third investigation, and so far in our current investigation, has come from public interest disclosures made to this office by staff working in the organisations responsible for water regulation. That so many staff members are driven to approach an independent investigation body to bring forward concerns invites inquiry as to whether there is both a lack of trust between staff and management, and a perception by staff that internal reporting mechanisms are not effective. We have been impressed by the evidence of the complainants and their views find support in other documentary and oral evidence in this investigation.

## Appendix 1 'The Shell Game' - administrative history of water management in NSW

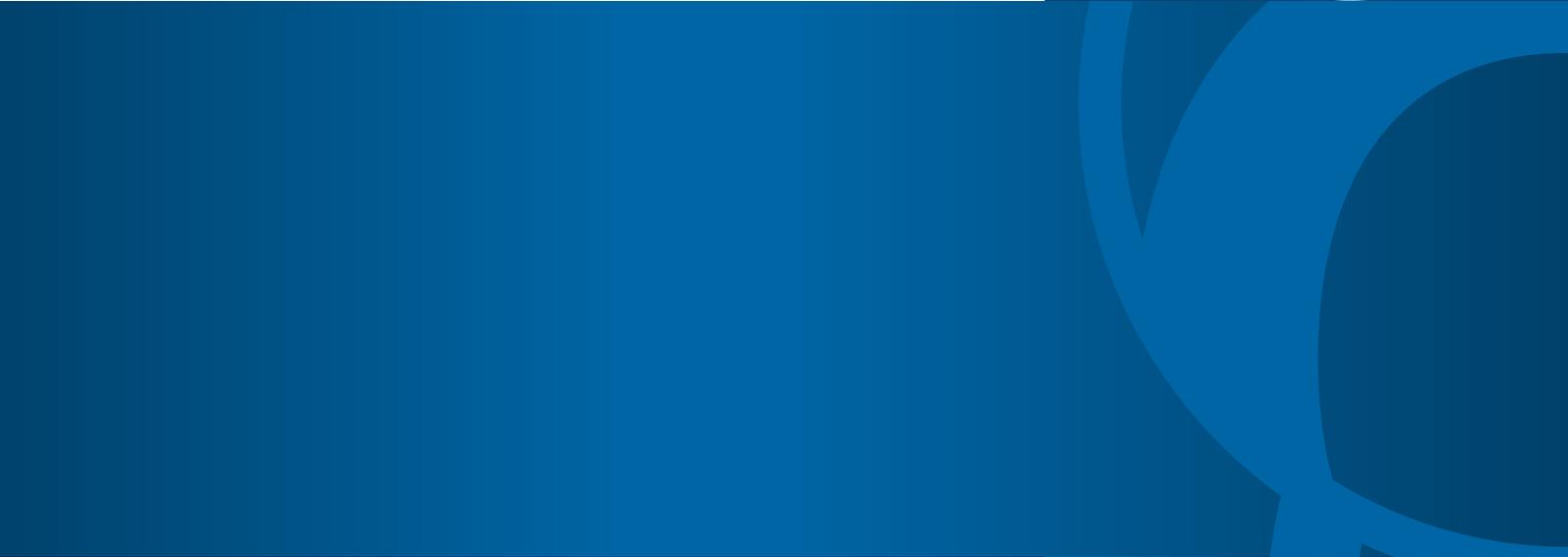
TIME PERIOD	MAIN WATER AGENCY	ASSIGNMENT OF WATER MANAGEMENT FUNCTIONS
6 April 1995	Department of Land & Water Conservation	The Department of Land & Water Conservation ( <b>DLWC</b> ) was established. Several separate departments were amalgamated, including Department of Water Resources and the Department of Public Works (Department Water Services Policy Division). DLWC also included Catchment Assessment Commission and the National Resources Audit Council. DLWC was responsible for providing policy advice for sustainable water resource usage. <sup>53</sup>
18 April 1997		Valuer General's Office ( <b>VGO</b> ) established as separate agency from DLWC, and was responsible for water regulatory and valuation functions. The State Valuation Office ( <b>SVO</b> ) was established and remained under DLWC. <sup>54</sup>
Sometime in 1997		DLWC realignment of water functions under single department. <sup>55</sup>
Sometime in 1997		<b>State Water</b> was established as a commercial business under the DLWC (Regional & Commercial Services Group) responsible for rural bulk water supply and managed water-related assets (e.g. dams). <b>Soil Services</b> was established as a commercial business under the DLWC responsible for water conservation earthworks. <sup>56</sup>
March 1999		Administration of the SVO was transferred to the <b>Department of Public Works and Services</b> . <sup>57</sup>
August 2000		State Water head office was relocated from Sydney to Dubbo, with staff located at a number of regional sites. <sup>58</sup>
2 April 2003	Department of Lands and Department of Sustainable Natural Resources	DLWC was abolished. State Water was transferred to the Ministry of Energy & Utilities ( <b>MEU</b> ). Various other water regulation functions were transferred to the Department of Lands, and Department of Sustainable Natural Resources ( <b>DSNR</b> ). DLWC water-related areas transferred included: State Water, Town Water & Recycling Services, Department of Public Works & Services, and Soil Services. <sup>59</sup>
1 July 2003	Department of Infrastructure, Planning and Natural Resources	Department of Infrastructure, Planning and Natural Resources ( <b>DIPNR</b> ) was established. DIPNR amalgamated the various water-related functions, including those of the DSNR. Aim of having a single department to provide integrated decisions and services in relation to natural resource management, land use and planning. For water issues, DIPNR was responsible for water regulation, compliance and pricing. <sup>60</sup>
24 September 2003	Department of Environment and Conservation	Department of Environment & Conservation ( <b>DEC</b> ) was established. <sup>61</sup> DEC was responsible for various water-related functions, including under its Environment Protection and Regulation Authority and various other sustainability programs. <sup>62</sup>
1 January 2004		MEU abolished. Department of Energy, Utilities & Sustainability ( <b>DEUS</b> ) established. <sup>63</sup>

TIME PERIOD	MAIN WATER AGENCY	ASSIGNMENT OF WATER MANAGEMENT FUNCTIONS
1 July 2004		State Water removed from DEUS and established as a State Owned Corporation (under the <i>State Water Corporation Act 2004</i> ). Key objectives included to capture, store and release water in efficient, effective, safe and financially responsible manner. <sup>64</sup>
29 August 2005	Department of Natural Resources	DIPNR was abolished and split into 2 departments: <ul style="list-style-type: none"> <li>• Newly established Department of Natural Resources (<b>DNR</b>). Key water-related functions of DIPNR transferred to DNR.</li> <li>• Department of Planning (<b>DP</b>). It appears no water-related functions of DIPNR transferred to DP.<sup>65</sup></li> </ul>
27 April 2007	Department of Water and Energy	DNR was abolished. <sup>66</sup> Department of Water & Energy ( <b>DWE</b> ) established. <sup>67</sup> DEC was renamed Department of Environment & Climate Change ( <b>DECC</b> ). <sup>68</sup> Water-related functions of DNR transferred separately to newly established DWE and renamed DECC. Other water-related functions were also transferred to the Department of Primary Industries ( <b>DPI</b> ) and DEUS. <sup>69</sup>
1 July 2008	Department of Environment and Climate Change (Office of Water)	Separate Office of Water established within DECC. Included staff from DWE involved in water regulation. <sup>70</sup>
1 July 2009	Department of Environment, Climate Change and Water (NSW Officer of Water)	DWE was abolished. <sup>71</sup> DPI abolished and functions transferred to the Department of Industry and Investment ( <b>DII</b> ). <sup>72</sup> DECC renamed Department of Environment, Climate Change & Water ( <b>DECCW</b> ). <sup>73</sup> DWE functions were split between the renamed Department of Environment, Climate Change and Water (which was now responsible for the Office of Water) and DII. <sup>74</sup> Office of Water renamed NSW Office of Water ( <b>NOW</b> ). <sup>75</sup>
4 April 2011	NSW Office of Water within DITIRIS	DECCW was abolished. <sup>76</sup> NOW and water-related functions transferred to the Department of Industry, Trade & Investment, Regional Infrastructure & Services (also known as the Department of NSW Trade and Investment) ( <b>DITIRIS</b> ). <sup>77</sup>
Sometime in 2014	Department of Primary Industries Water	DITIRIS abolished and functions transferred to re-established Department of Industry, Skills & Regional Development (also known as the Department of Industry) ( <b>DI</b> ). <sup>78</sup> NOW water-related functions transferred to newly established DI and renamed DPI Water.
1 January 2015		State Water and the <b>Sydney Catchment Authority</b> are consolidated to form the newly established <b>WaterNSW</b> (a State Owned Corporation). <sup>79</sup>
1 July 2016	Transformation	A number of functions related to the delivery of water services in NSW commence transfer from DPI Water to newly established <b>WaterNSW</b> (a State Owned Corporation). <sup>80</sup>
1 July 2017		Finalisation of transfer of DPI Water functions and employees (including various regulation and compliance functions) transferred to WaterNSW.

TIME PERIOD	MAIN WATER AGENCY	ASSIGNMENT OF WATER MANAGEMENT FUNCTIONS
19 September 2017	Crown Lands and Water (within Department of Industry)	In response to findings Ken of Matthews Report, DI undertakes transitional restructuring of water regulation functions by amalgamating DPI Water and Crown Lands into a newly established <b>Natural Resource Asset Division</b> . A separate and new <b>Natural Resource Access Regulator</b> led by a Chief Natural Resource Regulator will also be established as part of this new division. <sup>81</sup> Further formalised restructuring is anticipated.

58. NSW Government Gazette Special Supplement No.39, 5 April 1995, p.1859.
59. Report of the Department of Land and Water Conservation for the year ended 30 June 1997, p.7.
60. Report of the Department of Land and Water Conservation for the year ended 30 June 1997, p.9.
61. Report of the Department of Land and Water Conservation for the year ended 30 June 2000, p14.
62. NSW Government Gazette Special Supplement No.42, 8 April 1999, p.2688.
63. Annual Report of the Department of Land and Water Conservation 1999/2000, p14.
64. NSW Government Gazette Special Supplement No.67, 2 April 2003, p.4328.
65. NSW Government Gazette 20 June 2003 p. 5899- 5900; DIRNR Directions from the Department of Infrastructure, Planning and Natural Resources web site. [http://www.dipnr.nsw.gov.au/aboutus/the\\_vision.html](http://www.dipnr.nsw.gov.au/aboutus/the_vision.html) accessed 20/11/2003.
66. NSW Government Gazette No.152, Special Supplement, 24 September 2003, pp.9506-9509; Public Sector Employment and Management (Environment and Conservation) Order 2003, ss. 2 and 4.
67. NSW Government Gazette No.152, Special Supplement, 24 September 2003, pp.9506-9509; Public Sector Employment and Management (Environment and Conservation) Order 2003, ss.2 and 4.
68. Report of the Department of Energy, Utilities and Sustainability for 2003-04.
69. NSW Government Gazette No.110, 1 July 2004, p4983.
70. Public Sector Employment and Management (Planning and Natural Resources) Order 2005; NSW Government Gazette No.108, 26 August 2005, p.6385.
71. New South Wales Government Gazette No.56, Special Supplement, 20 April 2007, p.2435.
72. Public Sector Employment and Management (General) Order 2007, cl.16 in NSW Government Gazette No.47, Special Supplement, 2 April 2007, p.2103; amended by Public Sector Employment and Management (General) Amendment (DNR Corporate Services) Order 2007 in NSW Government Gazette No.56, Special Supplement, 20 April 2007, p.2435 (amending commencement date to 27 April 2007).
73. NSW Government Gazette No.47, Special Supplement, 2 April 2007, pp.2102-03.
74. NSW Government Gazette No.56, Special Supplement, 20 April 2007, p.2435.
75. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352) cls.2, 4 and 9; notified on NSW Legislation website, 27 July 2009.
76. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352); notified on NSW Legislation website, 27 July 2009.
77. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352) cls. 16; notified on NSW Legislation website, 27 July 2009.
78. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352) cls.2, 4 and 9; notified on NSW Legislation website, 27 July 2009.
79. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352); notified on NSW Legislation website, 27 July 2009.
80. Public Sector Employment and Management (Departmental Amalgamations) Order 2009, cl.10 (1); notified on NSW Legislation website, 27 July 2009; Department of Water and Energy website About Us New South Wales Government Reform <http://www.dwe.nsw.gov.au/about/index.shtml> (cited 14 September 2009).
81. Public Sector Employment and Management (Departments) Order 2011 (2011 No 184) cls. 19; notified on NSW Legislation website, 3 April 2011.
82. Public Sector Employment and Management (Departments) Order 2011 (2011 No 184) cls. 19; notified on NSW Legislation website, 3 April 2011.
83. Department of Trade and Investment, Regional Infrastructure and Services website, 'Who We Are' <http://www.trade.nsw.gov.au/about/who-we-are> (cited 27 June 2014).
84. <http://www.waternsw.com.au/about/newsroom/2015/welcome-to-water-nsw>
85. NSW Government Media Release, *Water Management: Reforms Pass NSW Parliament*, 1 June 2016; *Water NSW Amendment (Staff Transfers) Act 2016*.
86. Email from Simon Smith, Secretary of the Department of Industry, to Sanya Silver, Manager – Projects & Major Investigations at the NSW Ombudsman, 26 September 2017.





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