



FINAL REPORT | KEN MATTHEWS AO

Independent investigation into NSW water management and compliance

Advice on implementation



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NSW Department of Industry

industry.nsw.gov.au

02 9338 6963

contact@matthewsinvestigation.nsw.gov.au

Acknowledgments

Cover image: Darling River inland fish habitat near Menindee NSW, NSW Department of Primary Industries

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**Independent Investigation into NSW
Water Management and Compliance**
Chair: Ken Matthews AO

24 November 2017

Mr Simon A Y Smith
Secretary
NSW Department of Industry
GPO Box 5477
Sydney NSW 2001

Dear Secretary,

I am pleased to submit to you the final report of my Independent Investigation into NSW Water Management and Compliance.

My previous interim report diagnosed serious shortcomings in the New South Wales water management compliance and enforcement system. It offered a prescription comprising a package of reform measures to restore health to the system. The NSW Government accepted that prescription in-principle and your department is now responsible for delivering it.

As we have agreed between us, this final report assesses the department's progress to date in implementing the prescription and offers advice on how to tackle the considerable work involved in the months ahead.

At the outset I want to make two important points flowing from the public reaction to my interim report. First, community concern about compliance shortfalls has, if anything, intensified since my first report. The issue is not going away. The NSW Ombudsman has recently released a special report making many similar observations about longstanding problems in NSW water compliance and enforcement to those in my initial report. There continues to be strong and broad-based stakeholder support for firm and speedy action to fix the compliance and enforcement system.

Second, irrigators have expressed concern to me that the Four Corners program and my report have left an impression that non-compliance by irrigators is rife across the state. I want to make clear that that is not my view. The overwhelming honest majority of NSW irrigators take compliance seriously themselves and are firmly in favour of action against the small minority who may not be playing by the rules. They too, want the system fixed.

PO Box 4478, Sydney NSW 2001

Tel: +612 9338 6963 contact@matthewsinvestigation.nsw.gov.au

So, the environment for implementation is good. Decisive action is expected, and will be widely supported. Such a hospitable environment for reform is not always the case.

Against this background, my overall assessment of progress to date is that the government was quick out-of-the-blocks to accept the diagnosis and adopt the prescription. The legislation to put in place the new independent Natural Resources Access Regulator has been introduced and passed speedily. You took immediate action under the proper public service processes to deal with individual staff members associated with the Four Corners allegations. The steps you have taken internally within the department to more closely manage water have also been put in place without delay.

However, I am concerned that work on other elements of the total reform package is at risk of delay. I am concerned also about the risks of unwarranted 'watering down' of the reform measures as implementation proceeds. I am concerned that inter-agency boundaries, and organisational restructurings may, as has happened too often in the past, lead to an unsatisfactory or unworkable operational environment for compliance staff members in the future. Finally, I am disappointed that decisions have still not yet been taken about whether to proceed to prosecution in the several alleged cases of non-compliant irrigation activities aired in the Four Corners program. (I should note that I have been briefed in detail by WaterNSW on the practical reasons for this continuing delay.)

Based on my experience in public administration, this second report attempts to provide practical management advice to you and your senior executive team about how to resume and maintain progress on each of the separate projects now required to complete the reform package. The report includes particular advice about ways to ensure senior departmental management can monitor progress and give directional guidance to implementation staff when required. Good governance arrangements are critical for a major program of reforms such as this.


But the departmental implementation process needs to be more than well governed. Good process, planning, budgeting, and monitoring are necessary, but not sufficient. The people of the department who work on water issues have had a tough time particularly since the Four Corners report. Morale is at risk. After 15 years of major water reforms, change fatigue is clearly evident. Workloads have significantly increased as the latest set of reforms are tackled. So, the human side of this major reform process needs to be taken into account as well. In this, I commend the department's efforts to date including efforts to improve leadership visibility, communicate direction, nurture ethical values, provide support for distressed or discouraged staff, and encourage two-way feedback. These efforts will need to continue.

The reform prescription for the problems in NSW compliance and enforcement systems comprises a package of many interlinked measures. Certainly, the measures go well beyond the structural changes now legislated to create an independent regulator, important though that is. The concept of a package of many mutually supportive reforms, delivered over time, has not yet been clearly communicated to the public. If trust in the compliance system is to be rebuilt, there is a need for clear public communication about the many mutually-reinforcing elements of the reform package, and progress in their delivery.

I therefore recommend a program of package announcements by the Minister as the 'building blocks' of the reform package are put in place. I also recommend regular public progress reports by the department and that a further external, independent review of implementation progress by a body or individual other than myself be commissioned after say, twelve months. This would be consistent with the theme of transparency which was an important part of my last report.

I wish you well in your leadership of this vitally important water reform task. It is still early days in a long implementation process. The department is off to a good start but sustained effort, good process and authentic consultation with the many interested stakeholders will be critical to a satisfactory completion.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ken Matthews', with a stylized flourish at the end.

Ken Matthews AO

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Key messages: five risks to successful implementation

Through its decisions following my Interim Report on NSW water management and compliance, the NSW Government has embarked on an historic program of reforms to the way water compliance and enforcement is managed in the state. This second, and final, report provides advice on progress in implementing those reforms.

Implementation commenced speedily. The government was quick to accept in principle the full range of recommendations for reform. The major building blocks for change are being put in place quickly, in particular the legislation to establish the Natural Resources Access Regulator (NRAR). A selection process to identify suitable board members has commenced. A new division of the department to manage water and Crown Lands was created. A new Deputy Secretary experienced in natural resource management was recruited from outside the department to lead it. Leadership of the water group within the new division was changed. Additional staff were assigned. Within the broader department, a major program to foster ethical conduct was launched. Considerable top management attention has been directed towards rebuilding staff morale, team performance and commitment to the reform journey ahead. In my view, the department has made a good start.

However, my review has identified five risks to continued momentum. They are:

1. risks associated with **planning** the implementation of the reforms
2. risks in not allocating the necessary financial and staff **resources** to the tasks
3. the challenges in translating the government's desired high-level reform outcomes into specific and practical measures on the ground
4. increasing pressure from certain stakeholders to 'water down' key reforms, including reforms to water metering and improving transparency of information about water usage
5. the risk of uncooperative relationships between government agencies and the risks associated with a new round of restructuring of staff involved in compliance and enforcement.

These risks are manageable but will require close attention from senior departmental staff. More details follow.

1. Risks associated with planning the implementation of the reforms

The government's ambitious program of reforms will require scores of different projects and activities. Having an overall master plan identifying each and every such project is a basic prerequisite for managing the process. Such a master plan is being prepared but 11 weeks after the government's decisions, the plan is still not complete.

Beneath the master plan most individual projects will require their own plan. To date, there has been only limited progress in such project planning.

Machinery and processes to monitor and steer progress is being designed but is by no means fully in place.

I **recommend** that top departmental management move quickly to complete the implementation master plan, commission work on individual project plans, and

establish and commence operations of the necessary program oversight and steering arrangements.

2. Risks in not allocating the necessary financial and staff resources to the tasks

Reforms go nowhere without resources to complete the work. Although in excess of 20 additional staff have already been allocated to the department's water effort, budgetary resources have not yet been explicitly assigned to the reform process overall, nor to any individual project. Project leaders and their immediate managers need to have clarity about the resources available to them for the job. An estimated budget will be an important part of most individual project plans.

In the present case it is likely to be human resources (staff) that is the critical resource constraint. Recruiting staff almost always takes longer than planned and even co-opting existing staff members from elsewhere in the department with expertise relevant to a project tends to take longer than expected. Guidance needs to be provided to part-time team members about the proportion of their time to be dedicated to a reform project, and at what cost to their normal week-to-week work.

I **recommend** that the proposed top-level steering committee move quickly to clarify reform project budgets, and especially to make available the necessary staff resources and time.

3. The challenges in translating the government's desired high-level reform outcomes into specific and workable measures on the ground

It is not reasonable to expect ministers to specify every detail of a new policy. As in the present case, ministers commonly take decisions in principle and expect the public service to translate the outcome they seek into practical measures. This has always been an important means by which talented public servants support and complement their ministers.

For example, in the reform package decided by ministers following the Interim Report, ministers clearly committed to much improved water metering, much improved transparency of information about water usage, greater protection of environmental water, and a considerably more effective compliance and enforcement system throughout the state.

However, taking this broad guidance and translating it into practical measures is not easy. As work proceeds, the obstacles, practicalities, complexities, resource requirements, technical challenges, and stakeholder objections come into sharper and sharper relief. For example, judgments will need to be made about the cost-and-risk-effectiveness of water metering of small volume or very occasional extractions. The costs and benefits of more transparent water usage information will need to be weighed. The different options for protecting environmental water will need to be ranked. The sequencing of operational and administrative improvements to compliance and enforcement will need to be settled.

My advice therefore, is that it will be critical that the departmental steering committee closely monitors progress to ensure that the outcomes originally sought by ministers are not watered down to a point where these historic reforms are not, in practice, achieved.

A good discipline is to continue to test planned project outputs against the original broad conceptual outcomes desired by ministers.

4. Increasing pressure from certain stakeholders to ‘water down’ key reforms, including reforms to water metering and improving transparency of information about water usage

While stakeholder response to the Interim Report was overwhelmingly positive, certain important stakeholders have already expressed concern about two of the major reforms: water metering; and improved transparency of information about water usage.

It is critical that these concerns be considered carefully and respectfully.

Current plans are to take account of stakeholders’ views in a sequence of discussion papers and exposure drafts on the pathway to implementation. I support these plans as an opportunity for the government to understand the concerns and views now being put. It will be important also to invite and include the views of supporters of the reforms.

There will inevitably be some practical adjustments within the general policy outcomes sought. However, if too many ‘adjustments’ accumulate, there is a risk of gradually losing the current unprecedented opportunity to achieve long-overdue remedies to NSW compliance problems.

Again, monitoring by the steering committee of the cumulative effects of various project ‘adjustments’ against originally planned outcomes will be an important management oversight discipline.

As a further discipline, I **recommend** that the government announce now its intention to commission an independent audit and evaluation of results against ministers’ original target outcomes, after 12 months.

5. The risk of uncooperative relationships between government agencies and the risks associated with a new round of restructuring of staff involved in compliance and enforcement

My Interim Report, and the NSW Ombudsman's report since published, have made plain the problems caused by unresolved boundary issues between government agencies involved in compliance and enforcement. Similarly, endless restructurings and reorganisations have had a damaging effect on the quality of compliance and enforcement in NSW. In delivering on the government’s clear wish to raise the general standard of compliance and enforcement in the state, there is now a significant risk that these problems will be repeated.

Clarity about the respective roles of the Natural Resources Access Regulator, WaterNSW and the department’s new Crown Lands and Water Division will be critical. The objective should be to delineate roles to avoid any overlap in responsibilities. Not only is overlap unnecessarily costly but it causes confusion in the minds of clients and staff. Later in this report I **recommend** an allocation of roles to achieve this.

Even with the clearest of roles, constructive and collaborative relationships between the agencies will also be necessary to lift overall performance. I **recommend** the

establishment of machinery and protocols for the three agencies to stay in touch and to cultivate a constructive, collaborative working relationship. Learning a lesson from the Interim Report, these relationships will need to be nurtured at all levels in the respective organisations, with the more positive future tone of the relationships modelled by senior officers.

The risks to performance as a consequence of yet another reorganisation of compliance and enforcement staff (the creation of NRAR), needs to be recognised and managed. While no guarantees can ever be given that structural changes have ended, some practical steps can be taken. These include the finalisation of internal NRAR structures at the first meeting of the incoming board; finalisation of the boundary agreement between NRAR and WaterNSW before commencement of operations; and a joint commitment by the Departmental Secretary and the Chief Regulatory Officer (perhaps in the proposed Charter Letter or Memorandum of Understanding) that they see value in organisational stability for the period ahead.

Part A: Introduction and purpose of this report

On 24 July 2017, the ABC broadcast a Four Corners program concerning allegations of water mismanagement in the Barwon-Darling region of NSW.

The program focused on the extraction of large volumes of water for irrigation, highlighting the impacts on downstream water users and communities. It suggested that water purchased with taxpayer funds for environmental purposes was being diverted for irrigation. It alleged that certain irrigators had pumped water from the river system in periods when pumping was not permitted, or in quantities greatly in excess of their entitlements. It alleged that meter tampering was common in the region and that compliance and enforcement efforts were ineffective. It carried a report on an irrigation channel allegedly constructed on Crown land without approval.

The program carried an alleged audio recording of a teleconference between senior NSW Government officials and representatives of certain irrigator groups in which an official offered the irrigator groups special access to restricted government information. It was alleged that this information provided these irrigator groups with inside knowledge not available to other stakeholders, and thus advantaged them in their negotiations and dealings with government and other parties.

The program also interviewed a former departmental staff member who alleged that a proposed region-wide compliance and enforcement campaign had not received the necessary support from senior officials. Known individual compliance cases had remained unaddressed to the present day. It was alleged that the department had reduced its focus on compliance and enforcement. It was argued that this reflected a loss of appetite for compliance on the part of senior officials.

On 26 July 2017, the Minister for Regional Water, Niall Blair, announced that I would be conducting an independent investigation into the issues raised in the Four Corners program.

My terms of reference set out the following key goals:

1. Determine the facts and circumstances related to the allegations made in the Four Corners Program.
2. Assess whether the Department of Industry's policies and procedures (including the department's Code of Conduct) were complied with in relation to these allegations.
3. Assess whether departmental actions in relation to the allegations were appropriate in the circumstances.
4. Identify whether further action should be undertaken in relation to the allegations, including further investigation or referral to other authorities.
5. Identify opportunities to improve the department's water management, compliance and enforcement performance.

An Interim Report providing preliminary findings was to be provided by 31 August (subsequently extended to 8 September). A final Report (this report) with more definitive advice was to be provided by end-November 2017.

In the event, it proved possible in the Interim Report to offer substantive advice to the government suggesting responses to the Four Corners program. The Minister decided to take the report to Cabinet and the government accepted in principle all the recommendations of my Interim Report within its jurisdiction. In so doing, it set

out a longer-term reform agenda to improve NSW water compliance and enforcement arrangements and water management more broadly.

As a consequence, the need and scope for a Final Report in the form originally envisaged has reduced. Accordingly, on 30 October 2017, the Secretary of the Department of Industry and I agreed, through an exchange of letters (Attachment A), to an amended tasking for my Final Report as follows:

1. Assessing progress and providing advice on implementation of the Government's decisions following my initial Interim Report. This would be the main focus of the work.
2. Advising on policies, strategies and options to give practical effect to improved water metering and usage monitoring, especially in northern NSW.
3. Assisting NSW in the management of environmental water and in its dealings with the Murray-Darling Basin Authority (MDBA) and other jurisdictions to achieve whole-of-Basin improvements to compliance and enforcement arrangements.
4. Further advice on opportunities to improve the department's water policy advice and water management, including any matters from the original July terms of reference that emerge in the course of my further work.
5. Assist in the continuing work to improve staff understanding of public service ethics, conventions and professionalism and to lift standards of NSW public administration.

It was agreed that the primary character of my final report was to become an assessment of, and advice on, progress in the implementation of the government's decisions following the Interim Report. It was further agreed that I was to continue to act independently and that my scope for providing critical comment continued to be unconstrained.

Part B: Key findings and recommendations of the Interim Report

For ease of reference, a summary of the key findings of the Interim Report is as follows. Please refer to the Interim Report itself for the precise wording and complete listing of findings and recommendations.

The principal finding of the Interim Report was that water related compliance and enforcement arrangements in NSW have been ineffectual and require significant and urgent improvement. Specifically:

- 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.
- There is little transparency to members of the public of water regulation arrangements in NSW, including the compliance and enforcement arrangements which should underpin public confidence.

The report recommended the urgent initiation of a *Water Management Compliance Improvement Package*. The package included the creation of a new NSW Natural Resources Access Regulator (NRAR) and the consolidation within it of all compliance and enforcement functions now dispersed between WaterNSW and NSW Department of Primary Industries—Water (NSW DPI—Water).

These structural reforms were to be complemented by a package of more detailed administrative and operational reforms to make the NSW compliance and enforcement system:

- more transparent
- more independent
- considerably more effective than the current system.

Two flagship (and challenging) recommendations were the introduction of a universal requirement for metering of water extractions and a significant improvement to transparency and public accessibility of information about NSW water usage.

Part C: Implementation of actions flowing from the Interim Report

1. The department's overall plan for implementation

Following the NSW Government's acceptance in principle of all the recommendations of the Interim Report, on 11 September 2017, the NSW Department of Industry became the lead agency responsible for implementation. WaterNSW continues to be responsible for a smaller number of actions, pending commencement of the legislation to transfer compliance functions from WaterNSW to the new Natural Resources Access Regulator (NRAR) within the Industry cluster of agencies.

Within the department, the Secretary withdrew water responsibilities from the NSW Department of Primary Industries and created a new Crown Lands and Water Division, headed by a deputy secretary. A senior officer experienced in natural resource management policy has been recruited from outside the department to fill the new deputy position. New leadership was appointed to the water group within the division.

To manage the implementation process, the department (through the Crown Lands and Water Division) has developed a *'Matthews Reforms Implementation Project Master Plan'*. This plan is intended to consolidate and provide an overarching strategy for the many actions now required to implement the government's directions and decisions following the Interim Report. The plan is still being finalised but already provides a good indication of the work ahead.

The plan already identifies 20 separate projects to be undertaken. I envisage more projects will emerge over time. For each project the plan will assign lead responsibility and identify other parties to be involved or consulted. When completed, it will provide a brief outline of the proposed process and plan to deliver the project. It will set the timeframe and sometimes, milestones.

The Master Plan embraces a number of important subsidiary plans also to be developed:

- The Departmental Integrity Reform Program, including the 'speak up' whistle-blower program
- The Departmental Stakeholder Engagement Strategy
- A NSW Environmental Water Management Strategy
- A NSW Water Take and Metering Strategy
- The Natural Resources Access Regulator Establishment Plan to be put to the incoming NRAR Board.

The *Matthews Reforms Implementation Project Master Plan* is to be overseen by a steering committee chaired by the Deputy Secretary, Crown Lands and Water.

Implementation advice to the department

I support the development of such a master plan although I am concerned that 11 weeks after the government's decisions, the plan is still not complete. An exhaustive listing of all the actions required to carry forward the government's decisions is a

basic requirement for successful management of the implementation process through to completion. It will be needed also for accountability purposes in the future—to measure what was originally required against what was ultimately achieved.

I accept that intensive work on the highest priority tasks such as the new legislation has delayed finalisation of the plan and that the plan will continue to need to be modified as work proceeds. Nevertheless, I **recommend** that the plan be completed as a matter of urgency and maintained thereafter. Successive updates are opportunities to progressively provide more detail in the plan.

The advice in this second report should assist drafting of the plan. Specific recommendations are highlighted in this report, but there is also a good deal of more general advice which is not in the form of formal recommendations.

I suggest enhancements to the current master plan in four areas:

1. clarifying arrangements for stakeholder consultation
2. specifying staging/phasing of the work projects
3. specifying the roles, responsibilities, and authority of the steering committee to oversight progress in the plan
4. ensuring priority for the reform work in relation to departmental business as usual.

Details of these four suggestions follow.

Clarifying arrangements for stakeholder consultation

The Interim Report emphasised that comment on the recommended reform proposals should be invited from interested parties, including industry and community groups and members of the public. Consistent with one of the themes of the Interim Report, consultation will need to be broad-based, with no single group having a monopoly on access. As it prepares for these consultations, the department has already invested considerable effort in fostering a change of culture and practice within the department to ensure future consultation processes are experienced by stakeholders as authentic and satisfactory. I applaud these efforts.

I **recommend** that an early task for each ‘project lead’ should be to submit to the steering committee their plans for consultation. There is already considerable stakeholder interest in many of the projects, such as the metering projects and the projects to improve transparency of information about water usage.

By settling consultation plans now, interested groups will be able to know, in advance, their opportunities for involvement. In addition, staff managing individual projects will be better able to estimate timelines to project completion.

Specifying staging/phasing of the work projects

A related issue is the need to break up the work projects into manageable phases. While it is desirable to define the projects in terms of the final outcome to be achieved (which is the draft master plan generally does well), many projects will need to be developed stage by stage. Each completed stage should be submitted to the Steering Committee as an opportunity for management oversight and directional guidance.

For example, a phase one discussion paper might be completed and endorsed before a phase two legislation exposure draft is prepared. I therefore **recommend** that each 'project lead' should have an early task of defining the sequence of steps to be taken and products to be produced along the pathway to completion. These plans would be submitted to the Steering Committee for guidance and endorsement.

Specifying the roles, responsibilities, and authority of the Steering Committee to oversight progress in the plan

A major reform program such as this, covering at least 20 projects (I expect the number will grow), will require tight high-level management. It will be important that the Steering Committee be more than just an occasional consultative forum for interested senior departmental officers. I therefore **recommend** that the Secretary issue a formal statement of membership and terms of reference for the Steering Committee and make clear his expectations of a hands-on supervisory role and that the committee is ultimately accountable for progress. Equally, the Secretary should make clear to line areas that the Steering Committee has his authority to sign off at critical milestones of projects and to require changes in direction as necessary.

The terms of reference should require progress reports from the Steering Committee to the Secretary and the Minister from time to time.

Ensuring priority for the reform work in relation to departmental business as usual

Superimposing major reform tasks over a work team's normal week-to-week business is always difficult. Most responsible public servants feel a heavy responsibility to maintain their normal outputs, so a new, additional project is often difficult to resource. The Steering Committee will therefore need to make judgments about the opportunity cost of, and timing of, embarking on the new projects. It will be important for project staff to make transparent to senior management other tasks foregone or delayed in favour of the new reform projects.

Communication to all staff of the importance and priority of the reform projects will be important. This includes staff not immediately involved in the projects themselves. Staff need the opportunity to understand why resources are being re-assigned to new tasks. Transparency to staff of the overall implementation plan will therefore be important and could be furthered if the master plan were made available to all interested staff. This should also improve 'buy-in' and encourage cross-project linkages at staff level.

Budgetary resourcing of the reform projects will be a key success factor. Staff and financial resources will need either to be transferred from other current work or provided separately. Whichever option is chosen, resourcing needs to be made transparent. One practical difficulty with current reform planning is that the IPART funding recommendation in the Interim Report is unlikely to be realised until the end of the current determination period, which is 2020. In the meantime, resources may need to be garnered from existing budgets. Fortunately, the water areas of the department are currently 'underspent', potentially allowing resources to be available for the near term.

I **recommend** an internal funding allocation for reform implementation be announced as soon as possible. I **recommend** also that, immediately following the release of the MDBA's own Compliance Review report, discussions be undertaken with the

MDBA and the Commonwealth about the possibility of accessing Commonwealth funds available for basin plan implementation. Commonwealth funding for metering, compliance and enforcement, and protection of environmental water may advance the objectives of both levels of government. (This relates to my advice later in this report that efforts be made to re-set the NSW relationship with MDBA and to seek to align the NSW and MDBA reform agendas, especially in the area of compliance and enforcement).

However, it would be wise to recognise that securing a project budget is only the first step. Once a budget is allocated, recruiting staff almost always takes longer than expected and work cannot commence before staff are on board. I therefore encourage project leaders to take this into account in their project planning and **recommend** that the senior steering committee accept responsibility to facilitate the release and transfer of staff with expertise to relevant reform projects. This will sometimes require explicit choices to defer other work in favour of the reform projects.

Loss of momentum

One reason reform is difficult is that, as work proceeds, the obstacles, practicalities, complexities, resource requirements, and stakeholder objections come into sharper and sharper relief. Translating an apparently simple goal into a new policy, institution, or legislation is therefore always difficult.

Two of the most significant reforms from the Interim Report are the government's far-reaching in-principle decisions to implement water metering, and to significantly improve the transparency and public accessibility of information about NSW water extractions. It will be important for the Steering Committee to closely monitor progress in these critical areas to ensure these decisions are not watered down to a point where these historic reforms are not, in practice, achieved.

A third reform which will be closely watched by the public relates to improving arrangements to protect water for the environment. In this case, the issue to be monitored by the steering committee is the urgency and pace of implementation. As argued in the Interim Report, stakeholders will be looking for an early solution to the problem, even if the solution is only an interim solution with more enduring arrangements to follow. Timelines to 2019 have been discussed. In my view these are not sufficiently urgent. Later in this report (Part 6) I recommend a 90-day timeframe for recommending an interim solution, to be followed by advice on the more enduring solution within a timeframe sufficient to feed into the finalisation of Basin Water Resource Plans.

More than any other initiatives in the government's reform package, progress in these three areas (transparency, metering, and protection of environmental water) will be monitored closely by many external stakeholders.

2. The investigations into specific allegations of non-compliance in the Barwon-Darling region

The Interim Report reported on the several allegations in the Four Corners program concerning allegedly non-compliant extraction of water for irrigation from the Barwon-Darling River system. The report observed that these individual cases of alleged non-compliance had remained unresolved for far too long. The report

recommended that the appropriate authorities proceed immediately to assemble sufficient briefs of evidence to finally enable a decision to proceed to prosecution, or not.

WaterNSW is the appropriate authority in the first instance. WaterNSW has briefed to me in detail on the status of their continuing investigations. WaterNSW has advised that publication of material concerning those ongoing investigations and details of them maybe prejudicial to the investigative process and the interests of stakeholders. For that reason, I do not address the cases further in this report. However, I can report that, while prosecutions have not commenced, vigorous investigative steps are continuing with an expected resolution date in February 2018.

While I am disappointed that decisions have still not yet been taken I accept the reasons for the continuing delay. I am satisfied that WaterNSW is progressing the cases as fast as good legal process permits.

Almost needless to say, there will continue to be keen public interest in these cases and there have been valuable learnings already for the future design and operations of the NSW compliance and enforcement system. As argued in my Interim Report, these cases have not in general been well handled in the years leading up to the present, and I **recommend** that the Natural Resources Access Regulator consider conducting a post-case review to identify process improvements for similar cases in the future.

3. Allegations of inappropriate conduct by senior public servants

The Four Corners program included allegations about a "secretive group with irrigator lobbyists to discuss the Murray-Darling Basin Plan". It broadcast extracts from an alleged audio recording of a teleconference with the group. The program alleged that in the recording obtained of the meeting, "Gavin Hanlon (then Deputy Director General of DPI—Water) offers to share with the group sensitive government data". This included a privileged offer to make available "de-badged" Government papers.

The Interim Report focused on three issues flowing from this element of the Four Corners report. These were the:

- appropriateness of establishing the limited access reference group with irrigator interests
- appropriateness of the alleged sharing with the group of sensitive, security classified government information, including the alleged offer of further de-badged documents
- possibly unlawful recording of the teleconference.

Implementation advice to the department

Investigation actions

In accordance with the recommendations of the Interim Report, the Secretary of the Department of Industry promptly initiated a disciplinary investigation of the conduct of Mr Gavin Hanlon under the *Government Sector Employment General Rules, 2014*. Subsequently, on 15 September 2017, before the investigation had completed, the Secretary accepted the resignation of Mr Hanlon.

The Secretary terminated the employment of another senior executive, effective 22 September 2017. This executive had allegedly been involved in certain events reported in the Four Corners program, including the teleconference.

The Secretary also took action to initiate a further internal departmental investigation into the possibly unlawful recording of the teleconference. However, it has since been agreed to refer further action on this matter to other appropriate authorities.

Other response measures—Public Service ethics

In light of the Interim Report, the department has decided to introduce an externally-provided whistleblower service for employees and members of the public to easily and confidentially report fraud, corruption and or misconduct. This “*Speak up*” service will complement existing internal (staff) procedures for receiving and handling disclosures of improper conduct. A Request for Proposals has already been released and responses are being actioned.

A departmental cultural transformation program “*What will it take?*” has also been initiated and will include improved ethics training and community and stakeholder engagement and consultation. The department has already engaged a consulting firm to develop further details of the “*What will it take?*” program.

A further project is being scoped to develop a *Behaving Ethically Framework* for the department. If approved, the framework will seek to connect all the activities already undertaken in the department, and to develop a range of additional activities to embed ethical behaviour more firmly into the departmental culture.

In November of this year, the Secretary convened a full day meeting involving all Executive staff (the Senior Executive Leadership Forum) to discuss ethical issues. The day was led by Simon Longstaff of the St James Ethics Centre. Feedback was very positive. A smaller 50-person seminar of the Secretary’s direct reports, and their direct reports, was also convened by the Secretary to discuss ethical issues arising from the Four Corners experience. Again, feedback was very positive.

At staff levels below Executive, significant efforts have commenced to improve water staff engagement and to respond to the morale, communication, staff engagement and other issues which were surfaced in the department’s People Matter Employee Survey results.

Implementation advice to the department

I endorse and support the department’s cultural transformation program and the proposed *Behaving Ethically Framework*. Attention to the human dimensions of any change process is vital and the department’s initiatives are therefore well targeted. However, it will be important that activities go beyond staff training only—important though that is. I **recommend** consideration of the following initiatives:

- A review of the departmental Code of Conduct in light of the experience of the Four Corners program. Are there lessons to be learnt from the Four Corners experience? Are there aspects of public service conduct not satisfactorily covered by the current departmental code?
- A review of departmental guidance documents covering the handling of classified and sensitive government information. That officers

involved in the alleged teleconference considered that their handling of the documents was consistent with guidance material (a claim I do not accept) indicates at least a lack of clarity in that material.

- A review of all ethics-related departmental policies, including:
 - Code of Conduct Policy (see above)
 - Fraud and Corruption Prevention Policy
 - Gifts and Benefits Policy
 - Sponsorship Policy
 - ICAC Corruption Prevention Policy
 - Public Interest Disclosures Policy and processes.
- A review of staff induction processes including induction training, but possibly also induction briefings and ‘on-boarding’ material/welcome letter specifically addressing the ethical and conduct obligations of public servants. Guidance needs to be more than just a reminder to observe the ‘rules’. The rules need to be explained and made understandable to new staff at all levels. The rules need to be inculcated into ‘the way we do things around here’. Membership of a demonstrably ethical organisation can be a source of pride for most public servants and a powerful motivator of performance.
- Updating the current online learning module about the departmental Code of Conduct, and making the module mandatory for all staff.
- Consideration of how lateral appointees to the department from outside the public service can quickly absorb how the ethical and conduct obligations on public servants differ from those applying in the private sector.
- Consideration of how staff selections—especially at more senior levels— could take better account of the ethical example officers provide to others. This would need to be consistent with the merit principle but could be encouraged by means of revised staff selection criteria.
- Re-design of staff feedback processes to encourage frank and empowered communication up the line without staff needing the cover of anonymous formal whistle-blower procedures (although anonymous channels should of course, continue to be available). The healthiest organisations readily give and take advice up and down the line. Where questionable conduct occurs even by senior officers, it is questioned forthrightly, even by junior officers.
- Continuing reinforcement by the Secretary and other top managers of the importance of ethical conduct.
- Communicating that ethical conduct is not an onerous burden imposed on public servants, but rather a positive attribute of a modern workplace that encourages pride, collegiate commitment, loyalty, morale, and ultimately, team performance.

- Measures to ensure that ethical and public service conduct issues continue to receive departmental management attention into the future long, after the current impact of the Four Corners experience has dimmed. This could include the establishment of an appropriately senior standing committee with a mandate to carry forward the ethics issue, including regular reporting obligations directly to the Secretary.

Important though all these initiatives will be, the leadership and management challenge will be to embed ethical thinking into the ‘DNA’ of the organisation. The objective should be to shift perceptions of the department from an agency that (sadly and probably unfairly) is associated with a high-profile ethical lapse, to future perceptions of an organisation where ethics are particularly valued.

This will require consistent and persistent leadership from leaders at all levels in the organisation. It will require evidence that ethical conduct is valued and rewarded, and that local champions of ethics—at all levels—are recognised and receive promotion. It will require demonstrable intolerance of even minor ethical shortcomings anywhere in the workplace.

Organisational machinery and management processes will need to be designed to sustain the effort and keep the issues on the front burner. Executive level staff will need to be seen to have accepted past failings (even if they were in other areas of the department) and be seen to have ‘bought into’ corporate solutions. Though departmental management is the Secretary’s responsibility, occasional encouragement by the Minister would be helpful.

4. Consultation and engagement with departmental stakeholders

There were important lessons in the Interim Report about stakeholder engagement. The assessment in the Interim Report was that establishing a limited access liaison group with irrigator interests, may have damaged confidence in the professionalism and even-handedness of the NSW Department of Primary Industries. Excluded stakeholder groups may have perceived a lack of access to important policy development processes. The existence of the group may have detracted from the government’s endeavours to promote transparency. The risk of policy distortions as a result of inequitable access to the views of other groups may have increased.

Departmental response measures

The department has acknowledged that its previous approach to stakeholder engagement in the water sector was deficient. Stakeholders lacked trust. The approach was seen as non-transparent, not even-handed, and not fair, equitable, nor accessible. There had been no internal communications plan and no external stakeholder engagement plan. Stakeholder engagement had tended to be managed from a single point in NSW DPI—Water and not well integrated with the rest of NSW DPI—Water, nor the wider department.

The department has therefore initiated the development of a *Stakeholder Engagement Strategy* which is currently in preparation. One element of the strategy already decided, is that the communications and engagement teams will be embedded within the department, integral to the week-to-week operations of the agency. Engagement will be broadened to include the full range of stakeholders. As

an initial trial and demonstration of the new approach, a policy workshop involving 130+ stakeholder representatives is planned for December.

There are plans to redevelop the website to improve its appeal and utility for stakeholders. New arrangements to monitor and systematically record contacts with stakeholders, their concerns, risks and opportunities are planned. New processes to facilitate the pro-active public release of information will be developed.

For the first time the department's key stakeholders have been explicitly identified (a threshold requirement) and plans for how best to engage with each are being made. Special efforts are planned to improve engagement with indigenous groups.

Implementation advice to the department

I support the intention to develop a new *Stakeholder Engagement Strategy*. This will provide the opportunity to articulate a new and better departmental philosophy about stakeholder engagement. This will be of value to both staff members internally, and stakeholders, externally.

I suggest some principles flowing from the department's Four Corners experience:

- Ensure equitable and respectful access for the full range of stakeholders.
- Ensure transparency about the engagement arrangements in place.
- Ensure structures and processes are 'built-in' to wider departmental planning and decision making.
- Ensure senior managers lead, but do not monopolise, stakeholder engagement processes.

Engagement with a broader range of stakeholders

In relation to the first of the above, I **recommend** the department seek to make a significant adjustment to historical departmental practice by finding ways to provide greater access for water stakeholders such as environmental groups and agencies who until now have primarily engaged with the Office of Environment and Heritage. This should not be seen as a 'concession' making the future work of the NSW water department more difficult; rather, it should be seen as an improvement to previous work practices to enable more informed, comprehensive and rounded advice on water issues to the government.

It will be important also to recognise that stakeholder engagement needs to be designed for two-way traffic. As well as providing access to the department **for** stakeholders the strategy should be hard-headed about building and using channels for access **to** stakeholders by the department. A good strategy gives the opportunity to explain government thinking, make the case for necessary reforms, and enlist support for change. The department's unfortunate experience of the Four Corners program should not be allowed to drive a passive 'listening' agenda only.

I also **recommend** that the department seek to foster more constructive relationships with stakeholders elsewhere within the NSW Government. This includes the critical relationships with WaterNSW and the Office of Environment and Heritage. Re-setting these relationships will not happen overnight and may require patient leadership and modelling behaviour by divisional leaders.

As argued later in this report there would be advantage also in resetting the NSW water relationship with the MDBA and the Commonwealth Environmental Water Holder.

Engagement with irrigator groups

One challenge for planning stakeholder engagement arrangements into the future is the need to design appropriate future consultation arrangements with irrigator groups. The exclusive and somewhat private consultation forum for selected irrigator interests presented in the Four Corners program may not have been appropriate, but that is no reason for the department to be hesitant about close consultation with irrigator groups in the future. Indeed, the department has a special obligation to understand the views of irrigators, and irrigators have a right to be heard.

Factors to consider in designing the future arrangements include: non-exclusive access by the range of irrigator groups; transparent processes; and accessibility to the feedback received from irrigators for a wider range of staff members than may have been the case in the past.

The arrangements eventually struck for consultation with irrigators should certainly not be limited to a single forum. Healthy stakeholder engagement should always be open and multifaceted. However, in my view, a primary irrigators' consultation forum of some sort does need to be established. Consistent with other recommendations in this report, I **recommend** that the primary forum for consultation be established with published terms of reference and membership. The terms of reference should include guidance on how the forum will conduct its business. As well as being good management practice, this transparency will build public confidence in the propriety and integrity of the relationship.

Implementation advice on the strategy overall

As for the administrative process of preparing the new departmental engagement strategy as a whole, I **recommend** that: lead responsibility is made clearer; the timeline for finalisation of the strategy be settled, the authorisation (approval) process be specified in advance; and that the Minister, the Secretary, and his corporate communications staff be consulted as work proceeds.

It would be a powerful signal of the department's bona fides if key stakeholders were themselves consulted about the new strategy before finalisation.

5. Legislative and operational improvements to compliance and enforcement arrangements in NSW

The interim report recommended a *Water Management Compliance Improvement Package*. The package comprised two elements: a package of strategic structural reforms to be considered by ministers; and a complementary package of administrative and operational improvements to be considered by the Secretary of the department. The report proposed three principles for the future redesign of the NSW compliance enforcement system:

- Any future system needs to be more transparent.
- Any future system needs to be more independent.
- Any future system needs to be more effective.

The government accepted these recommendations.

Departmental implementation plans

These actions comprise by far the largest part of the implementation task flowing from the Interim Report. The actions include consolidating all compliance and enforcement functions now dispersed between WaterNSW and NSW DPI—Water and creating through legislation a NSW Natural Resources Access Regulator. In addition, some 35 specific options for action to develop a more transparent, independent and effective future system are now required to be carried forward. By any measure, this is a significant management task.

The department's approach is as follows. Some of the biggest implementation tasks are identified in their own right within the *'Matthews Reforms Implementation Project Master Plan'*. These include the legislative changes necessary to create the NSW Natural Resources Access Regulator (NRAR) and to transfer all compliance and enforcement functions into the new regulator.

Most of the 35 less-strategic options for action to improve the state's compliance and enforcement system will be identified as separate projects within the *Natural Resources Access Regulator Establishment Plan* which is being prepared for consideration initially by the incoming NRAR Board. Subject to the Board's view, the NRAR Establishment Plan would then go to the departmental steering committee for concurrence. However, it will be important to preserve the independence and prerogatives of the NRAR Board in this process.

Implementation advice to the department

The department was quick to commence a selection process to identify members of the incoming NRAR Board. This process is expected to be complete by the end of November 2017.

The department also moved quickly to contract a senior individual with significant experience in natural resource regulation to commence design work on the Natural Resources Access Regulator (NRAR). However, since then, delays in appointing staff—particularly staff with program and project management experience—has slowed progress. As for other implementation tasks elsewhere in the department, the experience has been that existing staff members—even those slated to transfer to the new regulator—are fully committed on their existing work and find difficulty in taking on new implementation projects for NRAR. I therefore **recommend** that staff appointments to NRAR and internal staff releases be expedited—partly to resume progress on preparing the NRAR Establishment Plan and partly to ensure the necessary staff are in place before the first meeting of the Board which is hoped to be arranged before the end of the year.

Preparing for the new NRAR Board

Despite the staff shortages, considerable design work has been done to prepare a recommended structure and operational principles for the incoming Board. In addition, a review of current departmental and WaterNSW compliance and enforcement capabilities has been initiated to understand professional capability gaps that will need to be filled.

To ensure the new Board can hit the ground running I **recommend** that agenda papers be available for the first meeting of the incoming Board covering the following subjects:

1. Background to the creation of NRAR and introduction to the legislation
2. Recommended processes for identifying and handling potential conflicts of interest
3. Report by the Interim Chief Regulatory Officer on establishment work to date
4. Proposed *Natural Resources Access Regulator Establishment Plan*, including:
 - a. roles and functions of the Board
 - b. recommended structure of NRAR
 - c. recommended operational principles
 - d. operational relationships with other relevant agencies
 - e. outcomes of the internal review of compliance and enforcement capability in NSW
 - f. transitioning to the new arrangements
5. Recommended strategic work priorities and draft workplan.
6. Next steps.

This would be a heavy agenda. It may be necessary to carry over some business to subsequent meetings.

I **recommend** that the Minister consider meeting the Board at its first meeting to communicate his expectations, including his commitment to the independence and success of the new agency.

I **recommend** that the *Natural Resources Access Regulator Establishment Plan* be published as soon as the incoming Board has endorsed it.

Minimising organisational restructuring

One lesson to be learnt from the compliance and enforcement failures of recent years is the debilitating effect on performance of constant organisational change. This lesson was brought out very well in the NSW Ombudsman's report issued earlier this month. The immediate implication is the desirability of launching the new NRAR with a clear and stable structure from the outset. Longer term, it will be important that ministers, NRAR board members, agency heads, and central agencies remain mindful of the invisible costs of organisational churn.

While no guarantees can ever be given that structural changes have ended, some practical steps can be taken. These include the finalisation of internal NRAR structures at the first meeting of the incoming Board; finalisation of the boundary agreement between NRAR and WaterNSW before commencement of operations; and a joint commitment by the Departmental Secretary and the Chief Regulatory Officer (perhaps in the proposed Charter Letter or Memorandum of Understanding) that they see value in organisational stability for the period ahead.

However, in my experience, the best guarantee of structural survival is always a reputation for organisational high performance. That reputation will have to be earned.

Clarifying agency roles

A second implementation issue is a possible ambiguity about the powers of the Board under the new legislation versus the residual powers of the Secretary of the department. The Secretary is the Minister's chief policy advisor for the portfolio as a whole, and has overall administrative and management responsibilities for the staff, resources and logistical support for cluster agencies, including NRAR. The NRAR is within the department but needs to be independent in its work.

I **recommend** that any such ambiguity be clarified before the commencement of NRAR by means of a charter letter or administrative Memorandum of Understanding from the Secretary of the department to the Chief Regulatory Officer within NRAR. The letter should set out the future administrative relationship between the department and NRAR and encourage the necessary strong relationship between the policy areas of the department and NRAR—while strictly respecting the independence of NRAR. The letter could also spell out the future respective roles of NRAR and WaterNSW (see following).

A third implementation issue relates to the necessary split of functions between WaterNSW and NRAR. The Interim Report recommended, and the government decided, that "all compliance and enforcement functions now dispersed between WaterNSW and NSW DPI—Water be re-consolidated into the Department of Industry". Negotiations have just commenced on the return of staff from WaterNSW. These negotiations will be challenging. There is disagreement about the appropriate residual role of WaterNSW staff in low level compliance and educative/advisory activities.

The department's objective is to give effect to the government's decision that "all compliance and enforcement functions ...be re-consolidated". It argues that compliance responsibilities do not sit well with the strong customer service orientation of WaterNSW. It notes that the experience of sharing compliance functions for different classes of customer post the Water Transformation restructuring was not a happy one. These arguments received support in the Ombudsman's report released on 15 November 2017. It is understood to be the view also of the MDBA, which also argues that it is good practice for all compliance functions to be in the same organisation. It is also my view.

For its part, WaterNSW considers it important that its staff on the ground should continue to be able to advise on compliance and, if necessary, impose low-level sanctions to encourage compliance. WaterNSW is prepared to exercise these low-level compliance functions within a framework set by NRAR, who would also retain step-in powers if dissatisfied with WaterNSW performance.

Both sides agree that whatever the outcome, it will be important to have a clearer delineation of roles than was the case after the previous Water Transformation process.

The department has prepared a paper setting out high-level principles to guide decisions on which staff should return from WaterNSW. This would need to be agreed with WaterNSW before negotiations could commence in earnest on staff transfers.

Based on my experience in public administration these processes could take an inordinate time and the outcome is still likely to be a compromise which will be likely

to be unsatisfactory to both sides. Instead, I **recommend** a clean break along the following lines:

- *Staff:* As decided by Cabinet, "all compliance and enforcement staff" would return from WaterNSW to the department.
- This means any staff member actively involved in enforcement.
- It also means a notional share of the WaterNSW staffing budget reflecting the proportion of time that WaterNSW officers currently deal with compliance issues.
- *Advice:* WaterNSW would henceforth no longer seek to advise individual clients on compliance matters. Where the need for such advice to a client became apparent, WaterNSW would refer that client to compliance staff within NRAR. For its part, NRAR would formally commit to timely response standards.
- *Education:* WaterNSW would retain a delegated role in contributing to customer education at the collective level, for example, the distribution of NRAR-endorsed educational materials to groups of customers or the presentation of such materials at meetings and conferences.
- *Sanctions:* WaterNSW would no longer have the power to issue low-level infringement or penalty notices. All such enforcement action would be with NRAR.
- *Reporting:* While the focus of WaterNSW staff would continue to focus on customer service, there would be an obligation on all staff including meter readers to contribute to compliance and enforcement efforts by mandatory immediate reporting to NRAR of suspected breaches. NRAR would formally commit to a reciprocal responsibility to consider the report in a timely fashion and to keep WaterNSW informed of follow-up action.
- *Liaison machinery:* Senior level consultation machinery would be established to monitor and steer the inter-agency working relationship and deal with any future operational interface difficulties.

A settlement along these lines would eliminate ambiguity and ensure that even well-intentioned independent education and advice provided by staff of the customer-focused WaterNSW did not jeopardise any future prosecution action by the regulatory-focused NRAR. Compliance and enforcement activities are not customer services; they are critical elements of successful regulation.

I **recommend** that the settlement between WaterNSW and NRAR be finalised as soon as possible. The current lack of agreement between agencies is a good example of risk to the timing of compliance performance improvement outcomes clearly sought by the government. Such risks will need to be actively managed. Intervention by ministers may be necessary.

I also **recommend** that the settlement be published as soon as finalised. This will enhance transparency and improve public understanding of the respective roles of these two key agencies in NSW water management. Publication could be in

conjunction with announcement of the new public reporting arrangements (telephone and email contact details) for members of the public concerned about possible non-compliance.

6. Protection of environmental water

The Interim Report identified the protection of environmental water as an urgent need—and that solutions should not wait until the Basin Water Resource plans are accredited and come into effect in 2019. Pending an enduring solution, the report proposed an interim solution involving greater use of event based mechanisms and utilising individual daily extraction limits.

Departmental implementation plans

The department has already commenced work to develop solutions. It has advised the MDBA of its intention to convene a working group including the Commonwealth Environmental Water Holder, the MDBA, the NSW Office of Environment and Heritage and potentially impacted water entitlement holders to discuss and seek agreement on temporary measures to protect the passage of held environmental water. The department has met with the MDBA to discuss next steps. The MDBA undertook to prepare an initial paper identifying opportunities for the MDBA to work with the department on the issue.

A Cabinet Submission and possible legislation is envisaged in the first half of 2018.

Implementation advice to the department

In my view these plans are insufficiently urgent and lack detail. In relation to the **process** to be followed, I **recommend** that the informal “working group” of part-time officers be re-designated an “Interagency Task Force” established with Ministerial or Secretary-level imprimatur to complete its defined, high profile task within a given time.

I **recommend** that timelines be set to deliver the interim solution within three months and that the more enduring solution be requested to be available well before the 2019 deadline for the finalisation of Water Resource plans.

To avoid ‘business as usual’ crowding out this urgent work, I **recommend** that an experienced senior officer (public service or contractor) be dedicated to lead the task full time. I suggest that nominees to the task force from other agencies also be full time, at least until the interim solution is in place.

I **recommend** that clear lines of accountability, regular reporting, and consultation and approval authority be established at the outset in terms of reference for the task agreed by ministers or secretaries.

To ensure its outputs receive due attention by the MDBA, I **recommend** that the MDBA be invited to build the Task Force process into the Authority’s own work program as its principal vehicle for resolving the long-unresolved issues associated with protection of environmental water in NSW, with potential for application in other jurisdictions where required.

In relation to the content of the task, I **recommend** that the terms of reference seek options and advice on at least the following:

- Scope for immediate voluntary agreements with major northern irrigators as an element of the interim solution
- Scope for greater use of event-based management in unregulated systems as part of both the interim and enduring solutions
- Advice on options to more actively manage low flows, including adjustments to commence to pump rules for Class A licences
- Scope to utilise Individual and Total Daily Extraction Limits already provided for in the Barwon-Darling WSP
- Scope for adjustments to, or abolition of, carryover arrangements where they exist in unregulated systems
- Advice on any necessary investments in metering or gauging to operationalise the recommended solutions, including the possible use of remote sensing technologies
- The merits of creating an active river operator to oversight and manage flows and extraction demands in unregulated systems
- Advice on how best to improve public awareness of environmental water arrangements (both planned flows and purchased entitlements), including improved real-time information about specific environmental flows
- Scope to improve science-based specification of, and public awareness of, the specific environmental objectives and outcomes of water dedicated for environmental purposes
- Transferability of any Barwon-Darling solutions to other water systems particularly in northern NSW
- Advice on mechanisms for implementation such as legislation, regulation and other.

The Interagency Task Force should also be requested to advise on the potential contribution to improved environmental water management of any future NSW Environmental Water Holder.

Voluntary agreements with irrigators

In relation to the first item listed above (scope for voluntary agreements with irrigators) it is my view that significant potential exists for an early, at least temporary, agreement by irrigators to contribute to a solution to the problem. For example, the number of irrigation licences on the Barwon-Darling is not large—around 200. Of the 200, the number of large irrigators is very small and a few have already expressed interest in discussing scope for making a contribution to better management of environmental water.

If a mutually acceptable agreement could be reached, implementation could be speedy as the need for legislation/regulation would be minimised or avoided. Different arrangements could be trialed to test the feasibility of more permanent protocols. The likely positive community response would certainly benefit the irrigators, whose public image has suffered in recent times and whose social licence to irrigate is at increasing risk. It would be a ‘local solution’ to the problem rather than

a solution imposed from outside. I **recommend** that the option be explored as a priority. Its feasibility should be included in the Task Force's initial report (due within 90 days) on interim solutions to the problem.

7. Intergovernmental and MDBA processes

The Interim Report observed that NSW is not an island within the Murray-Darling Basin. There is much that the Basin States collectively, and the MDBA specifically, can also contribute to improved whole-of-basin compliance and enforcement.

The Interim Report suggested a contribution by the MDBA in eight specific areas:

1. Clearly articulate and publish in advance the potential scope for direct action by the MDBA in compliance and enforcement.
2. Develop a revised whole-of-basin compliance and enforcement strategy.
3. Require more effective annual assurances from the basin states about their compliance and enforcement arrangements.
4. Implement reciprocal periodic third-party auditing of each state's compliance and enforcement systems.
5. Sponsor the formation of a national forum for compliance and enforcement agencies to share best practice, tackle transboundary compliance issues, and provide advice on opportunities for systemic improvements.
6. Announce now that the MDBA will take into account compliance and enforcement arrangements before it accredits any Water Resource Plan under the basin plan. Bring forward the Barwon-Darling Water Resource Plan for early assessment in this regard.
7. Announce now that the new Water Resource Plans will be assessed against the criterion of the adequacy of proposed arrangements for protecting environmental water.

The MDBA's response to these suggestions will be evident in the MDBA Compliance Review currently underway.

Departmental implementation plans

Since the Interim Report, NSW has actively sought to engage the MDBA. The NSW Premier has written to the Chair of the Murray-Darling Basin Authority providing a copy of the Interim Report and drawing attention to recommendations about ways the MDBA and other basin states can improve compliance and enforcement across the basin. The NSW Minister has written to a number of his Commonwealth and state counterparts in similar terms. The NSW Department of Industry has lodged a submission with the MDBA as a contribution to the MDBA's own current review of compliance and enforcement arrangements throughout the basin. Current planning is for the MDBA review to be released in late November 2017.

Implementation advice to the department

In my view, it is the latter MDBA review which is the key vehicle for achieving progress towards the NSW objective of engaging and leading the other basin states to an equivalent level of reform and renewed compliance and enforcement effort to that now initiated by NSW.

It is in the interests of NSW to have the MDBA play a more assertive role in relation to compliance and enforcement. The MDBA is uniquely positioned to engage and

lead the other Basin states. NSW will not be able to achieve whole-of-basin improvements acting alone. It therefore makes sense for NSW to seek to align its compliance reform efforts with those of the MDBA. It makes sense to seek to influence the outcomes of the MDBA review, and if satisfactory, it makes sense to drive hard to ensure their implementation throughout the basin.

I therefore **recommend** active and strategic input to the MDBA Review and to the decision-making processes to follow, by NSW at officials level up to and including the Basin Officials Committee, and at Ministerial level.

However, in arguing for a more assertive MDBA in compliance and enforcement it is important that the MDBA and the Basin states clearly delineate their future complementary roles. I **recommend** NSW seek to have the future compliance and enforcement roles of the Authority specified as follows:

- The Authority should focus its compliance and enforcement efforts, in general, at the Basin Plan level, while in future being prepared also to 'step-in' at the local level where a Basin state has manifestly failed to act satisfactorily.
- The Authority should in future be more prepared to exercise its full powers and leverage to ensure satisfactory compliance performance by Basin States (for example, legislative powers; WRP accreditation powers; influence over funding).
- The Authority should provide a common framework (strategic plan) for all Basin states' planning, execution and regular public reporting of compliance and enforcement.
- The Authority should be seeking to achieve equivalent standards, and levels of effort, in compliance and enforcement among all Basin states.
- The Authority should sponsor best practice sharing among Basin states in compliance and enforcement.
- The Authority should accept the responsibility to keep compliance and enforcement on the whole-of-basin agenda into the years to come.

Metering policy

In addition, the MDBA has significant potential to advance NSW objectives in relation to metering. The government has accepted the principle of 'no metering—no pumping' as recommended in the Interim Report. It has already committed to the urgent installation of meters for all large volume water users. More broadly, the government intends to consult on the implementation of its revised metering policy, including on how it may affect different categories of water users, what staging process maybe appropriate, and an assessment of technologies, costs and benefits to determine appropriate requirements. In relation to the latter, I **recommend** that consultation be broad: parties in addition to irrigators will have strong interests.

It would clearly be desirable to achieve alignment between the NSW Government metering objectives and any whole of basin technical or minimum threshold standards now likely to be proposed by the MDBA as a consequence of the MDBA

Compliance Review. Both reform processes are running in parallel and it would be unfortunate if different metering outcomes were recommended.

I therefore **recommend** that NSW urgently engage with the MDBA to outline NSW's objectives and intentions (including proposed consultation arrangements) in relation to metering and seeking a reconciliation of their respective positions.

It will be important also that consultations on future metering make clear to NSW stakeholders that any MDBA minimum standards emerging from its current compliance review must be a floor for NSW standards.

New technologies

In relation to metering, the Interim Report recommended more assertive adoption and implementation of new monitoring and compliance technologies such as remote sensing of crop growth and water holdings, and expanded use of back to base and remote meter reading and telemetry. A number of commercial firms and public-sector organisations have since expressed keen interest in contributing to future compliance and enforcement capacity in these areas.

The challenge for the department will be in selecting the most relevant of the capabilities on offer. The technologies, costs, technological maturity, track record and admissibility of remotely-sourced evidence in court, vary widely. Technologies are developing quickly. In such an immature technology procurement market a conventional tender process would be unlikely to yield the best outcome. Rather, the most responsible way for a government agency to discover the services potentially available is to initiate an Expression of Interest or Request for Proposals procurement process. This will give any potentially interested party an opportunity to make their case irrespective of the technologies they intend to deploy. It will be important that the requirement is expressed carefully in terms of metering and compliance and enforcement outcomes desired, rather than making assumptions about the best technologies to achieve those outcomes.

I **recommend** that such a procurement process be launched and I further **recommend** that opportunities to collaborate in harmonisation of remote sensing standards and procurement with other basin states and/or the MDBA should be explored.

Relations with the MDBA

A final issue for consideration is the overall NSW officials' relationship with the MDBA. From my observations, the posture of NSW officials towards the MDBA since the development of the Basin Plan has not always yielded the best results for NSW, nor for the basin as a whole. There was some evidence of this history in the alleged recorded teleconference in the Four Corners program.

Both the Premier and the Minister have taken opportunities since the Four Corners program to provide assurances of NSW's commitment to the success of the Murray-Darling Basin Plan. This should serve as a signal to officials.

As implementation proceeds of the historic reforms now agreed following the Interim Report, I suggest it would be timely to consider also a more productive posture to be adopted in NSW officials' future dealings with the MDBA. Of course, NSW should always be rigorous in pursuing the state's interests but opportunities to support the Authority in positive reform directions (such as enhanced compliance and

enforcement arrangements, above) should also be considered. Finding ways to ensure inclusive representation of the views and interests of the full range of NSW state interests (environment, communities, indigenous, floodplain graziers, etc., as well as irrigators) will also be important.

Attachment A: Exchange of letters settling the terms of reference for the Final Report



Independent Investigation into NSW Water Management and Compliance

Chair: Ken Matthews AO

30 October 2017

Mr Simon A Y Smith
Secretary
NSW Department of Industry
GPO Box 5477
Sydney NSW 2001

Dear Secretary,

Following completion of my Interim Report: *Independent Investigation into NSW Water Management and Compliance*, I am writing to propose the focus of my Final Report.

As you will recall, the original terms of reference for my investigation set out five goals:

1. determine the facts and circumstances related to the [Four Corners allegations]
2. assess whether the department's policies and procedures (including the department's code of conduct) were complied with in relation to the above matters
3. assess whether departmental actions in relation to the above matters were appropriate in the circumstances
4. identify whether further action should be undertaken in relation to the above matters including for example further investigation or referral to other authorities
5. identify opportunities to improve the department's water management, compliance and enforcement performance.

A good deal has changed since these original terms of reference were developed.

First, five other reviews or inquiries have been launched to address issues raised in the original Four Corners program.

Second, specific investigations are now in progress into certain public sector-related allegations made in the program. Externally, these include investigations by ICAC and the NSW Ombudsman. Internally, you have responded to the Interim Report by initiating investigations into the conduct of a number of departmental staff members.

Third, the allegations about non-compliance are being investigated by WaterNSW as they retain compliance functions at this point. WaterNSW has advised that briefs of evidence are nearing completion to enable decisions to proceed to prosecution or otherwise. Urgent finalisation of these briefs is consistent with recommendations in my Interim Report.

Fourth, the Government has accepted in principle all the recommendations of my Interim Report within its jurisdiction, and in so doing, has set out a far-reaching reform agenda to improve NSW water compliance and enforcement arrangements and water management more broadly.

In short, the necessary investigations highlighted in my original terms of reference are now in the hands of the appropriate authorities and a reform process is in train to minimise the chances of future administrative failings. The original goals (1-5 above) for my investigation have been substantially met through the Interim Report and the Government decisions that followed.

In these circumstances it is my view that the nature of my final report needs to be reviewed and my tasking going forward needs to be updated and re-specified.

Accordingly, I propose that my future work cover at least the following:

1. Assessing progress and providing advice on implementation of the Government's decisions following my initial Interim Report. This would be the main focus of Phase Two of my work.

PO Box 4478, Sydney NSW 2001

Tel: +612 9338 6963 contact@matthewsinvestigation.nsw.gov.au

2. Advising on policies, strategies and options to give practical effect to improved water metering and usage monitoring, especially in northern NSW
3. Assisting NSW in the management of environmental water and in its dealings with the MDBA and other jurisdictions to achieve whole of Basin improvements to compliance and enforcement arrangements
4. Further advice on opportunities to improve the department's water policy advice and water management, including any matters from the original July terms of reference that emerge in the course of my further work.

In addition to the above, I would be pleased to assist in the continuing work to improve staff understanding of public service ethics, conventions and professionalism and to lift standards of NSW public administration.

If you accept these proposals, the primary character of my final report would now become an assessment of progress in the implementation of the Government's decisions following the interim report. This would be complemented by oral and written advice on specific issues as requested from time to time by you or your senior nominee. For both the final report and the specific advisings, it will be important that my independence continue and that scope for critical comment be unconstrained. I would welcome your assurance that these conditions continue to apply, as they did during the first phase of my work.

I propose an exchange of letters to formalise these arrangements and to ensure shared expectations for the task ahead.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ken Matthews', with a long horizontal flourish extending to the right.

Ken Matthews AO



Office of the Secretary

SECO17/287, SECI17/402

Mr Ken Matthews AO
Independent Investigator
Independent Investigation into NSW Water Management and Compliance
PO Box 4478, SYDNEY NSW 2001

By email: ken.matthews@matthewsinvestigation.nsw.gov.au and contact@matthewsinvestigation.nsw.gov.au

Dear Mr Matthews

Your Independent Investigation into NSW Water Management and Compliance

Thank you to writing to me concerning the proposed focus for your Final Report for the Investigation. As you say, the necessary investigations highlighted in your original terms of reference are now in the hands of the appropriate authorities and a reform process is in train to minimise the chances of future administrative failings.

I agree to your proposal that the nature of your Final Report should cover at least the following:

- 1) Assessing progress and providing advice on implementation of the Government's decisions following your initial Interim Report. This would be the main focus of Phase Two of your work.
- 2) Advising on policies, strategies and options to give practical effect to improved water metering and usage monitoring, especially in northern NSW
- 3) Assisting NSW in the management of environmental water and in its dealings with the MDBA and other jurisdictions to achieve whole of Basin improvements to compliance and enforcement arrangements
- 4) Further advice on opportunities to improve the department's water policy advice and water management , including any matters from the original July terms of reference that emerge in the course of your further work.

As you have stated, the primary character of your Final Report will now be an assessment of progress in and providing advice on the implementation of the Government's decisions following your Interim Report.

I also welcome your assistance in the continuing work to improve staff understanding of public service ethics, conventions and professionalism and to lift standards of NSW public administration as you develop your Final Report.

I confirm as requested that, for both your Final Report and specific advisings, I expect you to continue to act independently and that the scope for you providing critical comment is unconstrained.

I look forward to receiving your Final Report and specific advisings at the end of November 2017.

Yours sincerely

Simon A Y Smith
Secretary