

Water: compliance and enforcement

A Special Report to Parliament
under section 31 of the
Ombudsman Act 1974.

17 August 2018

Water: compliance and enforcement

A Special Report to Parliament under
section 31 of the *Ombudsman Act 1974*.

17 August 2018

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone: 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
National Relay Service: 133 677
Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ISBN 978-1-925569-92-6

© State of New South Wales, 17 August 2018

This publication is released under a Creative Commons license CC BY 4.0.

ABN 76 325 886 267

Level 24, 580 George Street, Sydney NSW 2000

T 02 9286 1000 | F 02 9283 2911

Tollfree 1800 451 524

www.ombo.nsw.gov.au



17 August 2018

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Shelley E Hancock MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Madam Speaker

Pursuant to section 31 of the *Ombudsman Act 1974* I am providing you with a report titled *Investigation into water compliance and enforcement*.

I draw your attention to the provisions of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make the report public forthwith.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Barnes". The signature is fluid and cursive, with a long, sweeping tail.

Michael Barnes
Ombudsman

Contents

Executive summary	i
Introduction i	
The water investigation	i
The broader context	i
The outcomes of the water investigation	j
Key Lessons for Whole-of-Government.....	j
Managing restructures in the public service	j
Customer service principles in law enforcement environments.....	k
Summary of Findings.....	l
Transformation and compliance	l
Three compliance case studies.....	p
Detailed report	1
1. Transformation and compliance	1
2. The Transformation Complaints.....	1
2.1. Did DPI Water deliberately strip the SIU of its resources?.....	2
2.1.1. Background	2
2.1.2. Evidence.....	2
2.1.3. Analysis.....	3
2.1.4. Conclusions.....	4
2.2. Was the SIU transferred and disbanded in retaliation for complaints?.....	4
2.2.1. Evidence.....	4
2.2.2. Analysis	16
2.2.3. Conclusions.....	18
2.3. Were the SIU Manager’s delegations improperly removed?	18
2.3.1. Evidence.....	18
2.3.2. Analysis	20
2.3.3. Conclusions.....	22
2.4. Did DPI Water fail to communicate with staff about Transformation?.....	22
2.4.1. Evidence.....	22
2.4.2. Analysis	23
2.4.3. Conclusions.....	24
2.5. Did WaterNSW fail to integrate transferred water regulation staff?.....	24
2.5.1. Evidence.....	24
2.5.2. Analysis	26
2.5.3. Conclusions.....	28
2.6. Did WaterNSW have a different approach to compliance?	28
2.6.1. Evidence.....	28
2.6.2. Analysis	31
2.6.3. Conclusions.....	32
2.7. Did WaterNSW fail to take timely action to adequately resource compliance?	32
2.7.1. Evidence.....	32
2.7.2. Analysis	34
2.7.3. Conclusions.....	34

3. The Farm Dam Case Study One	35
3.1. Introduction.....	35
3.2. The evidence.....	35
3.2.1. Further correspondence from the local MP to the Minister	37
3.2.2. DPI Water’s meeting with the Minister’s office	38
3.2.3. The Department’s site visit with the local MP and the property owner.....	38
3.2.4. The ‘by-wash solution’.....	39
3.2.5. The ‘nutrient control pond solution’.....	40
3.3. Analysis of relevant issues.....	40
3.3.1. The legislative framework.....	40
3.3.2. The ‘solutions’ developed by DPI Water and WaterNSW	41
3.3.3. The approach to compliance by DPI Water and WaterNSW	42
3.3.4. The need for good public administration	44
3.3.5. Dealing with Ministerial representations.....	45
3.4. The Farm Dam Case Study One – Conclusion.....	47
4. The Farm Dams Case Study Two	47
4.1. Introduction.....	47
4.2. The evidence.....	48
4.2.1. The property.....	48
4.2.2. Actions taken in 2006.....	48
4.2.3. The first compliance case – 2012 to 2014	48
4.2.4. The second compliance case – 2015	49
4.2.5. The third compliance case – 2017.....	50
4.3. Analysis of relevant issues.....	50
4.3.1. The failure of DPI Water to take appropriate action	50
4.3.2. The need to understand the legislative framework.....	52
4.3.3. Significant delays	53
4.3.4. Issues raised by Water Sharing Plans.....	54
4.4. The Farm Dams Case Study Two – Conclusions.....	54
5. Compliance Case Study Three.....	55
5.1. Introduction.....	55
5.2. The complaints and the breach allegations	55
5.3. Action taken by DPI Water	56
5.4. Analysis of relevant issues	56
5.4.1. The expert report’s conclusions.....	57
5.4.2. The investigation process.....	57
5.4.3. The internal review.....	57
5.4.4. The importance of tamper proof meters for compliance.....	58
5.5. Compliance Case Study Three – Conclusions.....	60
6. Findings and Recommendations	60
6.1. Findings	60
6.2. Recommendations.....	63
Appendix 1 ‘The Shell Game’ - administrative history of water management in NSW.....	66

Executive summary

Introduction

The water investigation

In July 2016, the NSW Ombudsman's Office began its fourth formal investigation since 2007 into the administration of water compliance and enforcement under the *Water Management Act 2000* and the *Water Act 1912* (the water investigation).

This latest water investigation was prompted by public interest disclosures from staff of both the Department of Primary Industries Water (DPI Water)¹ and WaterNSW and a complaint from an irrigator.

On 1 July 2016, certain functions and staff from the former DPI Water were transferred to the state owned corporation – WaterNSW – through a program referred to as Transformation. The water investigation examined how water compliance was managed both before and after Transformation. It also included an in-depth examination of how DPI Water and WaterNSW dealt with three compliance cases about alleged breaches of the Water Management Act and considered a number of allegations concerning the Strategic Investigation Unit (SIU) within DPI Water.

In November 2017, the former Acting Ombudsman reported on the progress of the water investigation. The progress report summarised the findings of the three earlier investigations and identified concerns about water compliance that had persisted through previous structural changes. These included chronic and severe under-resourcing, issues with staff training and core capabilities, lack of adequate legal support and organisational culture issues.

The broader context

In July 2017, the ABC's Four Corners program, *Pumped*, broadcast allegations of widespread non-compliance with the NSW water legislation. The program sparked intense public scrutiny and led to five more investigations into water compliance issues. These were the Ken Matthews investigation (commissioned by the Minister for Regional Water, the Hon Niall Blair MLC), the Murray-Darling Basin Authority's (MDBA) Basin-wide Compliance Review, an ICAC investigation, a Senate inquiry into the integrity of the water market in the Murray-Darling Basin, and the South Australian Royal Commission into the operations and effectiveness of the Murray-Darling Basin system.

The NSW Government responded to the Matthews recommendations after his interim and final reports in September and November 2017 – and is taking a range of actions as part of its Water Reform Action Plan. The most significant and most relevant one for the water investigation is the creation of the Natural Resources Access Regulator (NRAR), which took over the compliance functions of both DPI Water and WaterNSW.

Unlike the previous agencies that were responsible for water regulation, the NRAR is an independent regulator. Its main objectives are to:

- ensure effective, efficient, transparent and accountable compliance and enforcement measures for the natural resources management legislation
- maintain public confidence in the enforcement of the natural resources management legislation.

As a result of these changes, the water management landscape is significantly different compared to when this water investigation began.

1. DPI Water was part of the Department of Industry.

The outcomes of the water investigation

The water investigation finalised a number of longstanding complaints about individual compliance cases. It highlighted the challenges DPI Water and WaterNSW had in managing a restructure the size of Transformation and the impact Transformation had on how compliance was done.

The Ombudsman found that aspects of the conduct of both DPI Water and WaterNSW in performing their water compliance functions had been unreasonable, based on irrelevant considerations or otherwise wrong within the meaning of s 26 of the *Ombudsman Act 1974*.

The evidence showed that the agencies failed to:

- adequately resource or secure funding to adequately resource their compliance functions
- clearly communicate changes to staff
- take appropriate and timely action on instances of clear breaches of the law
- meet acceptable standards of public administration in the conduct of their compliance functions.

There were also failures by DPI Water to ensure existing water meters met the requirements of the Interim Metering Standards for non-urban water meters – which undermined compliance efforts.

The Ombudsman's recommendations are aimed at ensuring valuable lessons from the past are used as learning opportunities and help to inform the future policies and practices of the new regulator.

The NRAR is an important reform and an opportunity to rectify the systemic and structural issues highlighted by this and other earlier investigations. Ensuring the NRAR is truly independent and adequately resourced will be vital to setting appropriate priorities and giving the regulator a visible, transparent and long-term role and strategy.

This is why the Ombudsman has made a range of recommendations to ensure that the NRAR has adequate long-term resourcing and establishes policies and procedures – including staff training and selection – to guard against repeating some of the poor investigative and management practices exemplified by the three case studies.

The Ombudsman has also recommended that the Department of Industry and WaterNSW review their communication, record keeping and delegation policies and practices, and the Department considers whether the objectives of the 'no meter no pump' policy could be achieved sooner – given the earlier extraordinary delays in this area.

Finally, the Ombudsman has recommended that the Department of Premier and Cabinet update and amend its 1992 Memorandum – 'Provision of Information to Members of Parliament' – to provide additional guidance to public sector staff when responding to Members of Parliament (MPs) who directly approach them to advocate on behalf of their constituents. The first detailed case study in this report (Farm Dam Case Study 1) highlights the difficulties staff experience when MPs vigorously advocate on behalf of their constituents, especially when those constituents may be suspects in ongoing enforcement matters.

Key Lessons for Whole-of-Government

Managing restructures in the public service

The Ombudsman's November 2017 water investigation progress report highlighted close to 20 occasions over two decades when the responsibility for managing ground and surface water resources was moved from one government agency to another. The report noted that the machinery of government changes were coupled with frequent internal restructures. These combined to have a devastating impact on staff, continuity of service, retention of expertise, and the ability of the responsible agencies to maintain their systems and corporate strategy.

An appendix to the November progress report contained the administrative history of water management in NSW since 1995. It has been reproduced in Appendix 1 of this report to illustrate the magnitude of the issue.

It is important to emphasise that frequent restructures in the public sector are a broader reality and not limited to the water administration portfolio. Challenges arising from recurrent and poorly managed restructures are increasingly a common theme behind many of the failures found in complaints investigated by the Ombudsman.

Research conducted into private sector restructures indicates that very few reorganisations add value, are completed on time and fully meet their business objectives².

A 2003 study by Gauld into the dissolution of the New Zealand Health Funding Authority and its merger with the Ministry of Health and District Health Boards indicates that some of the difficulties associated with restructures are magnified in the public sector where change is usually driven and complicated by politics³.

Gauld's study found that – in the public sector – there are added challenges due to difficulties in controlling information flows and coordinating timetables, workgroups and agencies. This was due to the complexities of government agencies. The relevant agency had to plan against and rely on the schedules of external parties, which resulted in confusion for participants and a lack of clarity on the stages of the transition.

A July 2018 submission by the UNSW Canberra Public Service Research Group to the Independent Review of the Australian Public Service highlighted that many machinery of government changes are highly disruptive, especially when they involve merging of organisations with different cultures within a short timeframe. Many similar challenges and impacts were evident in Transformation.

Machinery of government changes are inevitable. Restructures are unavoidable and often necessary to enable agencies to be responsive to changes in their environment and create public value.

The NSW Department of Premier and Cabinet's 2011 *Agency Change Management Guidelines* provide a useful framework for planning organisational change and are mandatory for all NSW public service departments, agencies and divisions. However, it is clear from the examples of poor management practices seen by the Ombudsman that more focused action is needed at a whole-of-government level to mitigate some of the substantial negative flow-on effects and resultant costs from poorly executed restructures. More comprehensive guidelines, especially on better communication practices, and more support for agencies on better managing change during restructures is needed.

Frequent communication by leaders that focuses on key questions relevant to staff – such as the rationale, time frame and practical implications of the restructures is of fundamental importance⁴.

The Ombudsman has consulted with the Public Service Commission on the need to enhance current guidelines in NSW and recommended that the Public Service Commission give consideration to reviewing current or developing new guidelines for agency restructures to ensure they encompass a focus on communication, employee support and the need for clearly articulating the rationale and vision for the restructure.

Customer service principles in law enforcement environments

Almost one third of all complaints the Ombudsman receives about government agencies relate to dissatisfaction with the level of customer service. This has been a consistent trend over time.

It is one of the Premier's Priorities to improve customer satisfaction with key government services. As a result, all agencies are working to improve services by simplifying processes, improving access to information and enhancing staff capability⁵. These are welcome developments.

-
2. McKinsey & Company, *Taking organizational redesigns from plan to practice: McKinsey Global Survey results*, <https://www.mckinsey.com/business-functions/organization/our-insights/taking-organizational-redesigns-from-plan-to-practice-mckinsey-global-survey-results> (accessed 1 August 2018).
 3. Gauld, R, 'The Impact on officials of public sector restructuring: The case of the New Zealand health funding authority,' *Journal of Public Sector Management*, 2003, vol 16, issue 4, p 303.
 4. Beauchamp, R, Heidari-Robinson, S, and Heywood, S, *Reorganisation Without Tears*, <https://www.mckinsey.com/business-functions/organization/our-insights/reorganization-without-tears> (accessed 1 August 2018).
 5. NSW Government, *Improving Government Services*, <https://www.nsw.gov.au/improving-nsw/premiers-priorities/improving-government-services/> (accessed 1 August 2018).

As the water investigation shows, it can sometimes be difficult for staff of regulatory agencies to reconcile the values embedded in delivering effective customer service with taking enforcement action. However, customer service principles and law enforcement are not incompatible.

A growing body of research has shown that people are more likely to comply with rules if they believe the rules are legitimate. The key to legitimacy is the perceived justice of the procedures used by the authority to implement the law⁶.

DPI Water's Customer Service Charter described its service goals as being responsive, accessible, accurate and consistent, communicating clearly, completing actions in a timely manner, valuing and encouraging feedback and driving continual improvement. The charter also committed to completing 70% of compliance cases within six months.

Such customer service goals are equally applicable to all members of the community, including suspects in enforcement investigations. If applied consistently and transparently they are likely to lead to increased compliance.

Agencies should not interpret their customer service obligations to mean they have to satisfy the expectations of those they are responsible for regulating. Good service in this context means the timely, professional, fair and efficient provision of regulatory services.

The issue of how customer service applies in practice in enforcement and regulatory environments requires further debate and development. The Ombudsman will continue to maintain a watching brief on this issue by monitoring agency practices through our complaint handling and investigative functions.

Summary of Findings

Transformation and compliance

Background

The government has done a great deal since the end of 2013 to try to determine an appropriate governance model for state-owned bulk water delivery in NSW. On 4 May 2012, the Schott Commission of Audit recommended that the government consider moving the operational activities of the NSW Office of Water (NOW) to the State Water Corporation (as it then was) and review and clarify the regulatory role of NOW.⁷

In late 2013, the government acted on the Schott recommendations and commissioned an independent review – known as the Bulk Water Review. Stage 1 of that review focused on the merger of the Sydney Catchment Authority with the State Water Corporation. That newly merged entity was established on 1 January 2015 and named WaterNSW. The second stage of the Bulk Water Review further considered the best arrangements for the governance of the NSW state-owned bulk water sector. This led to the decision that a number of functions undertaken by NOW would transfer to WaterNSW. NOW became DPI Water in July 2015. DPI Water and WaterNSW were tasked with working out precisely which functions (and people) should transfer.

As a result, in the second half of 2015, the Transformation program – led by DPI Water – started. The recommended division of functions was approved ten months later by the full Cabinet in April 2016. The Water NSW Amendment (Staff Transfers) Bill 2016 was introduced to the Legislative Council on 3 May 2016. The Bill was passed without amendment on 31 May 2016. WaterNSW's operating licences were amended to confer the relevant functions on that agency.

Compliance and enforcement was split between DPI Water and WaterNSW. DPI Water retained the function of enforcing compliance for all the entities it licensed (major utilities, water supply authorities, local water utilities, irrigation corporations and government agencies). WaterNSW took on responsibility for enforcing the compliance of licence holders to whom it issued licences, such as irrigators and farmers. According to advice received from DPI Water, the majority of compliance activity – approximately 70% – became the responsibility of WaterNSW after 1 July 2016.

6. Tyler, R, 2006, *Why People Obey Law*, Princeton University Press, Princeton.

7. Schott, P, *NSW Commission of Audit: Final Report: Government Expenditure*, (Report), NSW Government, 4 May 2012, p 364.

Transformation was a major restructure and realignment of water administration functions that involved the transfer of over 200 people from DPI Water to WaterNSW – as well as the transfer of assets and other infrastructure, including records.

The water investigation did not consider how the entire Transformation program was managed. It focused on examining the decision to transfer compliance functions to WaterNSW and how that transfer affected compliance, both in the lead up to Transformation and in the twelve-month period after 1 July 2016. It also considered a number of specific allegations about the SIU within DPI Water.

Inadequate communication

The process of transferring compliance functions and people from DPI Water to WaterNSW was poorly managed. Communication was inadequate before the transfer of staff. For example, on 1 June 2016, affected DPI Water staff received letters advising them that they were transferring to WaterNSW a month later. They were thanked for their 'continued commitment to (their) role and (their) support in helping the NSW Government achieve the highest service quality and delivery of better water outcomes across NSW'. For a large number of staff, particularly those in compliance roles, this letter was the first time they had been clearly advised they would be transferred from a government agency to a state-owned corporation. Although staff had a general understanding of the coming movements and most staff stayed in the same offices working on the same computers when the transfer occurred, this was a significant change with a significant impact on people's careers and entitlements.

Many of the witnesses interviewed said they were frustrated with the internal communications, which they felt caused a great deal of confusion. One witness stated that communication from leadership was very difficult and cryptic.

A senior staff member said that the biggest frustration for him and for many others was the fact that, although they wanted to tell staff more, their human resources area directed them not to say anything other than what had been approved.

One senior leader described the situation as follows:

...one of the most frustrating things for me through the whole change process, and I'm not sure I could fix this, was how filtered communications were from the Department to staff.

I couldn't for the life of me work out what a whole page actually said and I just thought, well, if I was a staff member reading this I'd pull my hair out.

Another senior staff member said he felt DPI Water was designing the process as they went along, which was not only incredibly frustrating for him but 'must have been horrible for staff'.

Less than ideal staff integration

Although WaterNSW prepared and planned to integrate transferred water regulation staff, the actual integration was less than ideal.

Many of the difficulties with integration could be attributed to an insufficient lead time and lack of adequate communication to ensure that WaterNSW was properly prepared to implement Transformation on the day of transfer. The CEO of WaterNSW gave evidence that he recalled saying to the Board of WaterNSW in early 2016:

'[i]t's very hard for us to know what we're getting in all of this because the transferor can't describe that to us, we were having a lot of trouble on a couple of those fronts just getting down to the nitty gritty of what are we talking about' and that persisted right up to 1 July.

WaterNSW had anticipated that staff would go to work on 1 July 2016 and do exactly the same job they had been doing on 30 June 2016 – and that this would be the case until WaterNSW determined their future structure and priorities. The reality was different. One executive described it in the following terms:

WaterNSW had such a job to do, to recreate and shape their business, as well as ... a lot of things [only] became known once it went to WaterNSW. It wasn't even known at DPI. The instability of systems. The amount of manual processes that run – you know, that were unnecessary. I brought in some people who I knew to provide sort of a crash course on lean processes. I would have had the guys in DPI undoing some of those processes and buying into some of that change and making those changes before it transferred [had I known].

Many of the water regulation staff who were transferred from DPI Water to WaterNSW initially saw the transfer as a positive move and an opportunity to improve water management compliance.

However, after a few months, at least some of the transferred water regulation staff felt that the opportunity for improvement had been missed. One officer described his experience as follows:

Our experience of never getting the restructure, never getting the integration, having to fend for yourself, having to find work arounds for everything you did showed that that wasn't the case [that it was positive]. When we moved over there were a whole lot of support groups, these were us and others, who had identified the shortcoming, identified a way to make up that gap and to fix the problem. Virtually all of those failed to deliver...they [WaterNSW] acknowledge[d] that they hadn't delivered but they hadn't been able to because the goalposts kept changing from people above them. Now, I don't know what the merit of that is but the reality was we were left to find solutions to all of these problems and some of them were very significant. We had to go and find them ourselves.

A clash of compliance philosophies

Some transferred water regulation staff struggled with the WaterNSW customer service vision, values and principles that they believed focused too heavily on the customer and made no reference to compliance and enforcement actions. WaterNSW senior management advised that staff were told that compliance and customer service objectives were not mutually exclusive. However, despite some attempts to address the issue – for example, through an article in a customer newsletter – there was no meaningful policy statement to guide staff on the key role compliance plays in protecting the state's water resources and what customer service looks like in the enforcement context.

One witness described how he thought compliance was seen by WaterNSW:

...compliance is a bad word within WaterNSW. It doesn't fit any of these values, it doesn't – it's all about be my partner, make it easy for me. Compliance isn't about making it easy for anyone, compliance is trying to bring someone into compliance which sometimes means that you're going to offend someone, and by doing so you're going to bring them into compliance. They're breaking the law; they need to be occasionally offended.

These sentiments were echoed by other witnesses.

By the end of 2016, a decision was made by WaterNSW that compliance investigations would be part of the Customer and Community Team, whose role was described to staff as:

Relentlessly focus on understanding and anticipating the needs and wants of our Customers & Communities, evaluating WaterNSW's performance in meeting those needs and wants and continuously improving our Customers' and Communities' satisfaction with WaterNSW. Accountable for all Customer and Community relationships. Also accountable for developing the Customer Strategy that delivers on the needs and wants of our Customers and Communities and also ensures that everything WaterNSW does and all the decisions it makes are driven by the needs of our Customers and Communities.

WaterNSW placed a strong emphasis on the customer and failed to sufficiently and consistently acknowledge that enforcement is essential in certain circumstances. The four customer service principles ultimately adopted and promoted by WaterNSW were – Understand and Know Me, Value for My Money, Make it Easy for Me, and Be My Partner.

When a WaterNSW manager was asked about reconciling the customer service principles of Be My Partner and Make it Easy for Me with compliance actions such as prosecutions and fines he said that you couldn't because they were contradictory and didn't fit with the 'pointy end' of compliance.

Despite attempts by the WaterNSW executive to reassure staff, those who had been transferred from DPI Water believed that WaterNSW was reluctant to take stronger enforcement action and instead appeared only focused on the education aspects of the compliance spectrum. Their perceptions were reinforced by the fact that WaterNSW did not provide staff who conducted compliance inspections with Penalty Infringement Notice books for over a year after Transformation. This situation, coupled with a failure to adequately resource compliance, led to disengagement by staff and diminished compliance performance.

Inadequate compliance resourcing

The resourcing of compliance was not given priority before Transformation, nor for over twelve months afterwards.

The adequate resourcing of water compliance functions has long been a vexed issue in NSW. The Ombudsman, over the course of a decade, has consistently found the function to be seriously under-resourced and has made recommendations to the responsible agency to address the issue. Up until the recent creation of the NRAR, there has been little evidence that sufficient resources have been devoted to this area of water management.

DPI Water's SIU specialised in high risk enforcement investigations and had 12 investigators when fully resourced. The Manager of SIU raised concerns in the middle of 2015 with DPI Water executives that the SIU staffing was being depleted. The reason for this was that additional Commonwealth funding for compliance was coming to an end in 2016 and positions were not being filled or made ongoing. Those concerns were well founded. No consideration was given by DPI Water to securing alternative funding for its dedicated compliance unit. Transformation was not an adequate explanation for this failure.

Transformation was not going to reduce the compliance workload for DPI Water and WaterNSW. However, only half of the original resources were retained at the point of Transformation – which meant that WaterNSW only acquired four specialised investigators.

The Ombudsman found that – after Transformation – WaterNSW failed to properly resource its compliance functions until after the Four Corners allegations were broadcast in July 2017. At this time, WaterNSW fully assessed the resources it required and employed a team of approximately nine contractors. By that time, it also had a further 21 non-contractor staff doing investigations and site inspections. Although the structure of the compliance function was not finalised until December 2016, WaterNSW could have taken steps sooner to deal with the high volume and significant backlog of cases it had inherited from DPI Water.

The lack of resources, the impact of the disruptions, the failure to manage staff expectations, the lack of effective communication, and a failure to integrate staff in a timely fashion had a significant negative effect on compliance performance. As reported by the Ombudsman's November progress report, combined DPI Water and WaterNSW compliance outcomes declined by 72% in the first year after Transformation⁸.

After the Matthews investigation in the second half of 2017, the NSW Government recognised the importance of properly resourcing the compliance function. As a result, the NRAR now has:

- 64 compliance officers/investigators engaged in compliance, breach investigations and monitoring activities, on-the-ground education and engagement
- 4 staff in the Water Enforcement Team, which will consist of a Director and 3 legal officers who will oversee and supervise investigations
- 12 Coordination officers for intake and triage of non-compliance reports and preliminary investigations.

This is long overdue reform. The government is to be commended for eventually giving this issue the attention and resources it requires. However, such resourcing needs to be safeguarded.

Allegations involving the Strategic Investigation Unit

One of the aims of the Matthews investigation, as noted in his interim report, was to clarify allegations made by the SIU Manager in the Four Corners program. The allegations made in that program concerned a lack of motivation by DPI Water to pursue compliance matters, resource reductions to the compliance effort and the abolition of the SIU. The Matthews report noted that, although a large amount of information specific to the SIU Manager's allegation had been obtained in the course of his investigation, it was decided to not include it in the report in order to avoid impeding investigations by other authorities, such as the Ombudsman.

Complaints about the SIU included allegations that it was deliberately disbanded and that SIU staff were transferred to WaterNSW in retaliation for making complaints to management about improper conduct by colleagues.

8. NSW Ombudsman, *Investigation into water compliance and enforcement 2007-17*, (Report), 15 November 2017, p 25.

The Ombudsman found no evidence that the SIU was improperly disbanded or that its staff were transferred to WaterNSW in retaliation for raising allegations and complaints. However, as discussed earlier, DPI Water did not direct sufficient effort toward securing the ongoing viability of the SIU in the lead up to Transformation.

The prevailing view about whether compliance functions would best fit in DPI Water or WaterNSW gradually evolved during Transformation. Eventually, it was decided that the split of compliance between the two agencies would mirror the split of their customers. The agency that had responsibility for licensing a customer also acquired or retained the responsibility for enforcing compliance by those customer groups. This proposal was approved by Cabinet. Regardless of whether this was the best option, there was no evidence that the decision was motivated by a desire for retaliation.

The SIU Manager also alleged that his delegated powers were improperly removed. The Ombudsman found there was no formal revocation. There was also no evidence that officers were acting under the control of another person in such a way as to breach the rule against dictation. This rule holds that, when a person has a statutory discretion, they must not be hindered by a superior authority from independently exercising that discretion. Although DPI Water senior management did not offend the rule, they came close to doing so and demonstrated a lack of understanding of how delegated powers operate. Interfering in a delegated officer's discretion to make a decision is unlawful. Giving staff, and specifically managers, clear and accurate guidance on how to exercise delegated powers is essential – as it helps to ensure public officials understand and follow proper decision-making processes. If an agency believes that an officer with delegated powers is using that power inappropriately or inconsistently, they should seek legal advice before taking steps to limit discretion.

Three compliance case studies

The Ombudsman examined in detail how DPI Water and WaterNSW handled three compliance cases and included them in this report as case studies. Two case studies involved farm dams and one involved an alleged pumping of water far in excess of the enterprise's entitlement.

All three case studies demonstrated poor decision-making – as well as a failure to follow the legislative and policy framework and basic principles of good administration, such as adequate record keeping and reasonable timeliness. Senior staff showed an unreasonable reluctance to take enforcement action, despite repeated apparent breaches of legislation. There was a lack of understanding among some staff of the enforcement options under the legislation and excessive and unexplained delays in taking action.

The two farm dam case studies involved dams that were investigated by DPI Water and/or WaterNSW for being constructed, modified or not licensed in accordance with the requirements of the water legislation.

The first dam was moved and doubled in size to approximately 20 mega litres (ML) far exceeding the 1 ML allowable storage for the size of the property. The second case involved several unlicensed dams with a storage capacity of over 600 ML, enough to fill over 200 Olympic size swimming pools. As in the first case, this was much greater than the allowable storage volume for the property of 50 – 100 ML. Although the dams were in existence for a long time, they were required to be licensed and could not be used for irrigation.

Both cases involved years of multiple inspections and attempted enforcement actions by staff, without a clear resolution of issues or any consequences for the property owners – who had free access to water during that time. According to advice given by DPI Water to one of the property owners, a 10 ML water entitlement on the open market would have cost him between \$10-20,000.

The first dam case started in 2012 and was completed five years later in 2017 when WaterNSW developed a solution to bring the dam within an allowable exemption under the legislation. This meant the dam no longer needed to be licensed. While the outcome was lawful, the Ombudsman found it was not in the public interest. Expert opinion sought by the Ombudsman showed that the solution was likely to have practical effects on neighbouring landholders by reducing the amount of rainfall runoff into the area. The solution also deviated from standard practice with no sound basis. This erodes public confidence in the regulator's consistent and fair application of the legislative framework.

The second dam case first came to attention in 2006 when officers realised that the dams were unlicensed and were missed during the period the relevant water sharing plan was drafted. Despite a number of follow up inspections and attempts by junior staff to escalate the matter, the dams have remained unlicensed for over ten years.

The Ombudsman recommended that the NRAR review the two farm dam case studies to consider whether any further action should be taken.

The third case study involved allegations that a cotton growing enterprise took water far in excess of its entitlements for several years through a sophisticated scheme of meter manipulation. As evidence of the allegations, the complainant pointed to the volume of crops grown during an otherwise dry period – which would have required close to an additional 30,000 ML of water. DPI Water investigated but found no evidence of breaches. The Ombudsman sought expert opinion from the UNSW Water Research Laboratory. The expert report concluded that the overall evidence collected during the site inspections was of little use in assessing the allegations. Although the expert found no clear evidence of breaches, the report noted that the meters on the property were not required to be sealed and were not fully inspected by DPI Water. The expert report confirmed that only accurate offtake metering could have clarified if there were illegal extractions.

The Ombudsman identified a number of concerns with DPI Water's investigation process – such as lack of investigation plans, and a failure to conduct a genuine review of the complainant's concerns.

The case study prompted an examination of how metering requirements were regulated.

The Ombudsman found that DPI Water had failed to properly oversee and enforce metering standards and put in place adequate measures to ensure NSW complied with its commitments to the National Water Meter Standards that were developed in 2009 under the National Water Initiative (NWI).

After consultation earlier this year, the government released the Draft NSW Metering Framework to be implemented by regulations and through further consultation.

The complete roll out of the metering requirements, as envisaged by the draft framework, will take five years to the end of 2023.

With the current completion targets, the roll out of full metering for non-urban water will have taken close to twenty years since its inception through NWI. Given the extraordinary delays in progressing this important public policy issue to date, measures must be put in place to avoid further delays and speed up the current roll out of meters.

The Ombudsman recommended that the Department of Industry consider what action could be taken to achieve the objectives of the Draft Metering Framework sooner than the current final target date of 2023, and take action to ensure existing meters are compliant with the relevant regulations.

Detailed report

1. Transformation and compliance

On 3 July 2015, the Minister for Primary Industries, Lands and Water, Niall Blair, announced that the NSW Office of Water (NOW) would be replaced by the Department of Primary Industries - Water (DPI Water). In his media release, the Minister signalled that:

While the traditional role of government functions such as policy, planning, regulation and water program administration will be the focus, the NSW Government will look to remove duplication and overlap in operational areas.

The Minister foreshadowed that DPI Water and WaterNSW, a state owned corporation (SOC), would be working together to progress the reforms.⁹

The Minister's announcement provided a broad direction for the reform that would come to be known as the Transformation. Work started by DPI Water and others shortly after July 2015 to work out the details of Transformation.

In late 2015, the NSW Government approved in principle and at a high level which functions would transfer from DPI Water to WaterNSW. It also approved the development of a more detailed business case.

Although there was formal approval, considerable uncertainty remained about whether to transfer some of the functions – including the function referred to as 'compliance'. Throughout the early stages of 2016, DPI Water management continued to work out, with the assistance of external consultants, precisely which functions and staff members would be transferred to WaterNSW.

In mid-February 2016, a NSW Government interagency working group made up of senior officers decided that part of the compliance function should transfer to WaterNSW. In April 2016, the government approved Transformation, including the transfer of part of the compliance function to WaterNSW. The Water NSW Amendment (Staff Transfers) Bill 2016 was introduced to the Legislative Council on 3 May 2016. The Bill was passed without amendment on 31 May 2016. On 1 July 2016, twelve months after the Minister's initial announcement, Transformation was completed with the conferral of a range of functions on WaterNSW and the transfer of over 200 staff from DPI Water to WaterNSW.

2. The Transformation Complaints

The Ombudsman started receiving complaints about Transformation in June 2016. The complaints continued over several months and related to both DPI Water and WaterNSW.

The complaints about DPI Water primarily concerned the SIU and alleged that DPI Water:

- Deliberately stripped the SIU of its resources so that it became ineffectual.
- Transferred SIU staff to WaterNSW and discontinued it as a standalone investigation unit in retaliation for SIU officers making complaints to NOW/DPI Water management.
- Improperly removed the SIU Manager's delegations under the Water Management Act.
- Failed to communicate with staff effectively and clearly during the Transformation process.

Later complaints about WaterNSW alleged that WaterNSW failed to:

- Properly integrate transferred water regulation staff.

9. Hon Niall Blair, Minister for Primary Industries, Lands and Water, media release, 'DPI water established', 3 July 2015.

- Acknowledge and address the perception that transferred water regulation staff had of cultural and philosophical differences in their respective approaches to compliance.
- Take timely action to adequately resource compliance.

2.1. Did DPI Water deliberately strip the SIU of its resources?

2.1.1. Background

The adequate resourcing of compliance functions for water management has long been a vexed issue in NSW. The Ombudsman, over the course of a decade, has consistently found the function to be inadequately resourced and has made recommendations to the agency responsible to address the issue. The November progress report noted that other regulatory agencies, including councils, workplace safety inspectors and others, had far higher levels of resourcing, which raised concerns about how priorities for water regulation were determined.

The creation of the SIU was a direct response to the Ombudsman's recommendations following earlier investigations.

The SIU, modelled on a similar arrangement in the NSW Environment Protection Authority (EPA), was created in 2012/2013 to focus on investigating and enforcing serious breaches of water laws. The SIU reported to the Director, Monitoring and Investigations Branch (MIB). The MIB incorporated a proactive monitoring role funded through the Commonwealth under the National Framework for Compliance and Enforcement Systems for Water Resources Management (NEF).¹⁰ Some investigator positions in the SIU were also funded through the NEF. When fully staffed, the SIU had 12 investigators including the manager. The NEF funding was received for a limited period until 2016 as part of a national approach to strengthening water compliance and enforcement in each state and territory.

By 2015, NOW had established the so-called water regulation model – which combined the functions of licensing and compliance within a single Water Regulation Group. The intention of the model was to create generic positions that would undertake the whole spectrum of regulation, from writing licence conditions and monitoring compliance to enforcing low-level compliance matters.

2.1.2. Evidence

In mid-2015, the manager of the SIU raised concerns about ongoing funding for the unit with the Deputy Director General of DPI Water¹¹. The SIU manager was concerned that if funding was not secured there would be a shortage of staff to do compliance work which would have an impact on DPI Water's customers.

Senior staff, including the Director of MIB, were aware that the funding was temporary. They had previously raised with the Commonwealth that, without further funding for the project, they would not be able to recruit towards the end of the year because people would not be willing to take short-term contracts. However, once Transformation got underway, management considered that there was little point in making a bid for funding to continue the NEF funded compliance and monitoring positions. DPI Water's role in compliance was under consideration and it was likely that compliance would be transferred out of government. In addition, in late 2015 there was a staff hiring freeze.

The uncertainty caused by the funding situation, particularly among temporary SIU staff, resulted in many skilled investigators looking for other employment and a significant decrease in staff morale. The work that had been the domain of the SIU fell to staff within the Water Regulation Group, who did not feel equipped to undertake high-level strategic investigations.

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

11. NOW became DPI Water in July 2015.

The Deputy Director General gave evidence that he made no deliberate decision not to prioritise or find funding for the SIU. He recollected that around this time he was looking at setting up a Resources Regulator. His focus was therefore on strengthening strategic investigations and compliance activities, not winding them down. Despite his intentions about the Resources Regulator, by the time of Transformation on 1 July 2016 the SIU had decreased from twelve to six employees. Four out of the six were transferred to WaterNSW, including the SIU Manager.

2.1.3. Analysis

When the SIU was established, it was staffed with seven permanent positions and – over a period of time – the NEF provided funding for an additional five positions. It is acknowledged that the intention of the water regulation model was to upskill licensing staff to undertake low-level compliance activities and allow the SIU to focus their expertise on the medium to high-risk matters. However, the evidence before the Ombudsman demonstrates that NOW, and DPI Water after it, was never entirely successful in properly resourcing its compliance function. While the twelve officers in the SIU were – in the view of the Director of the MIB – ‘punching well above their weight’ in relation to the results they were achieving, they were still under-resourced even before Transformation. The Ombudsman was told that, optimally, the SIU should have had around 24 investigators.

When the SIU Manager raised the issue of funding for the SIU in mid-2015, his concerns about the depletion of SIU resources when the NEF funding came to an end were well founded. DPI Water was well aware (from previous Ombudsman reports, as well as other reports they commissioned) that the resourcing of compliance needed to be prioritised, and had given undertakings that it would be.

The evidence indicates that from the preparatory steps of Transformation in mid-2015 until early 2016, the SIU was expected to stay in DPI Water. There was therefore ample time for NOW/DPI Water to attempt to secure an alternative source of funding for those NEF funded positions in the lead up to Transformation.

The evidence given to the Ombudsman was that management did not take sufficient action to find alternative sources of funding to keep the temporary SIU investigators. The explanations given were that this was either due to a freeze on recruitment or because Transformation was on the horizon. Despite the SIU Manager specifically drawing the attention of the Deputy Director General to the funding needs of the SIU, the Deputy Director General gave it limited consideration and did not act to identify alternative funding sources.

Although there was no evidence that a deliberate or conscious decision was made to reduce the number of SIU investigators, Transformation is an inadequate explanation for the failure to secure funding so that appropriately trained and specialised staff could be retained on temporary contracts.

The expected split of compliance functions between DPI Water and WaterNSW was unlikely to result in a reduced combined workload for the two agencies after Transformation. If all the investigators working for DPI Water in mid-2015 had been retained through Transformation, approximately eight investigators would have transferred to WaterNSW and four would have stayed. Those staffing numbers would have more closely aligned with the resourcing required, but it would have still been difficult for such a small number of staff to provide a comprehensive compliance service for both agencies.

Once WaterNSW eventually in 2017 assessed the resources required for its compliance functions relating to investigations and enforcement, it employed a team of approximately nine contractors dedicated to carrying out compliance activities. By then, WaterNSW also had a further 21 non-contractor staff doing compliance investigations and site inspections and assisting other investigative staff.

If the government had not responded to the Matthews interim and final reports by establishing the NRAR, the Ombudsman would have had to again make recommendations about giving priority to the funding of water management compliance activities.

It is understood that the NRAR will have the following staff resources:

- 64 compliance officers/investigators – who will be engaged in compliance and monitoring activities, on-the-ground education and engagement, and pursuing breaches across NSW.
- 4 staff in the Water Enforcement Team – which will consist of a Director and 3 legal officers who will oversee and supervise investigations proceeding to resolution, whether civil or through prosecution.

- 12 Coordination officers – who will accept, assess and triage reports of non-compliance and progress initial investigations.

Once all the positions have been filled, there will be a total of 80 staff focusing solely on the compliance and enforcement of water regulation in NSW. This is a welcome step in the right direction. The Government is to be commended for eventually giving this issue the attention and resources it deserves – and such resources should be safeguarded.

Despite this long overdue action, it is highly regrettable that the SIU was allowed to dwindle to half of its 12 intended FTE (full time equivalent) staff on the eve of Transformation. By the time WaterNSW received the investigation and enforcement function from DPI Water, the SIU was significantly depleted – with only four investigators able to be transferred to WaterNSW.

2.1.4. Conclusions

There is no evidence that a deliberate or conscious decision was made to reduce the number of SIU investigators to the point that they could no longer adequately perform their role. However, DPI Water management failed to take action to find an alternative source of funding for the SIU – despite this issue being raised with the Deputy Director General as early as July 2015.

Had funding been prioritised by DPI Water, so that appropriately trained and specialised staff could be retained, approximately eight investigators would have transferred to WaterNSW. Many of the problems experienced by WaterNSW after the transfer may have been avoided – particularly the significant backlog of cases WaterNSW inherited from DPI Water and its inability to deal with them before late 2017. Similarly, four experienced investigators would have been retained by DPI Water – avoiding the need for recruitment action to be undertaken shortly after Transformation.

Good governance involves ensuring – or at the very least attempting to ensure – that agencies are properly resourced. Not doing so is a failure to meet acceptable standards of good public administration. The loss of expertise, skills and corporate knowledge was avoidable and will take significant time and resources to rebuild. The attrition of the SIU also came at significant personal cost to many of the staff involved.

2.2. Was the SIU transferred and disbanded in retaliation for complaints?

2.2.1. Evidence

The SIU Manager's complaints to NOW/DPI Water Management

In 2014, the SIU Manager reported a number of allegations about a fellow colleague to the management of NOW. The allegations were independently investigated and certain findings made.

In early 2015, the SIU Manager made further allegations of corrupt conduct about the same colleague. The new allegation was considered and it was decided that – due to insufficient detail, the passage of time and the generalised nature of the allegations – no further action would be taken.

In mid-2015, the SIU Manager raised allegations with DPI Water management about possible corrupt conduct of other NOW staff. The SIU Manager was asked to provide evidence to support his claims so that the allegations could be properly assessed and referred to the appropriate authorities if necessary. DPI Water has no record of any further information being received from the SIU Manager. The SIU Manager's recollection was that he told a senior executive in DPI Water that he would only provide the information to an independent investigator, but then heard nothing more.

The SIU Manager gave evidence to the Ombudsman that he was dissatisfied with the results of the investigations and the subsequent approach taken by management in dealing with the matters he had raised. Before being transferred to WaterNSW, the SIU Manager had consistently made his views about how his complaints had been handled known to NOW/DPI Water management – including writing emails to the Deputy Director General and the Director General of DPI.

The SIU Manager formed the view that, in response to his complaints about colleagues and his management of the first Farm Dam case, DPI Water – and specifically the Director of Water Regulation and Deputy Director General – took retaliatory action against the SIU, and in particular the SIU Manager, by transferring part of the SIU to WaterNSW.

The process leading to the decision to transfer compliance functions to WaterNSW

In determining the details of Transformation, DPI Water relied on a number of reports from external consultants – including Deloitte Access Economics (Deloitte), ThirdHorizon, and Ernst and Young.

Deloitte was engaged to consider first which functions could be done by government and which could be outsourced.

In August 2015, Deloitte provided DPI Water with a report titled ‘Role of Government in Water Services, NSW Office of Water’. The report sought to answer a number of high level questions in relation to DPI Water’s functions, such as ‘Should government provide this service?’, ‘Is DPI Water best placed to deliver this service?’ and ‘Can the service be delivered more efficiently from outside DPI Water?’

Deloitte’s view was that there was scope for compliance investigations to be outsourced.

Around the time of the Deloitte report, the Deputy Director General engaged a Director of Transformation to lead the Transformation program on behalf of DPI Water. The Director of Transformation recalled that – after Deloitte gave DPI Water their report – various DPI Water managers reviewed the report and consulted within their teams. She recalled that not everyone was consulted as, at this stage, DPI Water did not want to create fear or uncertainty for staff.

On 9 October 2015, the Deputy Director General delivered a webinar to all staff and presented a PowerPoint slide pack that was subsequently emailed to all DPI Water staff. One of the slides indicated that ‘compliance management’ was considered to be a customer or operational function and was therefore likely to be transferred to WaterNSW.

The Deputy Director General clarified in his evidence to the Ombudsman that the slide was intended to convey to staff that ‘compliance’ in the context of someone who pays to use water – as opposed to a government entity that has a water licence – would be transferred to WaterNSW.

At the time however, there was no clarity provided in the slides or webinar as to what the term ‘compliance’ meant. The Director of Transformation, who had drafted the relevant slides, told the Ombudsman that ‘likely to transfer’ meant 70%-80% likely to transfer and that she understood ‘compliance management’ meant a spectrum of actions – from managing licensing conditions and compliance with those conditions through to prosecution.

In November 2015, ThirdHorizon consultancy was engaged to undertake a consultation process with DPI Water managers. On 19 November 2015, a workshop was held that focused on functions other than compliance. ThirdHorizon requested data from the Water Regulation Group about the complexity of their transactions and the amount of time they took to complete tasks. A spreadsheet was prepared and the Acting Deputy Commissioner asked the Director of MIB to fill in information that related to compliance. It is not known whether the Director of the MIB consulted with the SIU manager before he provided information to ThirdHorizon. An internal audit report of DPI Water functions, emailed to ThirdHorizon on 13 November 2015, identified the Director of the MIB – rather than the SIU Manager – as the subject matter expert for compliance investigations.

A draft report by ThirdHorizon of 27 November 2015 stated that compliance should remain with DPI Water.

An Employee Functional Assessment spreadsheet dated 7 December 2015 indicated the final recommendation was for SIU staff to stay within DPI Water. In the comments section for the SIU staff it was noted:

Agreed to remain within DPI Water and look to remove duplication of activities with WaterNSW rather than a transformational transition of the function.

It is not clear who drafted the final recommendations, although the Director of Transformation thought the recommendations were probably those of ThirdHorizon based on discussions with and data from DPI Water.

A senior manager described the process of how the transfer of staff was determined:

...they [ThirdHorizon] took a month of timesheets for staff and they looked at it and made a decision whether it was in the market or of the market...so staff were assigned - functions were assigned in the market or of the market. So that was ... the blueprint for the change process.

The meaning of the terms 'of the market' and 'in the market' is not entirely clear. The Deputy Director General explained that 'of the market' was a reference to the role of government in designing the regulatory framework for the use and access of water, whereas 'in the market' referred to the regulation of individuals or customers in accordance with the regulatory framework. In essence, government was 'of the market' and WaterNSW was 'in the market'.

Functions that were 'operational' in nature were considered 'in the market' and therefore allocated for transfer. Functions that were policy-like in nature were considered 'of the market' and allocated to stay with DPI Water. According to this rationale, the SIU – which was operational in nature – should have been assigned to transfer to WaterNSW. However, as at December 2015, the SIU was still considered to be an exception.

The SIU Manager gave evidence that he was increasingly frustrated about not being consulted. He acknowledged the Director of MIB was consulted, but that it was his understanding that was in relation to high-level matters and not the day-to-day work of the SIU. He felt that only he and his team could properly convey the detail of the work of the SIU to those making decisions about the transfer of functions.

On 11 December 2015, the NSW Government approved Transformation and the development of a more detailed business case. The proposal approved at this time was that the enforcement and prosecution aspects of compliance would remain with DPI Water but that 'infield investigations' would transfer to WaterNSW.

Subsequently, DPI Water engaged Ernst and Young to support the development of the business case and to start planning for implementation. Workshops were held throughout December 2015 and January 2016 with people from across DPI Water and WaterNSW as well as other stakeholders. A project roadmap outlining key deliverables for Transformation was drafted as a result of the workshops.

On 20 December 2015, the Director of Transformation circulated the draft project roadmap to senior DPI Water staff – including the Deputy Director General. The document noted that a final decision about the details of where licensing and compliance would be located still needed to be made.

Around this time, the role of Director of Water Regulation was created – with overall responsibility for the Water Regulation Group and the MIB, including the SIU. The Deputy Director General asked the Director to conduct a review of the water regulation function and prepare a plan for the area. The Director was also given the job of delivering Transformation and working out the finer details about the functions that would be transferred to WaterNSW.

On 11 January 2016, the Director ran a workshop with the Water Regulation Group managers to discuss DPI Water's future structure. Six water regulation managers and the Director of MIB attended the meeting. The SIU Manager was on leave at that time and did not attend. In evidence, the Director of Water Regulation noted that the Director of the MIB was present as the director with responsibility for the SIU.

The minutes from the workshop record that one of the suggestions put forward at the workshop was for compliance functions relating to DPI Water customers (referred to as Tier 1) to be the responsibility of DPI Water, and compliance functions relating to WaterNSW's customers (Tier 2) to be the responsibility of WaterNSW. This was the first time the proposal to split the compliance function between the two agencies, based on their respective responsibility for particular customer groups, appeared in the documentary evidence.

On 22 January 2016, the Director of the MIB sent the Director of Water Regulation a discussion paper he had prepared titled 'Review of Operational Tasks Tier 1 (DPI Water)/Tier 2 (WaterNSW)'. The paper noted:

An extensive review into the way water is managed in NSW is currently underway. As a part of this review the Director Water Regulation has asked the operational managers to consider:

- How operational tasks carried out by the Water Regulation Group may be apportioned between DPI Water, WaterNSW, and other external organisations.
- Make initial recommendations regarding how existing staff resources might be allocated to implement these changes.

This paper aims to provide initial information on these two issues for further consideration. Tasks that will remain with DPI Water are listed as Tier 1, while tasks that identified as being transferred to Water NSW are identified as Tier 2.

On 27 January 2016, a new version of the discussion paper was reviewed by two other senior managers – although not by the SIU Manager, who was still on leave. This paper proposed that all of compliance should remain within DPI Water. On 28 January 2016, a further version of the paper was discussed with the Director of Water Regulation, the Director of MIB and four senior managers. This version also proposed that all of compliance remain with DPI Water.

On 30 January 2016, the Director of Transformation sent an email to DPI Legal stating that the Deputy Director General and Director General had met with their executive team on 29 January 2016 and had discussed which functions were to stay or be transferred. She noted they had given particular attention to licensing and compliance and had decided:

we [DPI Water] are overall market high level oversight [and] Water NSW should be empowered and accountable for most – recommendations in attached are based on this.

The attached document was a spreadsheet that mapped functions against the Water Management Act and the Water Act. The Director of Transformation had amended the document so that compliance related functions such as issuing directions, suspensions, penalty infringement notices (PINs) and prosecutions for WaterNSW customers were marked as being transferred to WaterNSW.

The Director of Transformation recalled:

... so this is where ... the conversation started to be had around of the market/in the market. We'd started to speak about, well...if WaterNSW are accountable for the water delivery and supply to those irrigators then they also should be accountable for monitoring them? But then we'd also have conversations around, well, we can't expect Water NSW to licence and ensure the compliance of everybody such as Hunter Water Corporation, the big hydros, coal seam gas, Sydney Water, and that they were the functions that would need to remain – the compliance – all of that compliance management and oversight would need to remain within DPI.

She described the conversation with the executive team on 29 January 2016 as one of the turning points in relation to Transformation.

The Director of Transformation was asked in evidence if the SIU Manager had been discussed when the decision was made on 29 January 2016 to transfer compliance functions to WaterNSW. Her evidence was that the discussion focused on the functions to be transferred – they never discussed particular employees, and she never reviewed the proposed transfers in terms of the individuals involved.

The Director of Water Regulation also gave evidence about the change in direction concerning the transfer of compliance. He explained the initial view had been to transfer all of licensing and approvals, including all decision-making functions, to WaterNSW but that enforcement elements would remain in DPI Water. He clarified that 'enforcement elements' included the work of the SIU. However, it was his personal view at the time, and one he continued to maintain, that government could not split licensing and enforcement as they were both key components of the regulation spectrum. There were also practical difficulties:

You've either got to regulate it wholly or you can't kind of have half a regulation here because if the SIU, for example, remained but everything else went, SIU would be regulating against the decisions that WaterNSW made and WaterNSW - it wouldn't be in its interests to make decisions that suited SIU's needs.

On 31 January 2016, the Director of Transformation drafted a one-page document titled 'DPI Water Transformation Overview – SOAP'¹². In this document, 'compliance investigations' were noted as an example of a function which would be transferred to WaterNSW since it was considered 'within the market' and 'operational'. The Director of Transformation confirmed that the document reflected the views of the Deputy Director General and the Director General arising out of the 29 January 2016 discussion.

The Deputy Director General conceded that the word 'compliance' did not have an agreed meaning and was in fact used interchangeably with enforcement, monitoring and regulation:

I prefer the term regulation and then break it into specific components, because other parts of the department have referred to regulation as enforcement, so they'd say regulation, and they'd mean enforcement or prosecution. Other parts would say regulation and mean monitoring, and the terms were being used interchangeably.

The consultation process

On 2 February 2016, the Director of Transformation sent an email to a number of senior executives, including the Director of Water Regulation, asking for input into the draft business case. In her email, she noted that work was being done on the transfer of functions – based on what was approved by government and, more recently, discussions within the Executive about the expectations of roles in market and of market. In particular, she noted there was still 'a lot of grey' around licensing and compliance. The Director of Water Regulation responded to her email the same day stating that he still had concerns about the split in functions that was being proposed. The Director of Water Regulation explained in evidence that:

There were things that I felt were inappropriate for WaterNSW to do. An example of that is the regulation of other government entities. I felt it was inappropriate for a SOC to regulate a government department because I felt there was potentially a power imbalance in that space... a private entity regulating another private entity that to me is - it wouldn't have been my choice but I can see that that could work, but a private entity regulating government I felt was inappropriate, there was power imbalance.

On 3 February 2016, the Director of Water Regulation forwarded the Director of Transformation's email of 2 February 2016 to the Water Regulation managers and the Director of the MIB asking for their views. The SIU Manager was not included in the email. When asked why he did not directly consult with the SIU, the Director of Water Regulation noted that the group consulted was 'very, very, very small', and that the SIU was represented by the Director of the MIB. He also did not expect the Director of MIB to consult with individuals within the SIU because:

we weren't allowed to talk to anybody...I think I stretched the boundary of who I was allowed to talk to by including some of the people I did. But it absolutely had to be - so the riding instructions were this is absolutely kept tight.

The Deputy Director General gave evidence that there were strict controls on the amount of detail staff were given about the Transformation process, and such information was managed by DPI Water People Learning and Culture (PLC), Industrial Relations and Legal. When asked whether he had told his direct reports not to talk about the details of the business case and Transformation, the Deputy Director General said that PLC and the legal team had told him there were limits on what he could tell staff and that it wouldn't be unusual for him to relay that message to his direct reports.

Whether a State Owned Corporation should be responsible for compliance

On 5 February 2016, the Deputy Director General commented on a copy of the draft business case – giving his views about the functions he believed should and should not be transferred to WaterNSW.

On 11 February 2016, DPI Legal circulated by email a PowerPoint presentation of the Transformation issues they had identified as requiring consideration. On the matter of transferring compliance to WaterNSW, Legal queried 'How can WaterNSW exercise compliance functions while continuing to meet its obligations as a SOC?'

Notes from a follow up meeting the same day confirm the issue was discussed and it was noted that most of DPI Water compliance functions were now customer focused (and would therefore be suitable to transfer), but that controlled activities would stay within DPI Water. It was also noted that the issue of compliance would be discussed at the upcoming 'Intergovernmental Panel' meeting.

12. SOAP stands for 'Summary on a Page'.

Concerns about how WaterNSW could meet its obligations under the legislation while undertaking compliance activities were not confined to the legal team. This issue was raised by many of the DPI Water staff who gave evidence to the Ombudsman, including some managers. A primary concern for staff was that, although there may have been an argument for licensing to be transferred, transferring compliance and enforcement responsibilities was a different matter. In their view there was a real risk of a conflict of interest, primarily due to WaterNSW's strong focus on customer service and the objects of the Water NSW Act. One witness said in evidence:

WaterNSW is a customer orientated business and as a business and one of its aims is, I think, from recollection, the WaterNSW Act, one of the key principles of that is actually to make it a viable and profitable business. Now I see real issues in relation to some of those aspects because a compliance function never makes money for anybody, it's more of a duty that has to be done and it actually costs money.

Another witness likened the situation to one of poacher and gamekeeper.

However, this view was not universally held. Contrary positions were put before the Ombudsman to the effect that WaterNSW had in fact a greater incentive to regulate.

The Deputy Director General's view was:

I don't think there was a conflict of any way, shape or form... If someone is stealing water, WaterNSW have absolutely lost an opportunity to charge someone for it, so they've got a bigger incentive to go out there and make sure that this is not the case ...If someone's stealing water, they're just taking it from another customer; I can't see a conflict anywhere.

The Director of Water Regulation also gave evidence that he didn't see a conflict with the model:

So if one person is stealing water they're generally not stealing it from state government or from the state... they're actually stealing it from their next-door-neighbour. And from my perspective, as a customer service function, you're failing in your service of this customer if you're favouring this customer...WaterNSW releases water up here and it's picked up by someone down here, right, and that person down there is paying for it, and if someone in the middle takes that water then WaterNSW is not delivering to that person down there. ...having a commitment to customer service you're not talking about one customer, you're talking about the delivery to all the customers and ensuring that the process, the framework of the system is all functioning properly and then regulation is critical to that.

The Director of Transformation shared the view that there was no conflict – as she saw WaterNSW as the 'custodian of the farmer's money' and essentially running as a not-for-profit. She conceded, however, that there may be a perception of conflict.

Finalising the decision about where compliance should be placed

On 12 February 2016, the Director of Transformation flagged in an email that on 15 February 2016 the Transformation Interagency Working Group would meet to discuss which agency will have responsibility for enforcement and compliance under the water legislation and prosecution for resultant breaches. She also flagged there was a potential change of direction.

A PowerPoint presentation prepared for the Working Group explained that – although government initially endorsed prosecutions to remain within DPI Water – further discussion regarding roles of and in the market could result in a recommendation to transfer that aspect of the compliance function to WaterNSW.

The minutes from the 15 February 2016 Working Group note that there was some discussion about the benefit of end-to-end customer management, from billing through to prosecution. The minutes record the decision of the group was that, for WaterNSW customers, 'end to end compliance' should transfer in its entirety to WaterNSW. The Director of Transformation recalled that at this Working Group:

... we [had] that conversation around how would you split out prosecutions from the management. How could DPI Water be accountable for WaterNSW prosecutions? Was prosecutions part of an end-to-end compliance chain? Yes, and again, the big – your water corps, who would be accountable for those versus your irrigators?

She recalled that the decision to transfer compliance to WaterNSW was made by the entire Working Group.

Communication with the SIU Manager about the future of the SIU and redundancies

On 22 February 2016, the SIU Manager emailed the Director of Water Regulation asking about the future of the SIU. The SIU Manager noted that he and the Director had discussed the issue of the future of the SIU before Christmas and that the Director had, at that time, been 'rather certain' that the SIU would remain in DPI Water. The SIU Manager queried whether that position had changed as he had started looking for other jobs and wanted to know whether the SIU or his role would be maintained or made redundant.

On 23 February 2016, the Director of Water Regulation replied:

As mentioned in the video conference we have recommendations at the high level of what the future state will be like but not the detail. What we know now is that State priority areas of focus will remain with DPI Water and localised issues will be transferred to Water NSW.

It is my view that compliance activities will occur in both organisations respective to the areas they look after.

I do see specialist compliance and investigator officers continuing in DPI Water. The skills of the SIU officers are highly valued and will still be needed into the future.

I am not sure that a standalone Unit for those officers is the way forward. It is important that those officers maintain links for mutual support and learning but it may be better if those officers are embedded back into the clusters.

If we distribute the team back to the clusters, where they would remain specialist, assessment would need to be made regarding the future of your current role.

This level of detail is what will be worked out over the coming months.

The SIU Manager gave evidence that he had detailed conversations with the Director of Water Regulation about the transfer of compliance to WaterNSW and that – until he received the Deputy Director General's letter of 1 June 2016 – he was of the view that the SIU was staying with DPI Water. In his evidence, the Director of Water Regulation rejected the assertion that he had given the SIU any undertakings that they would remain within DPI Water.

The Director of Water Regulation told the Ombudsman that in his view the SIU model was not working as it should have been – in particular, there was inadequate communication between those undertaking compliance actions and those undertaking licensing actions. In considering a structure for DPI Water post-Transformation, the Director of Water Regulation gave evidence that he thought a regional model would be optimal as he:

...really wanted to have one point of truth for any issue. So if there was something going on, on a property, there was one person who controlled what was happening on that property and for me that's the regional manager and that is actually the model that the EPA uses too.

When asked why he decided not to centralise compliance, the Director of Water Regulation said he could have done it that way, but instead chose to embed the specialist investigators into the regions so that they could mentor and upskill regional staff.

The Director of Water Regulation also gave evidence that – as a result of problems brought to light during the first Farm Dam case – it was his aim to reincorporate the SIU investigators back into the regions irrespective of Transformation. He said he gave similar advice to WaterNSW about how he thought their compliance model should be structured after Transformation.

On 25 February 2016, a group of Water Regulation Group managers and the Director of MIB emailed the Director of Water Regulation a breakdown of suggested FTE staff for DPI Water and WaterNSW. The compliance function was shown as split between the two agencies, but the columns for suggested FTE staff were left blank with the comment 'not sure this is going to be valid. I think it will be more accurate to assign current FTE to type of compliance work'.

Also on 25 February 2016, the Director of Water Regulation sent an email to the DPI Water PLC Manager:

[the SIU Manager] has just asked for an earlier VR. It was clear to him that there was no role for him in the new structure. I spoke with [the Deputy Director General] and he is as keen as I am to advance this as quickly as possible. What are the next steps? [The SIU Manager] is ready to go so can you please advise of the steps forward. Thank you.

The Director of Water Regulation told the Ombudsman he was not opposed to the SIU Manager's request for a voluntary redundancy and told him that it would need to be considered by the Deputy Director General.

On 26 February 2016, another PLC officer provided advice to the PLC Manager in an email that a voluntary redundancy should not be given to any staff member before the development and approval of a change plan. The PLC Manager responded that she would pass that advice on to the Director of Water Regulation.

On 5 March 2016, the SIU Manager emailed the Deputy Director General about his request for a redundancy and asked if his request has been determined.

On 9 March 2016, the Deputy Director General replied to the SIU Manager:

Unfortunately, this decision is not mine to make. Whilst I am supportive, I still need permission from PLC. This is being escalated by me as fast as possible. I will let you know as soon as I can.

The Deputy Director General's evidence about the SIU Manager's request for a redundancy was that he was absolutely supportive of him taking a redundancy – but that it had to be genuine. When he sought advice from PLC they advised that there were no genuine grounds for a redundancy in this case, and that ultimately whether the SIU Manager's role stayed with DPI Water or was transferred to WaterNSW was entirely dependent on the analysis of his timesheet and job description.

The Director of Water Regulation recalled that PLC refused to allow the voluntary redundancy and that the SIU Manager was ultimately transferred to WaterNSW because his position was 'appropriately identified' as one that was to be transferred.

The Director of Transformation explained in evidence that around this time there were discussions in DPI Water about whether redundancies should be made before or after Transformation. She advised that it was decided the redundancies would be offered after the transfer of staff to WaterNSW. Both agencies would then be accountable for the efficiencies to be delivered and made.

The Director of Transformation recalled there were many requests for redundancies from DPI Water staff. When asked about why voluntary redundancies were not offered before Transformation she replied:

Because if a VR was offered, everybody could have opted out and who would have continued to run the business? So that was one – you know, massive consideration. Two, WaterNSW throughout the process, the work that had been done by Third Horizon and even my own review, suggested that there was potentially a significant number of people that could actually be made redundant through process improvement and issues and efficiencies. WaterNSW were reluctant to actually sign up to those and reduced what that original figure was. Quite rightly so, because they didn't know what they were inheriting. And they wanted to understand what it was that they were - was being transferred, before they committed to that volume of savings.

The decisions about transferring individual staff members

In April 2016, the government approved legislative amendments to the Water NSW Act to enable the transfer of staff and some customer related compliance and enforcement functions to WaterNSW.

On 3 May 2016, the Water NSW Amendment (Staff Transfers) Bill 2016 was introduced to the Legislative Council. The objective of the Bill was to amend the Water NSW Act to provide a power for the Minister to make an order to transfer staff from DPI Water to WaterNSW. On 31 May 2016, the Bill passed without amendment.

Once the legislative amendments had been approved by the government, work started in earnest on which staff would be transferred to WaterNSW. It was around this time that the Director of Transformation left DPI Water.

During this phase of Transformation, the Director of Strategic Development was a project leader for DPI Water with responsibility for supporting the transition of selected functions from DPI Water into Water NSW. He described how staff were selected to transfer:

The compliance function, well the general transfer of activities and staff was initially determined by staff charging their hours in accordance with the IPART determination. So thinking about licensing and compliance within the market being moved to WaterNSW and the rest staying, so of the market, licensing and compliance of the market are remaining with DPI Water. So the initial analysis of time recordings gave an indication of these staff and the numbers of staff who were undertaking licensing and compliance activities which were determined to be transferred to WaterNSW.

On 12 May 2016, the Director of Water Regulation delivered a PowerPoint presentation to the WaterNSW Executive suggesting a possible organisational structure after Transformation. The slides identified four SIU positions to be transferred, including the SIU Manager. Two SIU investigators were to remain with DPI Water.

The PowerPoint presentation recommended the SIU Manager position sit beneath one of the transferring Water Regulation managers, despite the SIU Manager being graded at the same level. It also recommended the SIU investigators be incorporated into the regions rather than remain a standalone team. The Director of Water Regulation told the Ombudsman that he drafted the structure based on his professional view about the optimal structure for conducting investigations. With regard to which SIU investigators should stay and who should be transferred, the Director of Water Regulation advised he had input from the Director of MIB.

In explaining his rationale for how the SIU was split between the two agencies, the Director of Water Regulation said:

...basically we estimated that 70% of the work was going across and so we looked at the SIU and this was done with [the Director of MIB] who was the Head of the SIU, so we looked at the SIU and thought we will do a 70/30 split in relation to the change, so we will keep two and then we'll send across four. We looked at the activities of the individuals involved and [I got] advice from [the Director of the MIB] around our case load. So who was working on what kind of cases, and the second part, which was equally, was where were they located? So where were the individual officers located and what was their case load, because their location – because in certain locations the workload was more in line to WaterNSW, and certain locations workload is more aligned to DPI Water in terms of the primary types of issues that came up in that region it's more likely to be a DPI Water issue or a WaterNSW issue...And so that was kind of the driver – those kind of things were the driver.

One SIU investigator said that – when he considered the split of 'customers' between DPI Water and WaterNSW – then a 60/40 split for the SIU investigators in favour of WaterNSW would probably be a fair assessment.

On 1 June 2016, after the Bill was passed, the Deputy Director General sent an email with a letter attached to all staff being transferred to WaterNSW on 1 July 2016. Four out of the six remaining SIU investigators received the letter, including the SIU Manager.

The SIU Manager told the Ombudsman that this was the first time he and the SIU were informed that part of the SIU was to be transferred. He was shocked when he and his colleagues received the letter, particularly given he had not been consulted about his team's skill sets or what work the SIU did. The SIU Manager did not understand how the Director of Water Regulation had been able to determine who within the SIU should stay and who should be transferred without consulting him. Other SIU investigators gave evidence to the Ombudsman that echoed the SIU Manager's concerns.

The Director of Water Regulation was critical of the timing of the notification to staff that were transferring, noting it was 'terrible' that people found out in that way. However, he pointed out that all the staff being transferred (about 200 people) found out on the same date by letter and that 'the SIU didn't get a specifically poor outcome. Everyone got a poor outcome'.

The Deputy Director General explained that he had left it so late to notify those who were transferring because he had been given legal advice that he could not advise staff until the legislation had passed.

The transfer of the SIU Manager and his redundancy

On 14 June 2016, WaterNSW released a draft post-Transformation organisational structure that appeared to be based on the 12 May 2016 presentation made by the Director of Water Regulation. It showed the SIU Manager reporting to a fellow Grade 12 manager with no direct reports. The Director of Transformation noted that the document was never intended to be final and was being shaped by consultation ‘roadshows’ that the CEO of WaterNSW was conducting. She considered it a work in progress.

When asked what he understood to be the reasons for part of the SIU being transferred to WaterNSW, the SIU Manager was firmly of the view that the decision was a reprisal against him:

I think it was in retaliation for me sending the stuff that was occurring in the [Barwon], this was no secret in the [Farm Dam case] ...not only that, I had actually - we'd reported to the department and to this office some other issues in the state involving some other staff members. There was ...a staff member ...[who]...had basically granted themselves a licence, and that captured my attention, one of the staff referred it to me, everyone in the state knew about it. Then I reported it up the line, something that was wrong, and it turned out that the department already knew because someone else has raised it...and nothing has ever come from it. And I wasn't satisfied because, to me, it was a clear 101 conflict of interest, granting themselves a licence, so the Deputy Director General was aware of that matter as well.

The SIU Manager also believed the decision was improper and caused detriment to him.

On 14 June 2016, the SIU Manager emailed the Director of Water Regulation about the newly released draft WaterNSW organisational chart and about his redundancy. In the email, the SIU Manager said the Director had promised him a redundancy subject to the passing of the legislation. The email from the SIU Manager states the Director told him that his position would not exist in either DPI Water or within WaterNSW as the investigators would be embedded into the clusters. The SIU Manager conveyed his dissatisfaction with not being informed about the transfer earlier and complained the proposed WaterNSW structure left him with ‘no real purpose or role’. He went on to allege that the actions of the Director of Water Regulation and the Deputy Director General in transferring him were because they:

...both knew full well I was an internal complainant and was afforded protection from reprisal action and detrimental action under the legislation.

The SIU Manager put the Director on notice that he would be raising this matter with ‘anyone who will listen as transferring of me and [the colleague the SIU Manager had previously complained about] was unmeasurable in terms of detriment’.

On 15 June 2016 the SIU Manager emailed the CEO of WaterNSW, and another senior WaterNSW officer, copying in the Director of Water Regulation. He reiterated his concerns about his transfer and the proposed WaterNSW organisational chart – stating that ‘moving the two SIU investigators back into the water regulation regions effectively makes my role of no purpose and with no staff’. He also referred to a conversation he had with the Director of Water Regulation reporting that the Director told him ‘it’s much better for you as being a senior manager with no role or staff means you’re highly likely to be made redundant at WaterNSW’.

In evidence, the Director of Water Regulation gave his version of events:

So WaterNSW puts out a proposed structure prior to Transformation to the staff that are going to come across. Here's what it's going to look like coming across. [The SIU Manager] got really, really angry... One of the conversations I had with him, which then he sent back to me in email, was...I said, ‘Look, you're having no staff. You want a redundancy that will help you. You're a manager, you go across with no staff. That indicates that the position is in a good place as a possible redundancy’. He's not having that. So then he writes me back. ‘How dare you say that to me’ and he sends it to David Harris and the rest of the world...I couldn't quite work out what he wanted because I think he wanted a redundancy but at the same time he wanted his team too...

In his email of 15 June 2016, the SIU Manager also queried the Director of Water Regulation's advice that it was highly likely he would be made redundant at WaterNSW – because a redundancy from a SOC 'comes out of their funding or profits', which would be contrary to WaterNSW's objective to be profitable. He expanded on this in his evidence to the Ombudsman:

... there was no SIU on this [the WaterNSW structure], and this is the first one that come out, and that's what prompted me to write to the Premier, so why would the government transfer \$136,000 a year job to a state owned corporation that has no staff, no ability to do the work and it's bound to be made redundant in those situations. Why would the government then pass that liability onto a state owned corporation as opposed to the government, which I had a treasury fund redundancy, well, at certain times, they do, I mean, it's a lot easier, in my view, it was a lot better if I was going to be made redundant to be made redundant from government than a state owned corporation. And the fact that my name didn't appear on this when you go through and you can actually see compared to [another manager] ...halfway down there you will see [a] Senior Investigator, and under him, [an] Investigator ... my whole position is not even on here. I don't have a structure, I don't have any staff and that was prior to arriving there, and when I got there, I was isolated and made to feel like shit for nine months before I left.

On 16 June 2016, the Director of Water Regulation replied to the SIU Manager's email of 15 June to WaterNSW – reiterating that consistent criteria had been used to identify the roles that were transferring to WaterNSW with the outgoing functions. He explained that these decisions were based on the functions and type of work performed, not on individuals. He acknowledged the SIU Manager was unhappy with the decision that had been made and that the decision had affected his future plans.

The SIU Manager replied to the Director on the same day, copying multiple people into the email – including the CEO of WaterNSW, the Deputy Director General, and officers from DPI Water PLC. The SIU Manager repeated his dissatisfaction with the lack of consultation with SIU about the transfer and stated that he wanted a meeting to discuss the matter. He asked the officers from Human Resources for advice on how he could make a formal complaint about the actions of the Director of Water Regulation and the Deputy Director General which, in his view, amounted to detrimental action against him in reprisal for making complaints about his colleagues.

The Director of Water Regulation recalled that – after the SIU Manager's email of 16 June 2016 – the SIU Manager persisted in asking for a redundancy and after a while the Director 'disengaged' from the SIU Manager as he viewed this behaviour to be 'inappropriate'.

In his evidence about the SIU Manager's redundancy, the Director of Water Regulation said that he investigated whether the redundancy was possible but was told by PLC that it was not possible due to the change plan process. He said that he advised the SIU Manager that the redundancy could not be actioned immediately but might be possible once the change plan was settled.

The SIU Manager explained his understanding of the proposed redundancy from DPI Water in his evidence:

... I was ultimately made redundant by them [WaterNSW] after offering to leave when all this started going pear shaped, I could see the writing. I think I wrote to [the Director of Water Regulation] saying, 'We going in two different directions, I don't like the way you are going with water management...', and [the Director] said, 'Yeah, yeah,' well, he was fine to start with a redundancy then the next thing I know no, no redundancy, you're going over and you're needed, then when I got there, I had no staff, then they tell me that was an accident.

On 18 June 2016, the SIU Manager wrote to the Minister for Finance and to the Treasurer – in their capacity as the shareholding Ministers of WaterNSW. He asked why his role would be transferred when it was likely to be made redundant and queried why WaterNSW would pay for redundancies when they are a state owned corporation. He said that he would not be threatened or intimidated by DPI Water management for asking questions about the decision to transfer. He requested a meeting with the Minister and the Treasurer if the matter was not resolved by a meeting with the Director of Water Regulation and the Deputy Director General.

On 26 June 2016, the SIU Manager emailed the Secretary of DPI Water – although a copy of that email has not been produced to the Ombudsman. The Secretary asked the Deputy Director General to provide information about the matter, and on 28 June 2016 the Deputy Director General provided the following information:

[The SIU Manager's] position was assessed as being required in Water NSW to deliver on their compliance functions. This assessment was based on timesheet analysis and position descriptions. A number of [the SIU Manager's] team members are transferring with him plus 2 vacant positions that are yet to be filled. [The SIU

Manager's] manager, and his new manager in WaterNSW have both spoken with [the SIU Manager] in recent times. Its [sic] time for him to focus on making the transformation successful as a leader in the business. I understand that his new position has been communicated to him by WNSW.

On 30 June 2016, the Deputy Director General emailed all staff in DPI Water to advise of the transfer of over 200 staff to WaterNSW the following day. He attached an organisational chart for WaterNSW that had been disseminated by the CEO the previous day. That organisational chart, which was dated 28 June 2016, showed the SIU Manager reporting to the Director of Transformation and managing a team of three investigators which was quite different to the earlier organisation chart.

The Director of Transformation, after finishing at DPI Water in mid-April 2016, started a six-month contract with WaterNSW in late June 2016. Her role was to lead the 200 plus staff who were transferring across from DPI Water. In hiring her, WaterNSW considered that her pre-existing knowledge of water management related functions would help her to assist those transferred staff to be gradually integrated into the WaterNSW structure.

On 30 June 2016, the SIU Manager sent the Director of Transformation – in her capacity as his new supervisor at WaterNSW – an email titled 'Redundancy offer'. In that email, the SIU Manager requested a redundancy from WaterNSW, stating he was prepared to 'make the same agreement' he had made with DPI Water, and asking the Director of Transformation to see what WaterNSW's position was 'to this offer'. He wrote it was 'not in anyone's interests to have a standalone investigations team' and that the investigators should be incorporated into the regions.

On 4 July 2016, the Director of Transformation emailed the SIU Manager about the transfer of his role and his request for a redundancy at DPI Water. She explained that the structure of DPI Water and WaterNSW had been a matter for government, that his role had not been made redundant and that no redundancy would be offered.

The SIU Manager gave evidence about his frustration with his situation:

I had all my staff removed from me prior to even arriving at WaterNSW ... in fact, the SIU wasn't even mentioned on their draft structure. My staff had been taken off the structure, put into the Water Reg Groups, and I was a Grade 12 sitting on my lonesome, and that annoyed me because I'm expected to - I've been transferred with Ministerial power, that's quite clearly spelt out to do a role, my role was required to do a function. I wrote to the Premier, I wrote to the Treasurer, because I was ultimately made redundant by them after offering to leave when all this started going pear shaped, I could see the writing.

The Director of Transformation recalled the SIU Manager's role differently. She told the Ombudsman that as at 1 July 2016, the SIU Manager reported directly to her and managed a team of three investigators and that this remained the case until he left WaterNSW in January 2017. She saw him as part of the senior leadership team at WaterNSW and felt that with the right mentoring he would be a great asset to WaterNSW.

On 13 October 2016, the SIU Manager sent an email to the Premier titled 'Water should be the next backflip', forwarding an email from the CEO. In his email, the SIU Manager argued for the compliance functions to be returned to government.

Shortly afterwards, the SIU Manager went on sick leave. In December 2016 the SIU Manager again asked for a voluntary redundancy, which was approved. His last day of service in WaterNSW was 11 January 2017.

In evidence, the SIU Manager explained the circumstances under which he left:

Well, it was argy-bargy with them [WaterNSW] trying to - I couldn't have made it any clearer what we needed to do the job... so I started applying for other jobs, I couldn't see any other choice... And so then I asked again for redundancy, sayin g that we're in two different - going in two different paths so I can't work and do my job... And then I got a phone out of the blue saying, "Great news, it looks like you get your redundancy", and then a week later I was gone.

When asked what happened in December 2016 when the SIU Manager asked for voluntary redundancy, the Director of Transformation told the Ombudsman:

...he was probably off for six weeks. He did return. While he was away the team was overseen by [a Water Regulation manager] and it kind of confirmed that that role, the manager role, just wasn't needed. And it was during that time that we were mapping all those legal processes and what the processes would be, which had already started before all this happened.

The CEO of WaterNSW was asked about the decision to make the position of SIU manager redundant. He explained to the Ombudsman:

...what we determined was going to be the best outcome was for us to appoint within the legal team a prosecutions or an enforcement case manager, bluntly a lawyer, so that we could give better functional direct to our water reg officers and we also could better manage then our anticipated increase in enforcement activity. The consequence of that was three investigator positions were folded into the regions. The manager therefore of that team was no longer required or redundant. We established an enforcement case manager role within the legal team and appointed a senior counsel to that position...that was our reasoning.

2.2.2. Analysis

Transfer of the SIU to WaterNSW

The evidence before the Ombudsman has demonstrated that 'compliance', in the broad sense of the term, was considered to be 'customer focused or operational' as early as October 2015 (as indicated in the Deputy Director General's 9 October 2015 webinar) and therefore likely to be transferred to WaterNSW.

There was a view held for some time during 2015 that an investigation could be split into two halves – 'infield investigations', which would be carried out by WaterNSW and enforcement/prosecutions, which would remain the responsibility of DPI Water. During the time this view prevailed, it was logical that the SIU would be expected to remain with DPI Water as it had responsibility for enforcement and the compiling of briefs of evidence for prosecution.

However, the thinking around the practical feasibility of a split in the investigative chain started to change in early 2016. As the Director of Transformation explained:

... part of the reason later on for the transfer for the whole lot was because of...one, breaking that chain [of the investigation] and two, if you've got people making a recommendation to prosecute...is it really fair then for the department to be actually representing the organisation that's making the recommendations to prosecute?... How could DPI Water be accountable for WaterNSW prosecutions?

Once the thinking evolved to DPI Water and WaterNSW each bearing responsibility for the whole chain of investigation for their respective customers, it followed that the SIU would no longer be able to remain entirely in DPI Water. SIU staff would need to be split between DPI Water and WaterNSW in the same way as other Water Regulation staff were going to be split between the two agencies.

From early 2016, the SIU Manager had actively sought a redundancy from DPI Water. He was seeking this redundancy despite being of the belief that the SIU was staying in DPI Water. He was clearly unhappy with the state of affairs as they existed at that time and had told the Director of MIB that he was looking for other employment. The Director of Water Regulation and the Deputy Director General each gave evidence that they were supportive of the SIU Manager taking a redundancy and did their best to facilitate that outcome. Their evidence is supported by the documentary evidence.

The evidence indicates it is possible that the Director of Water Regulation may have suggested to the SIU Manager in or around late 2015 that the SIU would remain in DPI Water – as that was the in-principle decision of government. However, in an email dated 23 February 2016, the Director of Water Regulation clearly told the SIU Manager that compliance activities were likely to occur in both organisations based on the areas they looked after. He also said he saw a need for specialist compliance and investigation officers continuing in DPI Water and that the skills of the SIU officers were highly valued and would still be needed into the future. This advice was not inconsistent with what ultimately happened after Transformation with the retention of some SIU investigators by DPI Water.

The Director of Water Regulation was transparent about his view that a standalone unit for the SIU officers might not be the best way forward and that a better model would be to embed the officers into the regional clusters. He clearly stated in his email '[i]f we distribute the team back to the clusters, where they would remain specialist, assessment would need to be made regarding the future of your current role'. He also signalled that the details were yet to be worked out. It is apparent that, from 23 February 2016, the SIU Manager was on notice that the SIU function could be divided between the two agencies and that there was uncertainty about his role as SIU Manager.

The Director of Strategic Development and the Director of Water Regulation both gave evidence that the way in which employees were selected for transfer was based on an analysis of timesheets. The Director of Water Regulation explained that he and the Director of MIB had determined that an appropriate split of the SIU workload between the two agencies – based on the customers each would have responsibility for – would be 70% in favour of WaterNSW and 30% in favour of DPI Water. In practice, that would mean four SIU staff would transfer to WaterNSW and two would remain with DPI Water. The SIU Manager had expressed his discontent at staying in DPI Water and advocated for a redundancy. In this context, it would have been unreasonable for the Director of Water Regulation and the Director of MIB to insist on the SIU Manager staying in DPI Water with just one staff member and little possibility of a redundancy. It is reasonable that, given these circumstances, the SIU Manager was identified for transfer to WaterNSW where his role would have responsibility for managing three or potentially more staff members, depending on the structure ultimately chosen by WaterNSW.

It is understandable that the SIU Manager was shocked and upset when he saw the 14 June 2016 version of the proposed WaterNSW organisational chart. It was reasonable for him to seek clarification about the status of the chart and enquire about the basis for drafting it in such a manner. Also, the Deputy Director General and the Director of Water Regulation had previously told the SIU Manager that the issue of his redundancy had been deferred until the legislation had been passed by Parliament. It is quite possible, given the Director of Water Regulation's evidence that he disengaged from the SIU Manager, that the SIU Manager was not told the voluntary redundancy was not possible and, instead of receiving confirmation of his redundancy on 1 June 2016, he received an email advising him that he was to transfer to WaterNSW.

An amended WaterNSW organisational chart was disseminated on 29 June 2016, less than two weeks later. In this amended version, the SIU Manager was shown as having three direct reports and reporting directly to the Director of Transformation, who was by then an executive at WaterNSW. The SIU Manager's evidence was that during his time at WaterNSW he had no staff. However, documentary and oral evidence showed that he was expected to manage a team – albeit a significantly reduced one. The Director of Transformation confirmed that the SIU Manager reported directly to her and had a team to manage during his employment with WaterNSW.

In order to consider the draft 14 June 2016 organisational chart to be evidence of retaliation, either the Director of Water Regulation or the Deputy Director General would have needed to persuade WaterNSW to make the SIU Manager's position untenable after Transformation and reflect that in the draft chart. There was no evidence to suggest that this occurred. The organisational chart was a draft of what WaterNSW's structure might look like after Transformation and it was changed only two weeks before Transformation occurred.

The Director of Water Regulation strongly denied that the transfer of part of the SIU to WaterNSW had anything to do with the three events described above, namely, the making of complaints to management about improper conduct by colleagues and the attempt to serve a direction in the Farm Dam One matter. The two events involving the SIU Manager's allegations of staff engaging in corrupt conduct predated the Director of Water Regulation's employment at DPI Water. The Director of MIB confirmed that he was involved in the discussions with the Director of Water Regulation about the split of the SIU and that the decision about who was to be transferred was based on timesheets and the location of staff.

After seeing the 14 June 2016 version of WaterNSW's organisational chart, the Director of Water Regulation commented that the SIU Manager would be well placed for a redundancy at WaterNSW. Given the organisational chart indicated that the SIU Manager had no team to manage, was reporting to an officer of the same grade, and was keen to secure a redundancy from DPI Water, the comment by the Director Water Regulation can be reasonably interpreted as an attempt to assist the SIU Manager see the move as a positive step – rather than evidence of retaliation.

The Deputy Director General was involved in the three events described above. He knew about the complaints raised by the SIU Manager as well as the circumstances surrounding the SIU Manager's attempt to serve a direction on the landholder in the Farm Dam case. His evidence was that these events had no bearing at all on his decision to transfer part of the SIU. The Director of Transformation, who was part of the conversations about which functions should be transferred, confirmed that the SIU Manager was never discussed and the SIU was only discussed at a high level. There is no documentary evidence to support a conclusion that any of these incidents had an impact on the Deputy Director General signing off on the transfer of part of the SIU. To the contrary, the contemporaneous evidence suggests that the decision to divide the expertise of the SIU between the two agencies was logical in the context in which it was made.

The discontinuation of the SIU

The decision about whether to place SIU investigators in a standalone investigation unit or embed them into the regions was within the legitimate discretion of management in both DPI Water and WaterNSW. The Director of Water Regulation was entitled to restructure the Water Regulation Group within DPI Water after Transformation. There is no evidence to suggest it was improper for the Director of Water Regulation to provide WaterNSW with his views on a possible structure.

Similarly, the WaterNSW Executive and the Director of Transformation were entitled to act on the Director of Water Regulation's advice, if they chose, when initially forming their views about the optimal structure. They were under no obligation to keep the standalone structure that had been in place at DPI Water or the decentralised model proposed by the Director of Water Regulation. Ultimately, as discussed later, WaterNSW developed a new model for compliance under which investigators reported to the regional managers and dedicated resources were made available from the WaterNSW legal team. The SIU Manager conceded that the proposal to embed investigators into the regions had merit, and it was only after the SIU Manager had accepted a redundancy from WaterNSW that the staff members who remained in the SIU were transitioned into a new WaterNSW structure and the SIU formally ceased to exist.

2.2.3. Conclusions

The available evidence does not support the conclusion that the SIU Manager, or part of the SIU, was transferred to WaterNSW in retaliation for raising allegations about his colleagues or for his actions in attempting to serve a statutory direction on a property owner – discussed in more detail in the first Farm Dam case study. The main reason behind the transfer of part of the SIU and the SIU Manager to WaterNSW was the eventual decision by government to split the compliance function between the two agencies, based on the types of customers each agency was responsible for licensing. The SIU was consequently split between DPI Water and WaterNSW in the same way the compliance function was split. There is no evidence that the decision was motivated by a desire for retribution by DPI Water senior staff.

The prevailing view among stakeholders about where compliance functions would best fit evolved gradually in the lead up to Transformation. Initially, it was decided that the compliance function would stay in DPI Water. However at that time the understanding of what the compliance function covered was limited to enforcement and prosecutions – it did not include infield investigations of alleged breaches. If this model had been implemented, it would have led to DPI Water taking enforcement and prosecution action based on evidence collected by WaterNSW staff conducting investigations in the field.

By early 2016, the Director General and the Deputy Director General recognised that breaking the chain of investigations in such a way would lead to difficulties. As a result, the view about the best fit for compliance began to shift.

The decision to split the SIU between DPI Water and WaterNSW based on which entities each agency licensed was endorsed by an Interagency Working Group and subsequently approved by government. Under this model, each agency was responsible for end-to-end regulation – from licensing to enforcement – of their individual customers. There was no evidence to suggest that the Interagency Working Group or other decision makers within government were improperly influenced by the Deputy Director General, the Director of Water Regulation or anyone else. An analysis of timesheets and position descriptions indicated that the SIU Manager's position was required in WaterNSW. The transfer of part of the SIU, including the SIU Manager, was logical in the circumstances.

2.3. Were the SIU Manager's delegations improperly removed?

2.3.1. Evidence

The SIU played a key role in the compliance matter of the first Farm Dam case. The Director of Water Regulation had started in his role at the height of the tension between the SIU and the Water Regulation Group – which developed because of disagreements about how the case should have been handled. The tension came to a

head when the SIU Manager attempted to serve the landholder with a statutory direction on 27 November 2015. The SIU Manager was relying on powers that had been delegated to him by the Minister under an Instrument of Delegation under the Water Management Act.¹³ Serving a direction on the landholder at that point in time was contentious as there had recently been a meeting with the Minister's office and the direction that the Minister's office wanted to take was yet to be determined by DPI Water.

The Water Regulation manager who was involved in the case gave evidence that when he heard that the SIU Manager had placed the direction in the post with the intention that it would be served on the property owner, he was 'flabbergasted' – because they were still waiting to hear back from the Minister's office about what the next steps would be.

He also recalled that it was the Acting Deputy Water Commissioner who made the decision to halt the service of the direction and this decision arose during the:

...flow of the conversation when he found out that it hadn't been served, he said, "Don't serve it," and yeah. I remember [he] was quite decisive; he was quite forthright, decisive at the time.

The Acting Deputy Water Commissioner agreed that it was his decision that the direction not be served, and said that he had made his decision in consultation with the Deputy Director General:

I suggested to [the Deputy Director General], I could talk to [the SIU Manager] and check whether the notice had been sent out through the mail system, or whether it was still sitting in the office... I asked [the SIU Manager] to check the mail to see if it had left the office, and if it hadn't left the office to take it from the mail tray, and just hang onto it.

The Deputy Director General was asked if he told the Acting Deputy Water Commissioner to tell the SIU Manager not to issue the direction. He said:

I don't remember that. I mean ...No. I don't remember saying don't issue a direction. The Acting Deputy Water Commissioner may have. [The Acting Deputy Water Commissioner] may not have even known that he'd [the SIU Manager] issued the direction. He may have told him to stop....

On 3 December 2015, the Acting Deputy Water Commissioner sent a directive by way of email to all managers (Water Regulation and SIU) indicating that the process for issuing notices and directions had changed and – as an interim measure – 'any proposed directions, stop work orders and the like' would be referred to the directors for discussion with the Director of Water Regulation prior to issue. The SIU Manager was unconvinced by the intention behind the email and felt that it was retaliation against him because such steps had never been taken before and the change only affected his team.

However, a Water Regulation manager gave evidence that the 3 December 2015 directive also had an unwelcome impact on his team and that a bottleneck developed. He concluded that the change put more hurdles in the way of trying to do things and indicated to staff that compliance was not a priority for management.

The SIU Manager described the impact that the directive had on the SIU:

...my issue was it adversely affected my ability to issue orders and stop work orders ...and section 329 orders and all the delegated orders adversely impacted on my ability to actually do my job. For example, my guys went out to a case on Friday afternoon. I normally don't stop work. I've got to go home, but I don't stop working per se, I'm just not in office and I'd heard from them and it wasn't uncommon for them to ring me at 7 o'clock at night time and say, "Just got back to the hotel, we're going to send you through an order," and I could issue it that night and send out an email to a person to say, "Immediately stop pumping right now." Yeah. So, I saw it as an impediment to us doing our job and not preventing people stealing the water and we needed to stop it.

According to the Director of MIB's evidence, the directive was not a change to the delegation but a policy decision. It meant that the Director of Water Regulation would endorse decisions first, but managers would still issue any notices and directions. When asked about whether the directive was a direct reprisal against the SIU as a result of the SIU Manager attempting to issue the direction to the landholder in the Farm Dam case on 27 November 2015, he said he did not see the directive as a reprisal. Rather, it was a way for him to both 'get his head around the business' and ensure that the situation that arose in the Farm Dam case did not happen again.

13. Minister for Primary Industries, *Instrument of Delegation (Water Management Act) 2011*, p 26.

The Acting Deputy Water Commissioner was questioned about his decision to issue the directive. He confirmed that the change in approach was associated with the Farm Dam matter as well as being a way to get the Director of Water Regulation up to speed with compliance matters. He gave evidence that he had discussed the matter with both the Director of Water Regulation and the Director of MIB before sending the email. His conversation with the Director of MIB concerned how processes could be improved and how they could reduce the opportunity for embarrassment for the Deputy Director General 'where he might be having high-level communications, particularly with the Minister's office, or other parts of the agency'. They also spoke about affording the new Director of Water Regulation with the courtesy of knowing what was going on within his team.

The Acting Deputy Water Commissioner agreed that the directive would have predominantly had an impact on the SIU. However, he viewed the directive as a means of giving the Director of Water Regulation, as a new director, information about the processes – rather than a measure to restrict the SIU Manager. In his view, the change in approach:

afforded them [the SIU] greater protection, greater transparency in their decision-making process, and ensuring proper and due processes were followed.

The Director of Water Regulation's evidence about the change in approach was that he was concerned that the SIU Manager had used his delegated authority inappropriately. He felt that he needed to find a way to obtain control of the situation – so he and the Acting Deputy Water Commissioner decided to temporarily create an oversight role for the Director of Water Regulation where he would review and endorse (or otherwise) proposed decisions. The Director of Water Regulation's view of the process was that officers would still hold their power and authority but a check would be in place.

The Director of MIB gave evidence that over time the Director of Water Regulation gradually became comfortable with the Director of MIB making those decisions on his behalf, and expected that the Director of the MIB would raise issues where necessary.

2.3.2. Analysis

The SIU Manager had been delegated certain powers by the Minister under the Water Management Act.¹⁴ This included a power under section 329 of the Act to direct a landholder to take specified measures to demolish, remove, modify or dismantle an unapproved water management work or otherwise render it ineffective. The delegated power was also conferred on DPI Water officers in more senior positions.

The SIU Manager attempted to exercise the power when he signed a section 329 direction on Friday 27 November 2015 in relation to the Farm Dam case.

The SIU Manager and his team were justifiably frustrated by the change in process that followed shortly after the disagreements about serving the direction. The SIU Manager had been exercising his delegated powers without scrutiny for some years and the impact of the change on the SIU was disproportionate to the impact on other areas of DPI Water. In his view, having to discuss the matter with the Director of Water Regulation or the Director of MIB each time a direction was required impeded the ability of the SIU to work quickly when an urgent direction or order was required.

As described in Farm Dam Case Study One, it is evident that there were significant failures by officers to adequately communicate and keep proper records preceding the SIU Manager's attempt to serve a direction on the Farm Dam landholder. Given the June 2015 decision that the SIU would take the lead on the case – and in the absence of clear communications and direction from those involved with the Minister's office – it was foreseeable that the SIU would at some point act on the draft direction that had been prepared in October 2015.

To avoid a recurrence of the events of late November/early December 2015, the Director of Water Regulation needed to properly address the underlying systemic issues. These included:

- a lack of clarity around roles and responsibilities
- an absence of clear processes for decision-making

14. Minister for Primary Industries, *Instrument of Delegation (Water Management Act) 2011*, p 26.

- inadequate documentation of decisions and outcomes
- the failure of senior management to deal with a lack of collaboration between the SIU and the Water Regulation managers.

The Director of Water Regulation appeared to have some appreciation of these issues early on. However it seems that his main focus in the Farm Dam case, based on the advice he was receiving, was the SIU's role in the case – and limited consideration was given at that time to other factors that contributed to the situation.

The Director of Water Regulation intended for the change in approach to be an interim measure. There is conflicting evidence about how long the measure was in place. However, although the Director of Water Regulation's involvement in reviewing cases stopped in early 2016, the Director of MIB continued to review the SIU Manager's decisions until Transformation.

In NSW, the government is vicariously liable for the acts of government employees – even if the employee is exercising independent discretion under powers conferred upon them by law. Managers therefore need to ensure that the actions of their staff are appropriate and lawful and do not expose the Crown to liability. Directions, guidelines, policies or criteria informing employees how delegations of authority are to be exercised are not only permissible, they are important management tools.¹⁵ However, such policies must not hinder a delegate's discretion in making a decision based on his or her opinion, belief or state of mind as, to do so, would offend the rule against dictation.¹⁶

The Instrument of Delegation (Water Management Act) 2011 was not formally amended to revoke the SIU Manager's delegation. However, despite the absence of a formal revocation, the question is whether the Acting Deputy Water Commissioner, the Director of Water Regulation or the Director of MIB breached the rule against dictation by directing how a delegation of authority was to be exercised in relation to any specific case or circumstance.¹⁷

The Acting Deputy Water Commissioner, with the agreement of the Director of Water Regulation, issued a directive to delegates stating that the proposed actions of delegates would be discussed with the Director of Water Regulation and had to receive his concurrence before being issued. The purpose of the change in process, as stated in the email, was so that the Director of Water Regulation could gain awareness of the business.

Other than the Acting Deputy Water Commissioner's email, no policy document or guidelines were issued to staff about how the process would operate for the exercise of the delegates' discretion in decision-making.

The evidence indicates that the reason for the directive went beyond the Director of Water Regulation gaining awareness. It was intended that the directive would also result in improved processes and allow the Director of Water Regulation to review matters to ensure that powers would be exercised appropriately.

Discussing a matter to improve processes or gain awareness was unlikely to result in a decision-maker's discretion being fettered. However, the evidence of the Acting Deputy Water Commissioner, the Director of Water Regulation and the Director of MIB – about the proposed actions being 'reviewed', 'endorsed' or obtaining 'concurrence' before being issued – gives rise to concerns that the effect of the directive could have been that the Director of Water Regulation or the Director of MIB could hinder a delegate from exercising their discretion in making a decision based on his or her 'opinion, belief or state of mind'.¹⁸

There was no evidence that the Director of Water Regulation or the Director of MIB subsequently dictated a decision to the SIU Manager or any other delegate. However, issuing the directive – in the absence of clear policies and recognition of the discretion available to delegates – laid the groundwork for dictation, even if dictation did not occur in practice.

Interfering with the independent decision-making of a delegate is unlawful. If the senior management of DPI Water were of the view that the SIU Manager's professional judgment was questionable, then appropriate action should have been taken to address that issue specifically – for example, by a formal process of performance management or review of the terms of the Instrument of Delegation.

15. NSW Ombudsman, *Good conduct and administrative practice: Guidelines for state and local government*, March 2017, p 45.

16. *Interpretation Act 1987* s 49(7).

17. NSW Ombudsman, *Good conduct and administrative practice: Guidelines for state and local government*, March 2017, p 45.

18. *Interpretation Act 1987* s 49(7)

2.3.3. Conclusions

Although there was no formal revocation of delegations, a directive issued by the Acting Deputy Water Commissioner had the potential to hinder the independence of the SIU Manager's decision-making and that of other delegates.

The aim of the directive may have been to prevent objectionable decisions from being made, to manage the timing of when a decision was made, to allow a more senior officer to exercise his or her own delegated power to make a decision – or a combination of all three. There was no evidence that the SIU Manager, or any other delegate, was actually dictated to about the manner in which their delegated powers should be exercised in any particular case. In other words, there was no evidence that any officer was acting under dictation as a result of the directive. It follows that there is nothing to indicate that the rule against dictation has been breached and that the SIU Manager's delegated powers were removed.

However, the issuing of the directive in the absence of clear policies and recognition of the discretion available to delegates laid the groundwork for dictation – even if dictation did not occur in practice.

Public sector managers are responsible for ensuring that the actions of their staff are appropriate and should take steps to avoid exposing the Crown to liability. However, the actions of senior management in this case appeared to demonstrate a lack of understanding about how delegated powers operate. Although documentary material referred to a 'Delegations Manual', it appears that no such manual existed at the time – nor has one been drafted since. A manual that explains the fundamental principles concerning delegations, many of which have been embodied in statute, and which clearly sets out guidelines or criteria surrounding the exercising of delegated powers is essential to ensure the good conduct of public officials. If an employee with delegated powers is operating in a manner that may be considered inappropriate or inconsistent with the terms of their delegation, legal advice should be sought by management before taking any steps that may interfere with the delegate's discretion to make a decision.

2.4. Did DPI Water fail to communicate with staff about Transformation?

2.4.1. Evidence

There was substantial confusion among staff, including managers, about which functions were going to WaterNSW and which were staying in DPI Water. This confusion persisted almost to the day of transfer on 1 July 2016. One witness noted:

Well, communications with [the Deputy Director General] to the troops was very difficult... it was very cryptic, all of the communications. I can recall that he gave us something which he called the 'wordle' at the time which was a page of writing and it was in different texts and it had different words and he explained it to us that the wordle, the prominence of the word written on the page in terms of its size and the boldness of its font meant that what was the most important and the least important were the smallest words... the matters that related to us [water regulation] were in fact the smallest words...

Another witness gave similar evidence, saying that at times communication from senior management was 'not great', and this caused distress and uncertainty – with staff not knowing whether they would be remaining within the public sector.

The Deputy Director General conceded that communication around Transformation was poor and that he was frustrated with how filtered communications were from the department to staff. He recalled thinking that if he were a staff member reading the communications, he'd be pulling his hair out.

He also gave evidence that he had had sympathy for staff, but all his communications were vetted to avoid industrial action:

I felt at times that People Learning Culture were designing the process as we were going which was not only incredibly frustrating for me, it must have been horrible for staff and, again, that was all about making sure [it] did nothing [to] trigger industrial action...to be fair to them [PLC] they ran a very, very thorough process to ensure that we – when I say we – the Department did not end up in [the] Industrial Commission, the focus was to ensure that there was absolutely no chance of industrial action and...that created uncertainty for some staff because of the time it took to do things and employing people particularly in the latter parts of the change process, but they achieved the goal, there was no industrial relations action out of any of this but it highly disrupted staff.

Many witnesses gave evidence that there was a significant lack of engagement with, and communication by, the Director of Transformation who was leading the change process. The lack of communication from her compounded the confusion and frustration of many staff who had expected more information. Witnesses noted that her email communication style was often not clear and it could be challenging to understand what she meant. She was often unavailable, would change meeting dates without notice, was difficult to get hold of and would take a long time to respond to queries.

The Director of Transformation took a different view about her role at DPI Water. She felt that her initial communications filled a gap, but that once the Deputy Director General had recruited his new leadership team – which included the Director of Water Regulation – her expectation was that those managers would be communicating about Transformation with their teams and having direct conversations with people. The Director of Transformation also confirmed that some of her communications were vetted by the communications and legal teams. However she did not see the vetting as being improper, but rather a way of ensuring internal consistency in messaging.

The Director of Water Regulation conceded that Transformation was poorly handled but that he had felt constrained about what he could and couldn't say:

So we were given direction by our HR department that we weren't allowed to do any kind of communication at all... That was relayed somewhat - sometimes by our HR department itself and sometimes from [the Deputy Director General]. So I know that there was a desire to do lots of communication to staff and lots of updates and we kept being told, "No, you're not allowed to. You can't, can't, can't, can't."

2.4.2. Analysis

A common complaint from DPI Water staff who were ultimately transferred to WaterNSW was that DPI Water failed to communicate adequately with them about Transformation. The evidence is clear that the frustration felt by staff was understood by management – and often shared by them.

The Deputy Director General, the Director of Water Regulation and the Director of Transformation all described a communications process in which emails, webinars, FAQs and similar documents were 'vetted' by various sections of the Department of Primary Industries before being disseminated to staff. The Deputy Director General told the Ombudsman that the main reason for this process was to avoid industrial action.

The desire to avoid industrial action came at the expense of proper and thoughtful communications with DPI Water staff. As a result, communications were delayed, non-responsive and sanitised. Staff became disengaged and – as demonstrated by the 2016 People Matter Survey results (discussed in 2.5.1) – morale slumped.

There are constraints on what the executive can communicate to staff about a change process, particularly when that process is yet to be fully approved by Cabinet. There are often legitimate reasons why communications need to be considered by other sections of an agency before being disseminated – for example, to ensure internal consistency. However, if senior executives are given responsibility for driving a major change process, those same executives could be trusted to respect confidentiality requirements and not risk industrial action.

If those responsible for Transformation had been permitted to communicate more promptly and responsively, staff expectations and engagement could have been better managed. Those staff who were transferred may also have been more receptive to the changes that were being implemented.

2.4.3. Conclusions

The evidence showed that staff were highly dissatisfied with the level and quality of communication they received from DPI Water management about Transformation. The evidence of those managers responsible for communicating showed that they too were uncomfortable with the constraints placed on them as to how and what to communicate.

Agencies need to maintain best practice standards in dealing with staff. It is accepted that in the process of implementing a complex government policy, DPI Water faced significant challenges. However, the delay in communicating with staff about Transformation was unreasonable and a failure in good public administration.

Regular and informative communication is essential to maintaining staff morale and wellbeing when an organisation is undergoing a significant process of change. The communications of management should not be filtered and vetted to such an extent that those key aspects of communication are comprised.

2.5. Did WaterNSW fail to integrate transferred water regulation staff?

2.5.1. Evidence

The morale of staff at DPI Water before 1 July 2016 had been extremely low. A senior manager noted that the results from the People Matter Survey in May 2016 showed that DPI Water staff – particularly those in the Water Regulation Group – were deeply unhappy and disenfranchised. The survey results indicated that, in comparison to the rest of the Department of Primary Industries, DPI Water were especially dissatisfied with the leadership of senior management and management’s communication.

Many of the water regulation staff who were transferred from DPI Water to WaterNSW saw the transfer as a positive move and an opportunity to improve water management compliance.

Around 200 people were transferred to WaterNSW from DPI Water, the majority coming from the Hydrometrics and Water Regulation groups. It seems there was a degree of optimism initially among some water regulation staff who were moving to WaterNSW. One Water Regulation manager described how, to begin with, he was quite positive:

...when we first moved over ... he [the CEO of WaterNSW] gave a very positive talk and we left that meeting thinking we’re in the right place, this is an organisation that’s going to be going places, it’s got a great future, we’re going to lose a lot of the red tape that was with government, this will be really positive.

Another transferred officer described how he saw the transfer to WaterNSW as an opportunity to try and get compliance back on track.

The Director of Transformation recalled that most staff were happy to be transferred from DPI Water, although some staff – including the SIU Manager – were not pleased. She noted that there had not been a lot of operational support for the teams at DPI Water, and that the CEO of WaterNSW had tried to address that at WaterNSW by doing roadshows, providing new equipment, and cutting red tape and bureaucratic processes.

However, after a few months it became apparent to some of the transferred water regulation staff that the opportunity for improving water regulation processes seemed to have been missed:

Our experience of never getting the restructure, never getting the integration, having to fend for yourself, having to find work arounds for everything you did showed that that wasn’t the case [that it was positive]. When we moved over there were a whole lot of support groups, these were us and others, who had identified the shortcoming, identified a way to make up that gap and to fix the problem. Virtually all of those failed to deliver...they [WaterNSW] acknowledge[d] that they hadn’t delivered but they hadn’t been able to because the goalposts kept changing from people above them. Now, I don’t know the merit of that but the reality was we were left to find solutions to all of these problems and some of them were very significant. We had to go and find them ourselves.

The CEO of WaterNSW conceded that the first six months after Transformation were not well managed:

Look it did not turn out how I would have wanted it... I think we've lost six months basically there, going through that. I absolutely had wanted by December 2016 to have gone to my staff and said, "Look, you've all been involved in the process. Here's where we think it all is. Away you go." I can't remember the date, I think it's mid-December, I was left in the position where I simply had to take 80 people and put them in one business unit and 80 people in another and say, "I'm sorry guys, I know enough to know that's where you belong. I've not got to where I wanted to get to in terms of a much more sophisticated understanding of how exactly we should be integrating you with our pre-existing staff." It's not what I wanted. Disappointed.

In the twelve or so months after Transformation, a number of factors impeded the ability of some transferred staff to undertake compliance related activities which, in turn, resulted in them feeling that they did not have a role to play in WaterNSW and were not valued. These factors included:

- experienced investigators leaving shortly after transfer, with further departures occurring over the next 18 months – some staff returned to DPI Water at a lower grade
- a lack of penalty infringement notice books which meant that PINs could not be issued
- unreliable technology
- challenges with sharing information with government agencies as a result of no longer being within government
- a lack of direction and clarity about how compliance fitted within the broader WaterNSW context.

Many of these factors could be attributed to insufficient lead times and communication to ensure that WaterNSW was properly prepared to implement Transformation on the day of transfer. The CEO gave evidence that he recalled saying to the Board of WaterNSW in early 2016:

'[i]t's very hard for us to know what we're getting in all of this because the transferor can't describe that to us, we're having a lot of trouble on a couple of those fronts just getting down to the nitty gritty of what are we talking about' and that persisted right up to 1 July.

When he was asked about whether he contemplated asking for an extension past 1 July 2016 to allow more time for transition, the CEO replied that he was sure that he did. However, the timetable had been set by government and his approach was that they just had to get it done within that time frame.

The Deputy Director General explained the discussions that had taken place in government about the 1 July 2016 deadline:

Now, the discussions around three months, six months, do we wait, do we not and then other people chimed in and said, "Well, let's put it back, it'll give us more time to be thorough," others saying, "No, we're 80% there, we can fix the 20% as we go," some saying, "Well, actually 90, it's 10," others say, "No, we're only 50%," others would say, "This will be a nightmare for staff who are actually pushing things back by another – uncertainty for another six months for these staff." So in the end they said let's make 1 July the date, go for it.

One transferred water regulation staff member said that he thought that WaterNSW did not even know they were getting half the functions that were ultimately transferred, and that – at the time he left in mid-2017 – it appeared to him that they were still coming to terms with what they had received.

The Director of Transformation told the Ombudsman:

WaterNSW had such a job to do, to recreate and shape their business, as well as ... a lot of things [only] became known once it went to WaterNSW. It wasn't even known at DPI. The instability of systems. The amount of manual processes that run – you know, that were unnecessary. I brought in some people who I knew to provide sort of a crash course on lean processes. I would have had the guys in DPI undoing some of those processes and buying into some of that change and making those changes before it transferred [had I known].

After Transformation, the intention was that staff would go to work on 1 July 2016 and do exactly the same job they had been doing on 30 June 2016 and that this would be the case until WaterNSW determined their future structure and priorities. All DPI Water compliance policies and procedures were transferred to WaterNSW and, according to the conditions specified in the WaterNSW operating licences, it was expected that DPI Water policies and procedures would continue to apply.

The Director of MIB and the DPI Water policy team – with input from other subject matter experts within DPI Water, including the SIU – had developed comprehensive policies and procedures by considering what was best practice, looking at what other agencies were doing, and reflecting on the recommendations made by oversight bodies such as the Ombudsman.

All these documents were made available to WaterNSW after transfer as a condition of the WaterNSW Operating Licences. The licences mandated that all compliance action taken by WaterNSW would be in accordance with the documentation to the extent that the requirements were reasonable, relevant and practicable for WaterNSW to adopt, or where DPI Water – acting reasonably – specifically identified the requirement as a mandatory requirement and communicated the mandatory requirement to WaterNSW and IPART. WaterNSW was not required to adhere to the documentation if a procedure was not prescribed or it required access to information or systems not available to WaterNSW staff.¹⁹

After negotiations with IPART, WaterNSW was successful in having this condition removed from its Operating Licence. On 1 July 2017, the new WaterNSW Operating Licence came into operation and WaterNSW was no longer required to adhere to DPI Water guidelines and manuals.

The evidence on this point is that adhering to the DPI Water policies and procedures during the first twelve months after Transformation was challenging because accessing the DPI Water documents was problematic. For reasons that remain unclear, the documentation was only accessible via the former Department of Water and Energy Intranet. Although staff who transferred from DPI Water still had access through the DPI network, accessing the material was not a straightforward process as it involved ‘juggling between the two networks using a CITRIX program’. Also, WaterNSW staff – such as officers in the legal team and the senior executives – had no access at all and needed to ask former DPI Water staff to locate the documents for them.

The Director of Transformation told the Ombudsman there were initially issues around the branding of documents, and that the technology was unreliable because staff could not always physically access the network.

There was also concern about a lack of support and not feeling like a team. One witness observed that much of the work at WaterNSW was project work done by contractors, so the focus was on delivering contracts – not assisting other areas of the agency. He felt that this resulted in a very disjointed organisation. He gave evidence that:

There's no support for people. It's not a team. It's a lot of little bits and that's what's going wrong and I might say that the potential of this organisation is really enormous and they need to fix these things and that will only come if they start connecting the bits, having a proper vision and a proper set of goals they all share and they start supporting people that way. They're very positive in some things but they just do it in a fragmented way and they're not - they just don't have the trust of their staff through some of the actions that you see.

When asked about staff who transferred feeling unsupported, the Director of Transformation replied:

I think that when people are coming in and there's that many people coming in, you can't be there for everybody. There was also a lot going on because I think we thought that we would have had everything signed out before it all transferred and it wasn't, there was still a lot more to understand. You kind of, I suppose, if you can't be everywhere you expect to...those that work for you to be there and be the contact between you and the guys on the ground. I visited a number of sites in that time to talk people through things and like I said, it was one of the largest teams, it probably had the breadth of the things and lot more of the issues that were coming up. Do I wish I had been more there for people going through that? Absolutely no doubt. In hindsight, probably what I would have done is buddied up with the new Executive general managers earlier on and got them more engaged too in understanding those people earlier and the direction.

2.5.2. Analysis

Documentary and oral evidence before the Ombudsman shows that the Director of Transformation and the Executive of WaterNSW did a significant amount of preparation to facilitate the integration of the transferred DPI Water staff. For example, by the end of July 2016, the Director of Transformation had developed a 70-page

19. IPART, *WaterNSW (Sydney Catchment Authority) Operating Licence 2012-2017*; IPART, *WaterNSW (State Water Corporation) Operating Licence 2012-2017*.

Water Integration Project Plan – which included strategies for integration, stakeholder and communications, overall design, integration governance, integration budget, benefit realisation and work stream charters. The work stream sponsors met regularly to progress their individual deliverables and transferred staff were engaged in this process. The SIU Manager, for example, was nominated as the Water Champion for the legal work stream.

When asked what was done to integrate the transferred staff, one senior WaterNSW executive said:

There's been a lot of things done quite early in the piece so we had roadshows and [the CEO] took a lot of his time to go out and meet these new people, we have tried to integrate – because quite often, for example, at Leeton we had WaterNSW staff here, then we had staff, you know, a couple of kilometres away in another office so we have put a priority plan around merging them together so we feel like one team. I think integrating them into our other department, Customer and Community, instead of having them separately on the side of an org chart for the first six months, I think that has been a good move to bring them in. The new enterprise agreement has unsettled a lot of people, that bargaining process, so most people that have gone back to DPI which is more about the award and the conditions and that is hard for a state owned corporation...there's certain rules that we have to abide by and having an enterprise agreement is something that we needed to have one enterprise agreement.

However, by January 2017, it was clear that risks had been identified with the integration of transferred staff. In a handover pack prepared by the Director of Transformation, dated 7 January 2017, under the heading 'Change and Workstream handover update' these risks were identified as:

- disengaged workforce with resultant loss in productivity/turnover
- employee uncertainty and loss of trust – not just Water Integration teams
- fragmented culture – WNSW and ex DPIW – the 'way things are done' may vary between teams due to different business processes, different ICT systems and geographic considerations/locations/isolation. This is being supported with rollout of corporate 'one team' initiatives including new corporate values but may require additional support.
- slower return to productivity.

Despite the efforts of the CEO, the Director of Transformation and the WaterNSW Executive to integrate transferred staff into the WaterNSW business, it is clear that – for many who were in the Water Regulation Team – integration was less than ideal. Every transferred staff member who gave evidence to the Ombudsman spoke of their unhappiness at WaterNSW, and many talked about wanting to leave – if they had not already done so. WaterNSW maintained that this was not the experience of all transferred water regulation staff and this may be the case. However, the transferred staff who gave evidence believed others within the Water Regulation Team shared their view.

While being transferred from a government agency to a SOC was not necessarily something people had wanted, there was evidence that some staff members saw it as an opportunity. Contrary to the views of some members of the WaterNSW Executive, there was evidence that the starting position of some transferred water regulation staff was not that they did not want to be in WaterNSW. Instead, that position developed over time as a result of insufficient infrastructure to support the delivery of their work, inadequate communication and leadership, and a clear statement on the importance of the compliance function in the broader context of the WaterNSW business.

Any restructure of an organisation can be difficult and can present challenges, particularly if staff are transferred out of government. The time frame within which the actual details of Transformation were determined, such as which functions and staff would transfer, was relatively short. It is clear that, for a variety of reasons, WaterNSW was in the invidious position of not having a full appreciation of what they were receiving and therefore not being in the best position to ensure that disruptions to operations were kept to a minimum.

WaterNSW expected that by December 2016 it would have both a comprehensive understanding of the functions it received and clarity about its organisational structure that would incorporate both the transferred functions and the related pre-existing functions. WaterNSW acknowledged that it did not fully meet its own expectations.

The first six months were crucial in successfully integrating transferred staff and despite some attempts to rectify the position during 2017, the damage had already been done.

2.5.3. Conclusions

WaterNSW was in the challenging position of acquiring over 200 staff and the responsibility for administering a significant number of additional functions. Many of the practical details about these functions and which staff were transferring were not clear before 1 July 2016.

Although WaterNSW prepared and planned for the integration of transferred staff, the execution of integration was less than ideal. There was insufficient infrastructure to support the delivery of the compliance function, inadequate communication and leadership, and no clear statement on the importance of compliance in the broader context of the WaterNSW business. As highlighted in the WaterNSW 'Change and Comms Workstream update', by early 2017 there were significant risks of staff disengagement, a loss of trust, uncertainty and a fragmented culture. The evidence reviewed by the Ombudsman established that those risks were realised.

2.6. Did WaterNSW have a different approach to compliance?

2.6.1. Evidence

A common theme that emerged during the water investigation was a perception of 'us and them' – between the transferred DPI Water staff and the WaterNSW staff. This perception appears to be linked to how enforcement compliance measures – such as issuing PINs, directions and orders and starting prosecutions – could be reconciled with the values, principles and customer-focused culture of WaterNSW.

The Director of Transformation explained that the thinking around a customer service strategy had started before Transformation, but it was when an independent consultant was engaged not long after Transformation that it started to really take shape. The consultant undertook research with WaterNSW's customers in August 2016 and that research was then used to formulate a WaterNSW Customer Service Strategy and Customer Service Principles.²⁰ A PowerPoint presentation, outlining the proposed Customer Service Strategy, was discussed at a workshop with managers – including the transferred Water Regulation managers – in December 2016. The four Customer Service Principles that were ultimately adopted, were – Understand and Know Me, Value for My Money, Make it Easy for Me, and Be My Partner. The consultation slide pack that was presented to managers in December 2016 articulated the WaterNSW Customer Vision, which supported the principles, as:

Putting Customers at the Heart of our Business: Our goal is to relentlessly focus on our Customers, to have them foremost in our minds in everything we do, to know what they need before they do, and above all else to have all business decisions driven by their needs. This will involve a step change in our business starting with really knowing who our customers are and what they need from us.²¹

The CEO gave evidence about how the WaterNSW Values – which were 'consistent and complimentary' with the WaterNSW Customer Service Principles – were developed as a 'bottom up exercise'. The consultant convened 46 workshops with all WaterNSW employees, including all transferred staff.²² All employees were asked 'what are the values you want represented in the body of the organisation that you choose to work for?' The consultant provided ten of the most common values to the WaterNSW Executive and six were chosen as WaterNSW's corporate values. The CEO told the Ombudsman:

I do wish to make the point those values were generated by our employees including in part, employees that we're talking about [the transferred staff]. For me that's important to get on the record.

20. WaterNSW, *What our customers are saying today*, Internal PowerPoint presentation, 28 November 2016, p 2.

21. WaterNSW, *What our customers are saying today*, Internal PowerPoint presentation, 28 November 2016, p 4.

22. WaterNSW, *Values Development Final Report*, September 2016, p 12.

By the end of 2016, the WaterNSW Executive had settled on a new organisational structure. The CEO emailed all staff a summary and overview of all teams within WaterNSW and a new organisation chart on 6 December 2016. In his email, the CEO noted that:

Our Customers are at the heart and driving change, and our Customer Strategy will be the key reference point for activity going forward:

- Lower costs for “turning the wheel”
- Greater value through innovation/product development
- We are on the “right side” if we advocate for customer outcomes

The summary that was attached to the email was titled ‘The WaterNSW Organisational Design’. It described the purpose of the Customer and Community Team, where compliance investigations would now be located, as:

Relentlessly focus on understanding and anticipating the needs and wants of our Customers & Communities, evaluating WaterNSW’s performance in meeting those needs and wants and continuously improving our Customers’ and Communities’ satisfaction with WaterNSW. Accountable for all Customer and Community relationships. Also accountable for developing the Customer Strategy that delivers on the needs and wants of our Customers and Communities and also ensures that everything WaterNSW does and all the decisions it makes are driven by the needs of our Customers and Communities.

As a result of receiving communications such as the Customer Vision and the Values and Principles, staff who had been transferred from DPI Water believed that WaterNSW was reluctant to take a ‘hard edged’ approach to compliance and instead appeared only focused on the education aspects of the compliance spectrum.

This perceived incongruence between the respective approaches of WaterNSW and DPI Water is better understood when comparing DPI Water’s Customer Service Charter and the Water Regulation Team Business Plan in place before Transformation.²³ Both of these documents guided the work of the Water Regulation Team, along with various policy and procedure documentation.

The Customer Service Charter described DPI Water’s vision as a strong NSW economy built on resilient communities. The service goals were to be accessible, communicate clearly, be accurate and consistent, be responsive, complete actions in a timely manner, value and encourage feedback and drive continual improvement. The Charter also committed to completing 70% of compliance cases within six months.

The Business Plan described the work of the Water Regulation Group in the following terms:

The Water Regulation Group (WRG) operates within a complex and everchanging water environment involving both Federal and State Governments. WRG’s working environment is also affected by climatic extremes, vocal influential stakeholders and water user groups, State and National advisory bodies, Water Sharing Plans, environmental/social/economic considerations, and obligations to regulate in line with legislation.

A key role of WRG is regulating access to water and water sources through: Water Access Licences, Work Approvals, Basic Landholder Rights, Controlled Activities in riverine corridors, and State Significant Development requiring liaison with major clients such as infrastructure operators and mining companies.

The Group’s compliance role ensures stakeholders are aware of their obligations, risk manages alleged breaches, and implements appropriate enforcement actions. WRG is proactive in reducing red tape and improving customer service delivery and works to meet the expectations of our stakeholders and customers alike. WRG is an integral part of NOW’s operations in delivering the government’s water reform policies and goals of the NSW 2021 Plan.

In comparison, the WaterNSW communications and documentation placed a far stronger emphasis on the customer and lacked sufficient acknowledgement that enforcement can be appropriate in certain circumstances.

23. DPI Water, *Customer Service Charter*, https://www.water.nsw.gov.au/__data/assets/pdf_file/0005/549671/customer-service-charter.pdf.

Against that backdrop, the evidence before the Ombudsman was that there were transferred water regulation staff who found themselves struggling with the WaterNSW vision, values and principles which, in their view, focused heavily on the customer and made no reference to compliance and enforcement actions. One witness described how he thought compliance was seen by WaterNSW in the following terms:

...compliance is a bad word within WaterNSW. It doesn't fit any of these values, it doesn't – it's all about be my partner, make it easy for me. Compliance isn't about making it easy for anyone, compliance is trying to bring someone into compliance which sometimes means that you're going to offend someone, and by doing so you're going to bring them into compliance. They're breaking the law; they need to be occasionally offended

When a Water Regulation manager was asked about reconciling the Customer Service Principles of Be My Partner and Make it Easy for Me with compliance actions such as prosecutions and fines, he said that you couldn't because they were contradictory and didn't fit with the 'pointy end' of compliance.

Conversely, WaterNSW senior management told the Ombudsman that when transferred staff raised their concerns at roadshows, in meetings or in emails, they were consistently advised that compliance and the objectives of WaterNSW were not mutually exclusive. The Director of Transformation said that when the transferred staff had raised concerns with her she had verbally told them that the approach that they were to take was no different to that taken at DPI Water by at least one Water Regulation manager – which was called the Water Regulation Education and Audit Program (WREAP). The WREAP was focused on education and prevention, but it seems to have been confined to one DPI Water region and was not standard policy.

The CEO gave evidence about the perceived conflict between water regulation/compliance and being customer centric:

Those customer values are being perceived as a message of cut corners and they're absolutely not and I've said to staff, "We're not talking here about cutting corners. My water quality people do not see our values as giving them license to cut corners and they absolutely don't," but within that Water Reg space that's the immediate reaction and my discussion with them and it will take more than one go.

The CEO told the Ombudsman that his message to staff was that the more WaterNSW understood its customers, the more those customers could be helped. He felt that greater understanding of customers would allow WaterNSW to assist the 'rule maker' to simplify the rules around water regulation and therefore ultimately achieve better compliance.

The CEO described what he felt to be an ongoing challenge to organisations after an exercise like Transformation:

...one of the biggest challenges in that is bringing together – and I call it the one team, WaterNSW – how do I get people from very different backgrounds and organisational cultures, bearing in mind a lot of our staff, most of our staff, had been in those places for a long time, you know, we don't have a very high turnover rate, how do I get those entrenched, if you like, experiences, everyone coming together and working as one team? ... we actually have four cultures that I've got to bring together, we've still got the SCA culture, we've got the State Water culture, we've got the culture that came with the DPI Water transferred employees but we've also got a fourth culture which is the culture that's come from people who've come into our organisation without any background in either of the three. We've been running a program for the last year to year and a half around values, behaviours, even a unified enterprise agreement which is all about trying to get people to work together as one team. So that was my reflection from 2014, and I live with that challenge still today.

He strongly rejected the view that WaterNSW did not want to take compliance action where appropriate, saying:

...we're under the spotlight, this is the time to be doing everything by the book and I can only say from the perspective of the leader of the organisation, I have made that very, very clear from the get-go.

A transferred staff member gave evidence that he felt there was a clear and distinct disconnect between WaterNSW and the DPI Water staff who had transferred. He said that he had raised issues at an Executive meeting around how compliance – which did not raise revenue – could work in WaterNSW, which had profitability as one of its objectives:

[I said] look I still can't understand why you've got the compliance function because we're going to cost you money. And I got a comment back, well you just need to write more penalty notices....Now whether it was a jovial comment that he made in relation to it, that's what I mean, they [WaterNSW] just don't understand that sort of aspect in relation to it.

A senior executive within WaterNSW told the Ombudsman that he agreed that there was a disconnect and that the transferred water regulation staff were perpetuating an ‘us and them culture’. He felt that the transferred water regulation staff did not extend the same cooperation, collaboration and assistance to contractors within WaterNSW that they extend to their own staff. He commented that they acted like they were not part of WaterNSW and stated:

And it doesn't matter how hard we try to integrate them, drag them to weekly meetings, they're continuing with that; which is a performance issue.

Another senior WaterNSW executive also thought that there was an ‘us and them’ mentality, which was a result of the transferred staff just not wanting to be in WaterNSW.

Farm Dam Case Study One demonstrates that, after Transformation, transferred staff attempted to comply with what they thought the values meant at the expense of taking enforcement action. An officer involved in that case explained why he took the approach he did about the pollution control pond:

I can make that happen because if he [the Farm Dam landholder] does these minor adjustments this [his dam] is legitimate. It's not aligned with what the previous advice has been, it's not aligned with what I think, but I can deliver it so we can meet these standards. So this is the driver. This thing [the Values and Principles] is the driver. [The legislation] is never going to be [the driver] if we have that as our motto, and we try to be everyone's friend because compliance is not everyone's friend.

2.6.2. Analysis

The CEO of WaterNSW and the Director of Transformation both gave evidence to the Ombudsman that transferred staff had raised concerns with them about the perceived contradiction between taking enforcement action and WaterNSW's objectives, values and principles. They said they had conversations with concerned staff to reassure them that there was no contradiction and pointed to a Customer Newsletter dated April 2017. According to WaterNSW, this Customer Newsletter – which included a short article on compliance – was evidence that compliance was taken seriously. The article stated that a key part of WaterNSW's responsibility was ensuring compliance with NSW water management laws to enable the secure and sustainable sharing of water between water users including the environment. It also stated that WaterNSW monitored compliance with the Water Act and the Water Management Act and took appropriate enforcement action when a breach occurs. However, this single customer newsletter does not sufficiently address the concerns of transferred staff – that is, how enforcement operated within a customer centric environment and, crucially, how WaterNSW's customer service principles were to be applied in practice within the compliance context.

A customer newsletter is not a substitute for internal policy and procedure documents that clearly communicate what WaterNSW's approach to compliance was intended to be in practice. In view of the strong perception among transferred compliance staff who gave evidence that there was a conflict, a single newsletter – issued in April 2017 and aimed at WaterNSW's customers – was insufficient to reassure transferred compliance staff and provide guidance on how they should undertake their compliance responsibilities.

Although the Customer Service Principles were not launched until March/April 2017, discussions with staff had started in 2016 about developing the values, customer strategy and service principles and what they might embody. The Customer Service Principles were well developed by November 2016 and shared with managers around that time. The final version published in March/April 2017 was unchanged compared to the November 2016 PowerPoint presentation.

WaterNSW has maintained that senior staff should have been experienced enough to know that customer service and enforcement functions can co-exist. However, the evidence showed that they remained confused and concerned. Staff members' perceptions about WaterNSW's reluctance to take enforcement action was reinforced by the fact that staff were not provided with PIN books for over twelve months.

It is accepted that ‘compliance’ involves a range of activities. However, regulatory agencies generally have a legal or ethical obligation to take appropriate action to enforce the laws for which they have responsibility or jurisdiction (see NSW Ombudsman, Good conduct and administrative practice, page 104). Although there is evidence that the notion of compliance was not completely absent from WaterNSW's business, the evidence did not demonstrate that this translated into WaterNSW taking sufficient action to consistently enforce the laws for which it was responsible.

It is acknowledged that since mid-2017 – after the changes to the Operating Licence and the airing of the Four Corners Program *Pumped* – significant work has been done by WaterNSW to raise the profile of compliance within the agency and to make it clear that WaterNSW takes their regulatory obligations seriously. For example, prosecution guidelines and a compliance framework were published in the latter half of 2017 and additional resources have been engaged to clear the backlog of cases. The CEO gave an undertaking to the Ombudsman that he would ensure that WaterNSW policy documents clearly outlined WaterNSW's commitment to holding offending customers to account. The transfer of all compliance functions to NRAR has now made this undertaking unnecessary, although WaterNSW has advised that it has acted upon it.

2.6.3. Conclusions

Since mid-2017, work has been done by WaterNSW to improve its response to breaches of the Water Management Act and the Water Act and to convey to staff and customers that taking enforcement actions – such as issuing PINs or starting prosecutions – is compatible with its core values and customer centric focus.

However, for twelve months after Transformation, WaterNSW failed to adequately recognise and address the concerns of transferred staff about what they saw as a cultural misalignment. The evidence shows that these concerns were raised with WaterNSW executives and they were verbally responded to. Despite this, there was limited acknowledgment of the importance of compliance and the need for appropriate enforcement action in WaterNSW's internal documentation from that period, including its Customer Service Principles. Apart from a short article in the April 2017 Customer Newsletter on compliance, there was no meaningful statement or policy to guide staff on the key role compliance and enforcement plays in protecting the state's water resources. This demonstrated a failure by WaterNSW to have sufficient regard for its enforcement responsibilities.

2.7. Did WaterNSW fail to take timely action to adequately resource compliance?

2.7.1. Evidence

On 15 July 2016, the SIU Manager and another Water Regulation manager who had been transferred emailed the Director of Transformation a PowerPoint presentation which explained in detail the need for adequate resourcing for compliance in WaterNSW. The document listed the perceived benefits of a standalone team including efficiencies of resources, ensuring WaterNSW was seen by oversight agencies as serious about reforming compliance in NSW, and allowing Water Regulation officers to focus on the delivery of customer services. It was intended that the slides would be discussed at a meeting the following week however it is not known if this occurred.

The Director of Transformation explained to the Ombudsman that initially dealing with the backlog of cases inherited from DPI Water was the most pressing matter, and that – after asking the SIU Manager and a Water Regulation manager to provide some strategies for working through the backlog – she saw an improvement.

In August 2016, a further PowerPoint presentation was drafted by the SIU Manager and presented to the Director of Transformation and the other Water Integration team members. This document outlined the current challenges facing the SIU – including insufficient resources for the function, conflicting legislation in the Water Management Act and WaterNSW Act, the urgent need to recruit staff, and the need to develop a WaterNSW compliance program and compliance policy. In terms of opportunities for improvement, the document identified '[s]table committed leadership and direction regarding roles and functions and better program and workflows to ensure priority of cases identified earlier and appropriate enforcement put into place quickly'.

During this period, the Director of Transformation and the WaterNSW Executive were having ongoing discussions about the best functional design for the agency in the future. The Director of Transformation explained that compliance and metering were a priority so that the structure of those teams was mapped and considered relatively early on.

As part of that discussion, the idea was proposed for the SIU to sit within the legal team. A dedicated legal resource for the compliance function was also contemplated – specifically, a case enforcement manager with legal qualifications who could enhance the investigative function. It would be one of the responsibilities of that role to write the prosecution briefs, which would relieve investigators of this task. A variation of this model was eventually decided on and, as a result, by December 2016 the SIU Manager’s position was made redundant with his agreement. It was settled that the investigators would be placed within the regional teams, while the enforcement case manager would report through to the General Counsel of Legal. The regions would be responsible for the investigations while Legal would be responsible for the policy aspects of compliance and for the prosecutions.

On 12 December 2016, a Water Regulation manager emailed a WaterNSW employee assisting with integration – who in turn forwarded the email to the Director of Transformation. The email concerned a request for a redundancy from two of the three remaining SIU investigators. By this stage, the SIU Manager had already been advised that he was getting a redundancy.

The Water Regulation manager pointed out in the email that the future nature of compliance within WaterNSW was still not clear and that all indications at present were that most of the compliance effort would be focused on education and influencing/changing behaviours. The Water Regulation manager argued that – while he agreed that education and influencing/changing behaviours was an area that needed to be better resourced – there was still a significant volume of work in the harder-edged compliance function involving investigation and follow-up action that would potentially lead to fines or prosecution. He went on to note that dealing with high-end breaches at DPI Water had required a dozen or so well-trained officers to manage the workload:

We are now regulating an asset worth \$27 billion and I see there will continue to be a need for officers capable of conducting sound investigations able to meet the standards of proof to be able to put before a court. To meet this need, I think we need to increase the current number of staff with these skills.

On the issue of the redundancy requests, the Water Regulation manager pointed out that over the past year or so large numbers of experienced staff had left and if the redundancies were agreed to then those investigators would have to be replaced. However he conceded their replacement was dependent on the future role of compliance in WaterNSW. He further noted:

I understand a policy on how the compliance function are [sic] to be conducted and aligned to the business functions of WaterNSW is yet to be developed. This will be important to set the tone of how the new organisation addresses compliance matters and to guide staff in how to undertake the work. Where this is significantly different from the approach taken in DPI-Water this may require changes in behaviours of all staff.

He concluded by writing that – if the redundancies were agreed to – it would further diminish the already reduced capacity of WaterNSW to deal with the higher-level compliance matters. It does not appear that the Director of Transformation or anyone from the Executive responded to the Water Regulation manager.

One of the investigators who had sought a redundancy gave evidence that he wanted a redundancy because, in his opinion, WaterNSW did not want to undertake compliance enforcement actions. After his request for a redundancy was refused, his position and those of the other two remaining investigators were incorporated into the regions. This meant that the SIU no longer existed. The investigator told the Ombudsman that – even though he tried to be proactive with the high-end investigations under the new model – there was an absence of direction and leadership.

When the remaining three SIU investigators were incorporated into the regions they were placed within the Customer and Community Team headed by a senior WaterNSW Executive. The overall purpose of the Customer and Community Team was to focus on understanding and anticipating the needs of WaterNSW’s customers and ensuring that everything WaterNSW did and all the decisions it made were driven by the needs of their customers.

The WaterNSW Executive was asked by the Ombudsman whether he thought that four dedicated investigator positions in WaterNSW were sufficient to deal with water compliance issues. He replied that he was still forming a view on that because he believed there was insufficient data to make a resourcing decision:

I’m not prepared to make a decision what the required resourcing is for the medium or high’s or very high matters because I’m not confident in the triage process being robust enough to – if you rate everything very high then I need lots of senior investigators, if they’re not being categorised correctly I’m unnecessarily making them high, like, I don’t have a sufficient level of confidence to make a resourcing decision.

By mid-2017, two of the three remaining former SIU investigators had left WaterNSW and returned to DPI Water after applying for jobs via a merit selection process. At least one of the investigators returned to the department at a lower grade and rate of pay:

So when I went back to DPI Water, I was so disillusioned with WaterNSW, I actually took a pay-cut and I went from a grade 9/10 to a grade 7/8 to get back in the government.

After the investigators resigned, WaterNSW advertised on 31 July 2017 for two investigators but struggled to find suitable candidates. As a result, in August 2017 WaterNSW engaged a private company to provide investigative and analytic services and to assist WaterNSW with the backlog of compliance cases that were transferred from DPI Water on 1 July 2016. The private company had approximately nine contractors, including two data analysts and seven investigators – many of whom have a background in criminal investigations.

By December 2017, WaterNSW also had 21 non-contractor staff doing investigations and site inspections into alleged breaches of the Water Management Act and/or Water Act.

2.7.2. Analysis

WaterNSW maintained that the model under which it was funded constrained how it made decisions about resourcing. As already noted, the resourcing of compliance functions for water management within NSW has been a longstanding issue. Successive governments have continually failed to prioritise the function, resulting in seriously inadequate resourcing to properly protect the state's increasingly scarce and valuable water resources.

WaterNSW received four highly experienced water compliance investigators from DPI Water, plus a number of staff with some experience in doing compliance work at a lower level. At the same time, WaterNSW's customer base grew from 6,000 customers to over 45,000 and the cost of the assets they were now responsible for exceeded \$27 billion.²⁴ Twelve investigators had been employed at DPI Water to provide a statewide service and that number was acknowledged by many witnesses as being insufficient. After transfer, WaterNSW could have taken steps to engage – even on a contract basis – somewhere between 8 to 10 investigators to deal with the high-level compliance matters and the significant backlog of compliance cases they had inherited from DPI Water.

It is acknowledged that the structure for the compliance function was under consideration for the first six months after Transformation, and that the final structure was not determined until around December 2016. However, on several occasions, both the SIU Manager and the Water Regulation manager had drawn the attention of the Executive to the need to properly resource compliance. There was no reason why WaterNSW could not have taken steps to resource its compliance function as soon as it became aware of the resourcing issues. However, it was not until August 2017 – after the Four Corners program aired, the Matthews investigation was announced, and two of the three remaining SIU investigators had left – that WaterNSW engaged external contractors to finally start working through the backlog and the high-risk matters. There was no obvious impediment to prevent WaterNSW from engaging contractors on a temporary basis much earlier. Between the end of 2016 – when the SIU Manager left – and the engagement of the private company, there were only three investigators left to perform a role that should have been done by at least three times as many investigators.

2.7.3. Conclusions

It is acknowledged that in August 2017 WaterNSW took decisive action to address the backlog of compliance cases and deal with the new matters they had received since July 2016.

Compliance and enforcement action are a key component of providing a high level of customer service and protecting the state's valuable water resources. From July 2016, WaterNSW had responsibilities for enforcing the regulatory framework and it was open to WaterNSW to take action within that period to ensure that it fulfilled these obligations. There was no obvious impediment to WaterNSW making such a decision, as demonstrated by the actions it subsequently took in August 2017. The delay in properly resourcing compliance was avoidable. It

24. WaterNSW Internal Memorandum from [Manager] to Board WaterNSW, *Water Integration: Integrated functions & Functional Realignment*, 23 November 2016.

resulted in transferred staff feeling disenfranchised, unappreciated and unable to do their work. In addition, the delay in addressing the resourcing of compliance reflects poorly on WaterNSW's commitment to its own values and customer service principles.

Although the number of enforcement actions taken does not in itself give a complete insight into how effective a compliance program is, statistical information is an important component of transparency. The Ombudsman's November 2017 Water Investigation report published a seven-year historical comparison of enforcement actions. This showed a 72% drop in total actions taken by both DPI Water and WaterNSW in the 12-month period after Transformation when compared to the year immediately preceding Transformation.

To meet the needs of customers, the regulator of the state's water assets must have a strong compliance program which aims to prevent, detect and stop unlawful water activities. For 12 months after Transformation, such a program was absent and – as a result – customers who were victims of breaches were disadvantaged.

3. The Farm Dam Case Study One

3.1. Introduction

This case involved the relocation and doubling in size of a pre-existing dam. The complaints alleged that no enforcement action was taken despite clear evidence of breaches – leading to the dam remaining unlicensed for a period of five years.

The case study highlighted:

- A reluctance of senior officers to take enforcement action in the face of repeated breaches of the Water Management Act.
- The willingness of senior officers of the DPI Water and WaterNSW to develop an atypical solution that although technically lawful was inconsistent with the objects of the Water Management Act.
- The negative impact of miscommunication and poor working relationships between staff.
- That safeguards are needed to properly perform regulatory functions in a highly political environment.

3.2. The evidence

Between 2012 and 2017, there were a total of ten site visits to the property by either NOW/DPI Water or WaterNSW.

In 2012, the property owner contacted NOW about the location of the dam saying it created access difficulties to part of his property. During the first site visit in May 2012, the property owner was told that the dam in its then location did not require a licence or approval as it was constructed before 31 December 2011²⁵ and was not being used for a commercial purpose. Any plan to relocate the dam, increase its capacity or start using it for commercial purposes would require the relevant approvals and necessary licences from NOW/DPI Water and development consent from the local council.²⁶

In November 2012, the property owner told NOW that he was going to relocate the dam.

25. From 2004 to 31 December 2011, owners of certain works constructed before 1 January 1999 (such as dams that exceed their maximum harvestable right capacity) were able to apply for a water supply work approval and a water access licence (WAL) to enable such works to become licensed under the Water Management Act licensing regime. Dams that had been used for stock and domestic purposes only did not require a licence under the new regime. However, dams that were larger than the Maximum Harvestable Rights Dam Capacity (MHRDC) and were being used commercially would require licensing under the new regime.

26. A water supply work approval must be obtained to construct a dam on certain watercourses: *Water Management Act 2000* s 90. A water access licence (WAL) is required to be allocated an entitlement to a share in the available water within the water sharing plan: *Water Management Act 2000* s 56(1)(a). A water use approval is required to use water for a particular purpose, such as irrigation: *Water Management Act 2000* s 56(1)(b).

Twelve months later, he contacted NOW again to discuss the dam relocation and officers visited the property in December 2013 (second site visit). The officers inspected the dam and took photos and GPS coordinates to map the dam. There was no evidence at this stage that the land was being used commercially, but the property owner mentioned he was interested in being able to grow some produce for his own personal use.

NOW later confirmed in a letter that the current volume of the dam was 8.9ML and the Maximum Harvestable Rights Dam Capacity (MHRDC)²⁷ for the property was 1.04ML (based on a property size of 13 hectares). To move the dam would require a works approval and the purchase of a water access licence (WAL) to account for the difference in the volume of the dam and the MHRDC (8.0ML). He would also need to submit a development application to the local council.

Shortly after the visit, the property owner's local MP wrote to the Minister responsible for water in NSW about the dam. Between 2014 and 2017, the local MP sent six letters about the property owner to the Minister.

The first letter was sent in February 2014. The local MP claimed that the property owner had been carrying out a commercial concern on the property since 2006. The local MP also claimed that the property owner had not been told about a water amnesty and, as he had been using the property for commercial purposes, he should have automatically received a water licence for his property in 2011. The local MP requested that the Minister now issue the property owner with 'his appropriate water licence'.

The Minister responded informing the local MP that NOW had visited the site and there was no evidence of recent irrigation. The Minister also confirmed the advice previously given to the property owner that any proposal to relocate the dam would require him to apply for a works approval and purchase a WAL.

The local MP sent another letter to the Minister in July 2014 (the second letter). This letter maintained that the property owner was carrying out a commercial operation and as he had not been informed of the amnesty he 'should be given an exemption and not be forced to pay for his water licences'.

NOW prepared a response for the Minister but it was returned by the Minister's office suggesting that a NOW officer contact the local MP. When NOW queried this suggestion, it was told that the Minister's Chief of Staff:

...put this change forward as he feels that if the Minister is to sign this letter it needs to offer more direct assistance given this issue in particular has been long-standing.

I can assure you that this is not standard practice for all letters.

Officers said they felt uncomfortable being asked to initiate contact directly with a Member of Parliament who, in their view, 'was questioning the administrative process'. There was evidence that officers did not feel they could question instructions from the Minister's office, so an officer called the local MP and explained the application of NOW's policies in the property owner's case.

Towards the end of 2014, NOW received information that the property owner was undertaking work on the dam. A new compliance case was created in the case management system, CIRAM (Compliance Investigation Reporting and Management system).

Two officers visited the site in December 2014 – one from the Water Regulation Group and the other from the SIU (third site visit). They saw that the dam wall had been breached and a small amount of water was left in the dam. The property owner said he was just repairing the dam as it had leaked. He was again told that the dam could not be increased in size or moved without approval. There was still no evidence of irrigation for commercial purposes.

The case was closed in CIRAM on 13 January 2015, even though the property owner was to contact NOW once works were complete. Officers told the Ombudsman that there was an approach in NOW not to let matters 'drag on' in the system to avoid a backlog of cases. If subsequent events occurred, then a new case could be opened in CIRAM.

Once the case was closed, no follow up was done to ensure the works had been completed.

27. Where the volume of the dam exceeds the MHRDC an access licence and water use approval is required to authorise the taking and use of water from that source for any volume taken and stored in excess of the MHRDC volume unless the water is taken for domestic and stock purposes.

In June 2015, the local council told NOW that the property owner had submitted a development application for retrospective approval for works to repair the dam. The application claimed that the capacity of the original dam was 20.4ML and that capacity after the works was 20.5ML. This was significantly more than NOW's estimate of 9ML that was calculated based on data collected during the site visit in December 2013 to inspect the original dam.

A new case was opened in CIRAM and officers from the Water Regulation Group and the SIU met to discuss the case. It appeared from aerial mapping that the new dam was about double the size of the original dam. If the dam had been enlarged and/or moved, it would likely constitute a work without approval and give rise to a breach under the Water Management Act.²⁸ It was decided that the SIU would handle the case as there were 'politically sensitive' matters involved. The SIU would conduct the investigation and Water Regulation would assist with licensing matters.

Officers from SIU and Water Regulation visited the property in July 2015 (the fourth site visit). They saw that the original dam had been replaced by a new and larger dam. The property owner conceded that the dam had moved, but maintained that the new dam had not increased in volume because he claimed the original dam was deeper than NOW's estimate. The officers calculated that the new dam was 15.5ML. The MHRDC for the property was 1.04ML, which meant that the water volume in the new dam was 14.46 ML in excess of MHRDC.

Officers informed the property owner that they would proceed to investigate a breach of the Water Management Act. The property owner did not want to be interviewed, so he was issued with a request for information under section 338A(2) of the Water Management Act. He was to respond to the notice and contact DPI Water²⁹ to discuss licensing options by mid-August 2015. He was again informed that he would need a WAL to purchase water above the MHRDC and that he could not irrigate for commercial purposes without a water use approval.

Despite the property owner maintaining that he was not going to start a commercial operation, officers were suspicious that he intended to irrigate the land – given the significant financial investment in the dam. This was also consistent with the local MP's claims that the property owner used his property as a 'farm'.

3.2.1. Further correspondence from the local MP to the Minister

Shortly after the site visit, the local MP wrote another letter to the Minister (the third letter). The local MP said that the department was treating the property owner in an 'abhorrent manner'. The local MP had been advised that the dam had simply been desilted and repaired. The claim that the dam had increased in size and been moved was a 'false claim being made by OW [Office of Water]'. The local MP said that 'this hard working family should have received a free water licence some time ago but were not informed by the OW that they could apply for such a licence'. The local MP demanded that the Minister review the matter and asked that 'no further costs, intimidation and bullying' be undertaken by DPI Water toward the property owner's family and that a free water licence be given to the property owner. DPI Water was concerned by inconsistencies between the representations in the letter and evidence obtained during site visits.

The Minister again responded to the local MP advising that the property owner's dam had not simply been desilted but had more than doubled in size and the dam wall had been moved. He was told that there was no mechanism under the Water Management Act to grant the property owner a WAL or an approval without payment of the relevant fees.

The local MP wrote in September 2015 (the fourth letter) and again stated that the capacity of the dam had not increased. The local MP argued that the requirement to make a retrospective development application was 'grossly unfair and intimidating to [the property owner] and his family' and asked that the Minister review the matter independently and consider removing the need for a new development application.

DPI Water officers told the Ombudsman of their frustration that – as the political aspects of the case escalated – higher level officers in DPI Water or the Minister's office did not 'take control of the situation'.

The Minister responded to the fourth letter in October 2015 informing the local MP that DPI Water had inspected the site both before and after the construction of the new dam wall, and there was evidence that the dam wall had moved downstream and the capacity of the dam had increased.

28. *Water Management Act 2000* s 91B.

29. DPI Water replaced NOW in July 2015.

3.2.2. DPI Water's meeting with the Minister's office

In mid-October 2015, SIU officers determined that – as the property owner had not complied with the request for information and the licensing issues had not been resolved – a direction would be prepared under section 329 of the Water Management Act to direct the property owner to remove or modify the dam. This was prepared and sent to the SIU Manager for approval.

Around this time, DPI Water became aware that the local MP was meeting the Minister about the case. It seems this prompted a request from the Minister's office to meet with a Water Regulation Manager and the Deputy Director General of DPI Water. The meeting ended with the Minister's office stating that it needed a few days to 'figure out what's going to happen'.

A few days after the meeting with the Minister's office, the Water Regulation Manager emailed the SIU case officer (not the SIU Manager) advising that he had attended the meeting with the Minister's office and that the situation remained unresolved.

The next letter from the local MP to the Minister arrived in the Department on Friday 27 November 2015 (the fifth letter). It maintained that the capacity of the dam had not increased. It was allocated to the Water Regulation Group for a response. That same afternoon, the SIU Manager approved the section 329 direction that had been submitted earlier in October 2015.

On Monday 30 November 2015, the SIU informed the Water Regulation Group that the section 329 direction to remove or modify the dam had been sent the previous Friday.

The Water Regulation Manager was 'pretty flabbergasted' that the direction had been sent without first consulting Water Regulation, particularly as they were still waiting for advice from the Minister's office. By the afternoon, it emerged that although the direction had been approved it had not yet been mailed. The documents were retrieved from the postal out-tray. A senior manager informed officers that the direction should not be sent at that stage and that the 'direction is another step in the negotiation after the current consultation [with the property owner, local MP and the Minister's office] is concluded'.

In a series of emails over the following days between numerous officers in Water Regulation and SIU, tensions between the two teams became apparent as concerns were raised about the overall management of the case, – including about a lack of communication between SIU and Water Regulation about their respective responsibilities.

The evidence showed that some officers had concerns about the impact of the representations by the local MP on the management of the case and the decision not to issue the direction at that time.

In the days after, officers were informed of a new 'interim measure' whereby managers had to first refer any proposed direction and other statutory notices (such as stop work orders) to their directors for discussion with the new Director of Water Regulation.

Following these events, a meeting was held between the SIU and Water Regulation in mid-December 2015 where it was determined that the property owner would be asked to supply information to DPI Water to apply for a WAL. Alternatively, he would be required to reduce the volume of the dam by a direction under the Water Management Act.³⁰

The Minister responded to the local MP's fifth letter noting that 'parties should work together towards a mutually beneficial outcome'. The Minister offered that the Deputy Director General would meet with the property owner and the local MP in early 2016.

3.2.3. The Department's site visit with the local MP and the property owner

The Deputy Director General, a senior manager and a DPI Water officer met with the local MP and the property owner at his property in February 2016 (fifth site visit).

Records show that there was a well-constructed dam and a brand new large building on a concrete foundation on the property. The property owner said he intended the property to become a commercial market garden. He admitted to moving the dam and enlarging the footprint, but argued that there was no increase in the overall

30. *Water Management Act 2000* s 329.

volume of the dam because he had always maintained the original dam was deeper than NOW's original estimate. Contrary to information in previous representations from the local MP, the notes record that the local MP suggested that there was a reasonably large increase based on the photos. The property owner eventually agreed that he would have to pay for any additional water that was allocated to him (estimated at around \$10,000-20,000 on the open market). The senior officers of DPI Water agreed DPI Water would undertake a 'formal assessment' of the dam to assess any increase in volume between the original dam and the new dam and would inform the property owner of the amount he needed to purchase. He was told he would be given three years to comply. The records are not conclusive and there was conflicting evidence as to who developed this proposal.

After the meeting, other DPI Water officers were consulted on the outcomes and highlighted a number of issues arising from the site visit. Firstly, an assessment had already been done of the dam in 2013. A new 'formal assessment' was highly unusual and also problematic, because the original dam no longer existed. Secondly, it was agreed that the property owner only needed to buy the difference in the capacity between the original dam (8.9ML) and the new dam (20.5ML) – which was 11.6ML. This was despite the fact that the dam was 19.46ML in excess of the property's MHRDC. The proposal meant that the property owner would receive a concession of 7.86ML. Finally, being given a period of three years to comply was unprecedented. There was evidence that landholders were typically given six months at the most to comply with requirements.

There was no further action on the case until March 2016. Officers gave evidence that during this period work towards Transformation occupied much of DPI Water's time.

The formal assessment was only finalised in August 2016 and estimated that the original dam was within a range 'from 6ML to 9.2ML'. Despite the outcome of the formal assessment being communicated to the property owner in a letter, he was never told how much water he needed to purchase or by when. He was also told to contact an officer in DPI Water even though the case was about to be transferred to WaterNSW.

3.2.4. The 'by-wash solution'

The property owner's case was transferred to WaterNSW in September 2016. After discussions between DPI Water and WaterNSW, another site visit was planned. A senior officer from DPI Water's Water Regulation Group and a WaterNSW officer attended the property in December 2016 (sixth site visit) to 'take some levels on the by-wash/dam'.³¹ During the site visit, it was agreed that the property owner could reduce the volume of the dam to 9ML by increasing the size of the dam's by-wash. To do this, the property owner needed to excavate a larger by-wash of 0.5 metres next to the dam to allow water to leave the dam and reduce its overall level to the MHRDC of 1.04ML. The Ombudsman heard evidence that this 'solution' was problematic as 0.5 metres was insufficient to reduce the capacity of the dam to a compliant level and the by-wash could easily be reversed – for example, if the by-wash was filled in or it failed. It was made clear to the property owner that under this proposal the water could only be used for domestic and stock purposes.

The works on excavating the by-wash had not been completed by January 2017 when WaterNSW attended the property (seventh site visit). Although there was a larger by-wash it was not sufficient to satisfactorily reduce the level of the dam.

A 'warning' letter was therefore sent to the property owner in February 2017. The letter told the property owner to review the activities on his property and ensure that all activities were legal and authorised. He was again told that if he intended to use the dam for commercial irrigation or enlarge it, he would require a new works or use approval and a WAL with WaterNSW.

The case was then closed.

In late February 2017, the local MP sent another letter to the Minister (the sixth letter) with claims from the property owner that he had been told by DPI Water that he could have a WAL free of charge for both commercial and domestic and stock use.

31. A by-wash is a spillway or weir made to permit the escape of surplus water: Merriam-Webster Dictionary, *by-wash*, <https://www.merriam-webster.com/dictionary/by-wash> (accessed 4 April 2018).

3.2.5. The 'nutrient control pond solution'

A new case was opened in April 2017 after WaterNSW received a complaint about the dam. Around this time, managers in WaterNSW were exploring ways to authorise or 'legitimise' the dam.

In June 2017, the property owner met with officers from WaterNSW to discuss options to 'legitimise the dam on [the property owner's] property'. The property owner was again told that water from the dam in its current form could not be used on his property for irrigation without a licence. WaterNSW proposed a solution whereby the property owner would create two dams – one to capture harvestable rights water and the other to be a pollution or nutrient control pond, used to capture, contain and recirculate drainage from the harvestable rights.

The Water Management (General) Regulation 2011 provides an exemption to the requirement to hold an access licence in certain circumstances.³² This includes an exemption for taking water from dams that are solely for the capture, containment and recirculation of drainage and/or effluent, consistent with best management practice or required by a public authority to prevent the contamination of a water source.³³ These kinds of dams are exempt from approval requirements to take water under the Water Management Act and so landholders can irrigate from this type of exempt dam.

The property owner was told by WaterNSW that to implement this proposal he needed to hydraulically separate the dams. The small dam would be the property owner's harvestable right dam and would have to be kept under the MHRDC for his property (1ML). The large dam would act as a 'capture and control' holding that would recirculate dirty water run-off from his property (the 'nutrient pond'). This dam was to hold the balance of the water. The practical outcome of this proposal was that the property owner would be able to irrigate from the water holding without having to pay for or obtain a WAL – because it met the exemptions under the Water Management Act.

The property owner accepted the proposal.

In August 2017, WaterNSW went to the property (eighth site visit) to inspect what works had been done to comply with the proposal. The property owner had not sufficiently completed the works to create the nutrient control pond. He was told that he needed to complete the works within 60 days and supply photographs confirming the works done. Given the delays, a draft direction to complete the works was prepared and delivered during another site visit – which occurred in September 2017 (ninth site visit).

Works were still incomplete when WaterNSW issued a final direction in December 2017 for the property owner to complete the works to give effect to the 'nutrient control pond solution'. Two days later, the property owner told WaterNSW that the works were almost complete.

WaterNSW inspected the site in late December 2017 (tenth site visit) and was satisfied that the works had been completed to fulfil the proposal to create a nutrient control pond. This completed the case.

3.3. Analysis of relevant issues

3.3.1. The legislative framework

This case study raised serious concerns about the role of DPI Water and WaterNSW as an effective and fair regulator of a precious shared natural resource in NSW.

Agencies with a regulatory role must properly deal with allegations about unlawful activities. This includes activities that are prohibited or unauthorised, or contrary to the terms of a consent, licence, approval or other instrument or permission issued under a lawful authority.³⁴ Failure to properly deal with such allegations can result in unfair and inconsistent outcomes for members of the community, and erode public confidence in the regulator to fairly and properly discharge its functions.

32. Water Management (General) Regulation 2011 cl 18 and Sch 5 item 12.

33. Water Management (General) Regulation 2011 Sch 1 item 3.

34. NSW Ombudsman, *Good conduct and administrative practice: Guidelines for state and local government*, March 2017, p 104.

There were numerous options available to DPI Water and WaterNSW under the legislative and policy framework to ensure the property owner complied with the law in a timely manner and was appropriately penalised for any ongoing non-compliance.

Under the Water Management Act:

- Section 91A makes it an offence to take water from certain water sources without a water use approval.
- Section 91B makes it an offence to construct or use these dams without being authorised by a water supply work approval.

DPI Water became aware in June 2015 that the dam was in breach of section 91B of the Water Management Act. The dam remained non-compliant for over two years until late 2017 when the property owner finally completed the works proposed by WaterNSW to transform the newly constructed dam into two dams – a harvestable rights dam and a nutrient control pond. There was evidence that the property owner may have also been in breach of section 91A when concerns were raised that he was irrigating.

During the period that the dam did not comply with the legislation, enforcement powers under the Water Management Act were available to DPI Water and WaterNSW. For example:

- Section 327(2) provides that a stop work order can be issued directing a person to stop constructing or using a water management work in contravention of the Water Management Act.
- Section 329 provides that a person can be directed to take specified measures to demolish, remove, modify or dismantle a work that does not have appropriate approvals.

The legislative framework gave DPI Water and WaterNSW clear enforcement powers. How those powers are exercised becomes a question of objectives, culture and policies directed toward any discretion to exercise regulatory powers – which is discussed below.

3.3.2. The ‘solutions’ developed by DPI Water and WaterNSW

When DPI Water was responsible for the case, the property owner was given a number of opportunities to come into compliance via the purchase of a WAL and an allocation of water – neither of which were taken up by him. After Transformation, officers from DPI Water who remained involved in the matter and officers from WaterNSW developed two approaches to legitimise the dam that allowed the property owner to avoid purchasing a WAL and an additional water allocation.

The ‘by-wash solution’ was proposed by a senior officer from DPI Water – even though, by this time, the case was the responsibility of WaterNSW. A number of experienced officers gave evidence that this proposal was inadequate as the by-wash was not big enough to sufficiently reduce the dam’s capacity and could easily be reversed.

The ‘nutrient control pond solution’ was proposed by WaterNSW. The creation of two dams would reduce the capacity of the harvestable rights dam to fall within the MHRDC and create a new larger nutrient pond that would be covered by the exemptions under the legislation.³⁵ As a result, such a dam is exempt from the approvals required to construct a water works or take and use water and the property owner would be able to pump and irrigate from such a dam without approvals or licences.

The Ombudsman obtained an expert report from the UNSW Water Research Laboratory to comment on the appropriateness of the ‘nutrient control pond solution’. This report found that nutrient control ponds were not usually the size of the one created on the property (particularly where they are larger than the harvestable rights dam) and were typically used in circumstances where there are nutrients or other water quality constituents of concern that are in the excess irrigation.

All public officials are under an obligation to know and understand the law relevant to the performance of their official duties.³⁶ Under good enforcement and administrative practice, regulatory power can be exercised in a way to avoid situations where rigid adherence to legal requirements results in, or would result in, unintended

35. Water Management (General) Regulation 2011 Sch 1.

36. NSW Ombudsman, *Good conduct and administrative practice: Guidelines for state and local government*, March 2017, p 44.

and manifestly inequitable or unreasonable treatment of an individual or organisation.³⁷ However, this must not be misunderstood as a basis for developing solutions that, while notionally lawful, do not address manifest inequality, unreasonable treatment and have more far reaching negative consequences.

The approaches developed by DPI Water and WaterNSW gave the property owner special treatment in a way that was not consistent with the Water Management Act. This sets an unsatisfactory precedent to the community in terms of how the regulator acts. It also has a number of other consequences.

Firstly, the outcome is inequitable or generally not in the public interest. It results in unfair gain or advantage to an individual. The property owner benefited from constructing an unauthorised dam allowing him to store and use more water on his property without approval than he would otherwise be entitled to. He was also not required to purchase a water allocation which had an estimated value of between \$10,000 and \$20,000.

Secondly, the outcome would be expected to have practical effects on neighbouring landholders and the overall environment along the watercourse. The expert report also observed that the nutrient control pond solution was likely to reduce the amount of rainfall runoff to the area.

Thirdly, the 'solution' deviated from standard practice. There was evidence from experienced officers that the arrangement was highly unusual. The expert report also noted that it was not standard practice for a reticulation or nutrient control dam to be located on a natural stream line. Deviation from standard practice with no sound basis erodes confidence in a consistent and fair application of the legislative framework.

Fourthly, the approach proposed by WaterNSW provided an opportunity to circumvent local planning standards and processes. The 'nutrient control pond solution' provided a way for the dam to be significantly altered without undergoing the appropriate determinations by the local council.

Finally, the approach is not consistent with the objects of the Water Management Act and undermines the principles that underpin water sharing in NSW. The objects of the Water Management Act outlined in section 3 include:

- to provide for the orderly, efficient and equitable sharing of water from water sources
- to encourage best practice in the management and use of water.

The legislative and policy framework acknowledges that water is a limited resource and must be managed both for immediate needs and for long-term economic and environmental sustainability. The Water Management Act recognises the need to allocate and provide water for the environmental health of rivers and groundwater systems, while also providing licence holders with more secure access to water and greater opportunities to trade water through the separation of water licences from land.³⁸ This is why carefully considered allocations, licences and water sharing plans are critical to the effective and equitable management of water supplies.

DPI Water and WaterNSW failed to act consistently under the legislative framework. Each agency failed to act in the public interest when they respectively proposed 'solutions' rather than pursuing a consistent compliance response. It was a means of making the water holding technically lawful while avoiding dealing with the substantive breaches and unfair advantage the property owner obtained by constructing a new dam of increased capacity.

3.3.3. The approach to compliance by DPI Water and WaterNSW

While DPI Water had developed a number of policies relating to compliance, the number of those produced to the Ombudsman by WaterNSW were comparatively small.

DPI Water's policies outlined its approach to compliance as a continuum or 'pyramid' – most regulatory action occurs at the base of the pyramid where non-regulatory compliance actions to assist individuals (such as education or conversations) are all that is needed to achieve compliance. However, if this fails to secure compliance, then the regulatory response might escalate up through the pyramid to administrative actions, civil actions and finally criminal actions.

37. NSW Ombudsman, *Good conduct and administrative practice: Guidelines for state and local government*, March 2017, p 104.

38. DPI Water, *Law and policy*, <http://www.water.nsw.gov.au/water-management/law-and-policy> (accessed 4 April 2018).

The initial approach of DPI Water to the property owner was understandable and reasonable. DPI Water was trying to work with the property owner to achieve compliance in the absence of any clear evidence that he was irrigating for commercial purposes. However by mid-2015, not only had the property owner not complied with previous advice, but there was evidence that he had breached the Water Management Act by moving the dam with an enlarged footprint and increased capacity. By late 2015, despite requests from DPI Water for cooperation, the property owner's dam remained in breach of the Water Management Act. The property owner had not responded to DPI Water's request for information and had not made contact to discuss licensing options (both due by August 2015). He had acted contrary to the advice from DPI Water in relation to relocating the dam and had generally demonstrated little commitment to working with DPI Water to resolve the issue. It is therefore reasonable that, by late October 2015, SIU officers made the decision to prepare directions under section 329 requiring the property owner to remove or modify the dam to comply with the Water Management Act.

A senior DPI Water manager decided that the directions were not to be issued at that time because 'consultations/negotiations' with the property owner and the local MP were ongoing. Although this was an option open to DPI Water and the Minister, the question arises as to how effective those consultations and negotiations would be in achieving compliance given the past conduct by the property owner. The reasonableness of pursuing a strategy to negotiate and consult is questionable in circumstances where the parties deny a breach and show little or no commitment to remedying the situation.

DPI Water continued to pursue a negotiated approach. The basis for this approach is unclear. In February 2016, a senior officer and the Deputy Director General met with the local MP and the property owner at the property – a meeting which was seen by many staff as highly unusual in a compliance case of this nature.

Although it was appropriate that senior management became involved in this case to provide the necessary support to officers in light of the increasingly political nature of the case, the decisions made at the site visit in February 2016 needed to be better informed by the Water Management Act, departmental practice and policy and the advice of professional compliance staff in DPI Water. As pointed out by other officers after the meeting, the agreements made with the property owner were atypical and were not consistent with DPI Water policy or practice.

Finally, the discretion exercised in developing the 'by-wash solution' and 'nutrient control pond solution' demonstrates that officers of DPI Water and WaterNSW were willing to develop atypical outcomes for an individual and therefore failed to move that individual along the compliance continuum. This was in the face of clear non-compliance and lack of cooperation. These decisions allowed for an unfair outcome that was inconsistent, unfair and not in the public interest.

A strong and consistent compliance regime is crucial to good public administration and regulation. Consistency builds legitimacy and public confidence in the actions of regulators. It also strengthens the public perception that regulators act with fairness and equity. Research has shown that people are more likely to comply with rules if they believe the rules are legitimate. The key to legitimacy is the perceived justice of the procedures used by the authority to implement the law.³⁹ People were widely found to react to the fairness by which authorities and institutions make decisions and exercise authority, and these reactions shape both their willingness to accept decisions and their everyday rule-following behaviour.

The decision to treat the property owner's dam differently to other water users in the area – without legitimate and sound reasons – caused those members of the public to question whether DPI Water and WaterNSW were acting as fair and equitable regulators.

Even though the volume of water involved in this case may be smaller by comparison to other compliance cases, it still resulted in a situation where one user was gaining a substantial advantage over other users.

In considering another case involving a 'barely registrable amount of water' extracted during the commission of the offence, the NSW Land and Environment Court noted that while the environmental harm of the act was limited:

the real harm was nevertheless caused to the regulatory regime enshrined in the Water Management Act, a regime created to protect and manage one of our most vital and scarce resources, viz, water.⁴⁰

39. Tyler, R, 2006, *Why People Obey Law*, Princeton University Press, Princeton, p 274.

40. *Harrison v Harris* [2013] NSWLEC 105, [109].

The Court also recognised the importance of enforcement actions in the water regulation context when it observed that:

Offences which undermine the integrity of the regulatory system are objectively serious. Use of the criminal law ensures the credibility of the regulatory system.⁴¹

An offence committed under the Water Management Act, regardless of its size, is connected to the overall regulatory regime and the regulator's ability to properly perform its functions in the community. Enforcement action (where appropriate) demonstrates to the community that the regulator is willing to uphold the requirements of the legislative framework and acts as a deterrent to individuals.

DPI Water and WaterNSW had attempted a number of strategies to encourage the property owner's compliance – such as conversations, written communication, requests for information and draft directions. In the absence of voluntary compliance, the question needed to be asked at what point should the case have been pushed along the compliance spectrum toward taking enforcement action against the property owner. Although enforcement action is not necessarily appropriate in every case, if there is a clear, persistent and deliberate breach of the legislation regulators should consider all powers available to achieve compliance.

Regulators are required to make difficult decisions in the context of competing priorities, available resources and sometimes in a highly political environment. Not every situation demands a policy, and a policy is not a panacea that ensures that all situations are properly addressed. However, policies are an important means of guiding decision-makers in exercising discretionary powers appropriately, consistently and fairly.⁴²

The establishment of the NRAR provides an excellent opportunity for a consistent and transparent approach to be implemented in relation to enforcement and compliance with the Water Management Act. Its policies and procedures should include guidance on exercising discretion about when to take enforcement action.

3.3.4. The need for good public administration

Good public administration is supported by good communication, clarity of roles and proper record keeping.

In this case, the Ombudsman heard evidence of a collegial and productive working relationship between a number of officers in DPI Water's Water Regulation Group and the SIU. There were positive outcomes where officers worked together, with evidence of sound and thorough investigations in response to complaints.

There were, however, instances where the communication between officers was not clear. For example, there was inconsistent evidence on communication between SIU and Water Regulation concerning the meeting at the Minister's office in November 2015 and the decision to issue the section 329 direction that month. The only conclusion available is that unclear communication and reporting channels gave rise to miscommunication and poor decision-making.

The respective roles of the SIU and Water Regulation in the compliance process were not clear. In December 2015, a Water Regulation Manager said that the matter was a 'Water Regulation' case with SIU working on compliance actions. However, the documents indicate that a decision had previously been made that the SIU would take the lead on the case – with support from Water Regulation on licensing issues. As the case progressed, the teams became increasingly disconnected from each other's activities. For example, officers from the SIU were not involved in the meeting with the Minister's office while Water Regulation was not involved in SIU case conferences. A lack of clarity around roles and responsibilities meant that there was no clear process for decision-making and a coherent approach to compliance in this case. This resulted in decisions being made without a sound basis. For example, it was not clear that the advice provided to the Minister's office at the meeting in November 2015 fully accounted for the compliance approach being implemented by the SIU. In the absence of such information, the decision to approve a section 329 direction in December 2015 was also not based on a full consideration of the case within its broader context.

41. *Harrison v Perdikaris* [2015] NSWLEC 99, [45].

42. NSW Ombudsman, *Good conduct and administrative practice: guidelines for state and local government*, March 2017, p 50.

The division of roles has been largely remedied by the creation of the NRAR to oversee water compliance and enforcement across the state. However, strong leadership from senior management is imperative to create a culture of clear and transparent communication.⁴³ If issues arise between individuals and/or work groups, management should demonstrate clear and decisive leadership to encourage collaboration and clear communication.

Finally, it became apparent through the gradual production of records to the Ombudsman that there were some deficiencies in record keeping in both agencies. There was evidence of a perception held by some officers that certain senior staff members were reluctant to record communications and preferred to 'keep things verbal'. The inconsistent approach to and use of CIRAM by different officers tends to support this perception. It was clear from the evidence during the hearings that important discussions and decisions were missing from CIRAM.

Public agencies must keep good records.

Firstly, good record keeping helps to improve accountability and provides for transparent decision-making. The importance of transparency mechanisms such as public access to records, the giving of reasons and practices that support this – such as good record keeping and rights of review – cannot be overstated. Public officials must make and keep full and accurate records of their activities.⁴⁴

Secondly, good record keeping is particularly relevant to compliance action. Records are information created, received and maintained as evidence. It is crucial that regulators document their actions. This provides evidence of what has taken place and the decisions made and allows the regulator to account for its actions and decisions. This is especially useful if those actions or decisions become the subject of an appeal or a complaint to an oversight agency or the courts.

Thirdly, problems can arise when there is no central or coordinated method for recording and monitoring the investigation and resolution of reports about unlawful activity. The Ombudsman has previously highlighted that problems might arise if different branches of a department may be responsible for different aspects of regulatory responsibilities and use different procedures and records. The use of centralised record keeping tools is important to mitigate the risk of information not being shared across the agency. Widespread concerns about inconsistent record keeping practices were voiced by officers during the hearings.

3.3.5. Dealing with Ministerial representations

Public sector staff routinely prepare responses to Ministerial representations. In this case, the local MP made a number of representations on behalf of the property owner and participated in meetings about the dams on his property. Representing the interests of constituents and the public is a fundamental role of elected members of Parliament. They provide a direct link between their constituents and the Parliament.

The Minister, on advice from DPI Water, provided the local MP with clear, open and transparent information about the outcomes of its investigations and the relevant law and policy. The challenge for DPI Water was developing a response in what seemed to be an increasingly political environment that was beyond their control.

For example, DPI Water decided not to issue a section 329 direction in December 2015 because of the 'extent and progress of consultation/negotiation to date'. This included consultation and negotiation with the local MP and was most likely said in the context of the meeting with the Minister's office. WaterNSW's 'nutrient control pond solution' was an atypical approach and not consistent with the objects of the Act. There was clearly a desire on the part of WaterNSW to find an alternative to pursuing a 'harder' compliance response – such as issuing directions or taking other enforcement action.

The Minister's office also expected that officers in DPI Water would deal directly with the local MP. Although this might be appropriate in some circumstances, given the highly political context that was emerging around this case it was unreasonable for DPI Water senior management to expect more junior officers to be initiating such conversations.

43. See discussion above in section 3.3.3.

44. *State Records Act 1998* s 12(1).

DPI Water officers were also frustrated that someone either in the Minister's office or at senior management level did not step in to resolve the issue as the preparation of Ministerial correspondence on the issue was using resources that would have otherwise been directed to regulatory or compliance work. Although senior management became increasingly involved from November 2015 until the case was transferred over to WaterNSW, officers were exposed to dealing with Ministerial issues during 2014 and 2015 without the support of senior management. One officer told the hearing:

I think I recall at that stage just wishing that from that level it would be, well certainly the Minister's Office, or somebody would take control of the situation Which I think I had hoped would happen earlier than that but was, I think – I thought was outside of my control.

The independence of public servants and their proper understanding of their role is crucial to effective government. This is a matter of concern for the whole of government in NSW.

The NSW Public Service Commission (PSC) has developed a number of online resources to support staff in the public sector. These address a range of topics including Ethics and Conduct.⁴⁵ The PSC emphasises that senior public service managers, whose employees engage with Ministerial staff, play an important role in ensuring their employees have the necessary capabilities and support. It is critical that public service employees understand that:

Their role is to provide frank and fearless advice, which is uninfluenced by party political considerations or personal political allegiances; impartial and free from actual, potential or reasonably perceived conflicts of interests; and based on sound evidence.⁴⁶

It is evident from the circumstances of this case study that officers were being asked to perform regulatory functions in a highly political environment. Although this is not uncommon for government regulators, it can place public sector staff in a difficult position. Public officials have an overarching obligation to act in the public interest. This means that they must perform their official functions and duties – and exercise any discretionary powers – in ways that are consistent with matters of broad public concern and away from private, personal, parochial or partisan interests.⁴⁷

There is evidence that officers – particularly those from DPI Water – initially tried to resolve this case in the public interest, free from political interests. Despite this, the final outcome appeared to be influenced by considerations other than the legislative framework and DPI Water policy. There was evidence that officers did not feel experienced or sufficiently supported by senior management in their dealings with the Minister's office or the local MP – and it seems that this had an impact on the regulatory response in this case.

The PSC recommends that employees must receive appropriate orientation, training and feedback so they are clear on their roles, responsibilities and boundaries.⁴⁸ It also acknowledges that employee concerns may arise at times from a misunderstanding or differing expectations of their role and boundaries. Any concerns about engagement with a Minister's office should be referred to a relevant senior manager.⁴⁹

The PSC also recommends that departments and agencies clarify protocols for handling requests and remind employees of the need to maintain good records of communication with Ministers' offices.

Clear communication is important for good governance and transparency. The local MP appropriately communicated with the relevant Minister responsible for water regulation at the time to make his representations. However, communication then started directly between the local MP and DPI Water and WaterNSW both formally (with the approval of the Minister in correspondence) and informally (as a result of

45. NSW Public Service Commission, *Employment Portal: Ethics & Conduct*, <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct> (accessed 4 April 2018).

46. NSW Public Service Commission, *Behaving Ethically: Supporting public servants engaging with Ministers' offices*, <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-1/supporting-public-servants-engaging-with-ministers-offices> (accessed 4 April 2018).

47. NSW Ombudsman, *Good conduct and administrative practice: guidelines for state and local government*, March 2017, p 50.

48. NSW Public Service Commission, *Behaving Ethically: Supporting public servants engaging with Ministers' offices*, <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-1/supporting-public-servants-engaging-with-ministers-offices> (accessed 4 April 2018).

49. NSW Public Service Commission, *Behaving Ethically: Supporting public servants engaging with Ministers' offices*, <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-1/supporting-public-servants-engaging-with-ministers-offices> (accessed 4 April 2018).

face-to-face meetings). It is understandable how these communication arrangements developed. However, public sector staff and MPs should be mindful of ensuring that appropriate communication channels are observed to avoid miscommunication and ensure transparency. A NSW Department of Premier and Cabinet (DPC) memorandum entitled 'Provision of Information to Members of Parliament' issued by the then Premier in 1992 refers to the longstanding tradition that MPs obtain information by writing to the responsible Minister, or making contact with the Minister's staff, or writing to the head of the agency concerned. Adherence to this tradition helps to ensure that information given to MPs is as accurate and complete as possible.

There is a need for clear guidelines on the role of MPs, Ministerial staff and public servants in cases where MPs are advocating for their constituents. Public sector staff would benefit from guidelines and procedures which they could refer to when they find themselves in a highly political situation – and a clear whole-of-government approach would strengthen the independence of public servants. The PSC has a range of resources to guide agencies and public sector staff that could form the basis for such guidelines, as do a number of other jurisdictions.⁵⁰ The memorandum issued by the then Premier back in 1992 also provides a basis for whole-of-government directions, but should be reviewed and updated.

The NRAR is not subject to the control and direction of the Minister, except in certain limited circumstances under the *Natural Resource Regulator Act 2017*.⁵¹ The responsibility for determining whether proceedings for offences under the natural resources management legislation should be instituted rests with the NRAR.⁵² This model goes some way towards mitigating the risks highlighted above and is therefore a welcome development.

3.4. The Farm Dam Case Study One – Conclusion

This case study highlights how poor decision-making can result if actions are not first and foremost guided by the legislative framework, which is the basis of the regulator's power to act and exercise its powers in the public interest – in this case, the equitable sharing of water in NSW. The decisions and actions of DPI Water and WaterNSW were compromised by not following the legislative and policy framework and by irrelevant considerations, poor communication, poor record keeping and poor management of roles and responsibilities. There was also an absence of a consistent and clear approach to compliance. The result was an inconsistent, unfair and unjust outcome that benefited an individual to the detriment of other members of public.

4. The Farm Dams Case Study Two

4.1. Introduction

This case concerned reports to DPI Water and its predecessors of unauthorised works and ongoing use of large volumes of water without relevant approvals. DPI Water's lack of an appropriate response meant that this case continued to linger and remain unresolved for over 10 years. The case study highlighted:

- A reluctance of senior officers in DPI Water to take compliance or enforcement action despite having knowledge of potential breaches of the Water Management Act.
- A lack of understanding among some officers of the legislative framework and the compliance and enforcement options available under the Water Management Act.
- Excessive and unexplained delays by DPI Water in responding appropriately to reports of possible unlawful conduct.
- Miscommunications between staff that contributed to poor case management.

50. See for example, Australian Public Service Commission, *Supporting Ministers Upholding Values: A good practice guide*, 2006; Queensland Government, *Protocols for communication between ministerial staff members and public service employees*, March 2015.

51. *Natural Resource Regulator Act 2017* s 4(3).

52. *Natural Resource Regulator Act 2017* s 12(1).

4.2. The evidence

4.2.1. The property

According to departmental records, the property is approximately 1,305 hectares and is primarily used for cropping and grazing. There are four large dams on the property which DPI Water determined had a combined storage capacity of approximately 670 ML – enough water to fill 268 Olympic size swimming pools.

Following investigations in 2013, NOW determined that three out of the four dams were located on 3rd order streams. The classification of the watercourse is significant because it is a determining factor as to whether a licence is required for a dam. Dams on 3rd order streams and above require an authorisation or licence, whether under the Water Act or the Water Management Act – with some exemptions that might apply in specific cases. Dams on minor watercourses (1st and 2nd order streams) can be constructed without a licence unless the watercourse is permanently flowing.

4.2.2. Actions taken in 2006

The dams first came to the attention of the agency responsible for water administration (for simplicity referred to as NOW until July 2015) in 2006. An officer from NOW received information from a member of the public that the property owner was doing a lot of irrigation from the dams. They also had concerns about the amount of water held in the dams. The officer checked NOW's licensing database and could not find any relevant licences for the property. The officer informed his managers and did some further checks at their request.

There is no evidence that NOW took any further action in relation to the dams until March 2012, over six years later.

4.2.3. The first compliance case – 2012 to 2014

In March 2012, some six years later, the same officer was looking at other cases when he was prompted to question why regulatory action was being taken in some cases, but not in others – such as the dams on this property.

The officer did a number of investigations in relation to the dams and recorded them in a file note to his managers. The file note explained that there did not appear to be any licences for the dams and that, on the basis of aerial imaging, the dams were much larger than the MHRDC for the property. The officer expected that his managers would refer the matter to the compliance unit (as it then was) for further investigation.

It was not until seven months later that the file note was reviewed by a manager, who then referred the matter to the compliance unit. The delay was attributed to other more urgent matters at the time.

A new compliance case was opened in CIRAM. In February 2013, an investigations officer attended the property and informed one of the property owners/company directors that NOW intended to map the dams. NOW was told by a representative of the property owner that some of the dams existed when the property was purchased and others had been built around 30 years ago.

NOW estimated that the total storage of the dams was 671ML (based on conservative dam wall heights). The MHRDC for the property was 104.4ML based on a property size of 1,305 hectares.

The investigation officer who reviewed the case recommended that three of the four dams needed a work approval and that the water should not be used for irrigation without an access licence. The investigation officer also noted that the substantive offences would be 'statute barred' from prosecution.⁵³ As the dams had first come to NOW's attention in 2006, there was a concern that a prosecution for constructing the dam without approval would be

53. The potential offence concerned construction of a water supply without permit, which is an offence under section 91B of the *Water Management Act 2000*. The period in which a prosecution must commence under the *Water Management Act 2000* is within, but not later than, three years after the date on which evidence of the alleged offence first came to the attention of any relevant authorised officer: *Water Management Act 2000* s 364(3).

outside the statutory limitation period of three years. It was therefore recommended that the matter be referred to the Manager, Water Regulation (which was the unit then responsible for licensing) for consideration. There was also evidence of concerns that as the dams had not been identified in the development of the Water Sharing Plan (WSP), an amendment to the WSP might be necessary to account for the significant volumes of water held by the dams.⁵⁴

In mid-2013, the case was transferred from the newly created SIU to Water Regulation. An officer in Water Regulation then worked with an officer from the SIU to draft correspondence to the property owner. It was not until November 2013 that a draft warning letter, a draft direction under section 329(2) to remove unlawful water management work, and a draft direction under section 327(2) containing a stop work order regarding the unlawful use of water management work were prepared but not sent.⁵⁵

Officers gave evidence that it was a potentially contentious case given the amounts of water involved and the large scale primary production on the property. Documents showed that officers urged more senior officers with delegation to act and give direction in the case.

No further action was taken until three months later in February 2014 when a meeting was held with Water Regulation managers to review outstanding cases. The meeting concluded that the 'matter is statute barred' and that NOW would write to the property owner to advise that the dams were not licensed and could not be used for irrigation until a licence entitlement was obtained. It was proposed that this could be by transfer from either their other existing licences or from another licence holder. The note concluded that the property owner should contact a nominated officer in NOW.

That same day an 'advisory letter' was sent to the property owner advising them of a 'possible unlawful dam' on their property. It noted that NOW had become aware of the existence of dams that may have been used without appropriate licences in place. The letter said that NOW intended to review the matter and that the property owner needed to contact the nominated contact officer.

The letter was not entirely consistent with the decision of the meeting earlier that day. It did not expressly state that the dams were not licensed and that they could not be used for irrigation until a licence entitlement was obtained. No details were provided in the letter on how a licence might be obtained.

The case was closed that day. The Ombudsman heard evidence that officers were under a lot of pressure to finalise cases. As it had been decided that NOW would attempt to resolve the case through a licensing solution, officers closed the case and a new compliance case could be opened if it was necessary.

The SIU later sought an update on the case as it was doing a site visit with the property owner on another of their properties. After looking at the notes in CIRAM, the SIU attempted to escalate a review of the case as it had concerns about the manner in which it had been finalised by Water Regulation.

In late March 2014, the property owner telephoned and emailed the contact officer nominated in NOW's advisory letter of February 2014. There was evidence that it was only after the property owner called the officer that he became aware that he was the contact person for the case.

It was later acknowledged by a Water Regulation manager that there had been a 'miscommunication' concerning the contact officer in the letter to the property owner and that the manager would provide further direction on the case.

However, no substantive action was taken before the matter was raised again in 2015.

4.2.4. The second compliance case – 2015

In February 2015, SIU officers were driving past the property and saw centre irrigation pivots using water over a large crop area. A new compliance case was created and the case was given a risk assessment of 'very high'.

54. WSPs are made by Ministerial order published on the NSW legislation website and remain in force for 10 years: *Water Management Act 2000* s 43. WSPs can only be amended by the provisions in the relevant instrument. Before amending a WSP the Minister must obtain the concurrence of the Minister for the Environment. In areas where WSPs have commenced in NSW, water licences and approvals under the *Water Management Act 2000* are required to extract water from rivers to use for commercial purposes.

55. The maximum penalty for failing to comply with the direction was, at the time, for the corporation, \$1.1 million and a further \$132,000 for each day the offence continued: *Water Management Act 2000* s 336C.

The case was allocated – but due to various officers being on leave, it was not discussed until June 2015. It was agreed by the SIU that if no action had been taken, the SIU would move towards issuing a draft direction under section 327 of the Water Management Act to stop unlawful works as a way to achieve compliance.

The SIU sought information from Water Regulation on what action had been taken. Emails indicate that there was a view among some officers that there was no urgency in the matter as the statute of limitations had expired.

In early June 2015, a meeting took place between Water Regulation and the SIU. It was agreed that NOW would explore whether nearby WALs held by the property owner could be transferred to the dams on the property concerned. The case remained allocated to an SIU officer who sought regular updates from Water Regulation as the issues of WALs was a licensing task. Apart from numerous attempts by the SIU officer to get Water Regulation to act, by October 2015 no action had been taken.

The SIU officer resigned from DPI Water in December 2015. There is no evidence that any action was taken on the case between January and May 2016.

In May 2016, a senior officer from MIB contacted a Water Regulation Manager noting that the case was ‘an unallocated case’. The senior officer said that he thought it was ‘best managed to finalisation’ by Water Regulation and transferred the case back to Water Regulation with a recommendation that ‘to the extent that further investigation needs to be done, you can get the support of the SIU’.

The Water Regulation manager responded that if the case is ‘past statute’ it should be closed with a note that another approach would be taken – that is, ‘deal with it through the licensing process’. The senior officer suggested that the case be closed, with a note to review the case later as to the current status of the licence application. He also suggested a draft direction should be issued to the property owner fixing a date by which the dams must be licensed.

The Water Regulation manager responded again saying that – as DPI Water had no recent dealings with the property owner – a draft direction would ‘come out of the blue’, and queried whether ‘it would be a problem if we kept directions up our sleeve if the licensing route does not work’. The case was closed with a note ‘Licensing to action’. This meant that some action should have been taken by DPI Water to follow up the question of whether the property owner was appropriately licensed. There is no evidence of this ever happening.

4.2.5. The third compliance case – 2017

Prompted by enquiries from the Ombudsman, a new case concerning the dams was opened in September 2017. Preliminary investigations about maps and the current state of licences were done by WaterNSW officers between September and November 2017.

The entries in CIRAM noted that a site meeting was arranged for 6 December 2017. On 4 January 2018, CIRAM noted that the Water Regulation manager recommended that a warning letter be sent to the property owner. This was the last entry in CIRAM records obtained from WaterNSW.

4.3. Analysis of relevant issues

4.3.1. The failure of DPI Water to take appropriate action

Agencies with a regulatory role are obliged to properly assess and appropriately deal with allegations about unlawful activities. This includes activities that are prohibited or unauthorised, or contrary to the terms of a consent, licence, approval or other instrument or permission issued under a lawful authority. Failure to properly deal with such allegations, quite apart from being poor administrative practice, could expose the agency to liability for compensation and the expense of litigation. It can also result in unfair and inconsistent outcomes for members of the community.

Until 1 July 2016, DPI Water had primary responsibility for the administration and enforcement of the Water Management Act.

Under the Water Management Act:

- Section 91A makes it an offence to take water from a water source without a water use approval.
- Section 91B makes it an offence to construct or use these dams without being authorised by a water supply work approval.

The ongoing use of water from the dams without the necessary approvals under the Water Management Act was potentially an offence under section 91A. DPI Water could have begun a prosecution or taken other regulatory action in relation to this breach. The initial construction of the dam was potentially an offence under section 91B, although further investigations were needed to determine when the dam was constructed and whether any amnesties applied. However, the existence of the dam first came to the attention of NOW in 2006 and so any prosecution would have needed to start within three years. Even though the limitation period for a prosecution had expired, this did not preclude other regulatory action with the aim of the dams becoming compliant.

A range of regulatory measures were available to DPI Water under the Water Management Act. For example:

- Section 327(2) provides that the department can issue a stop work order directing a person to stop constructing or using water in contravention of the Water Management Act.
- Section 329 provides that the department can direct a person to undertake specified measures to demolish, remove, modify or dismantle a work that does not have appropriate approvals.

There were three separate occasions on which DPI Water received information indicating there may have been potential breaches of the Water Management Act – in 2006, 2012 and 2015. These occasions presented the opportunity to initiate a full investigation and take action within the legislative framework.

Investigations

During the relevant period, a number of officers correctly identified the potential breaches of the Water Management Act. The officers properly assessed the situation and its risks and appropriately sought advice and action from their senior officers.

Some preliminary assessments were done in response to information received in 2006. However, senior officers did not take appropriate action to progress to a full investigation. This meant that any potential prosecution for the construction of works without approval could not be started within the limitation period.

In relation to the report received in late 2012, the investigations outlined in the internal memo in April 2013 were a reasonable and sound response under the legislation and current policies. This approach was followed in the preparation of a draft warning letter and draft directions in November 2013. In accordance with standard practice, it was proposed that directions would first be issued in draft form to give the recipient procedural fairness and allow NOW to consider any relevant information received in response – including mitigating circumstances – when it came to issuing final directions. However, the draft direction was never sent despite the fact that a meeting of senior officers on 4 February 2014 generally endorsed this approach. There is no clear explanation why this was the case. A draft direction would have put the property owner clearly on notice for potential breaches and given them an opportunity to remedy the situation.

When deciding what, if any, compliance and enforcement action is required, agencies have an obligation to uphold the law and act in the public interest.⁵⁶ The unauthorised storage and use of large volumes of water in a WSP has significant implications for other water users and landholders in the area – as well as falling short of the community's expectation that water resources are appropriately managed. Although not every breach of legislation requires enforcement action, DPI Water should have attempted to resolve the matter expeditiously within the legislative framework. The absence of clear, reasonable and prompt action has enabled potential breaches of the Water Management Act to remain unregulated over a long period.

56. NSW Ombudsman, *Good conduct and administrative practice, Guidelines for state and local government*, March 2017, p 105.

The advisory letter

The advisory letter that was sent to the property owner in February 2014 was ambiguous and not properly framed within the context of the Water Management Act. It did not adequately inform the property owner that NOW had already undertaken investigations that confirmed the presence of unauthorised dams, and that on this basis the dams could not be used for irrigation without appropriate approvals and licences. The draft warning proposed by officers in November 2013 would have achieved this purpose. Although the advisory letter ‘reminded’ the water user of licensing requirements, it did not refer specifically to relevant offences under the Water Management Act and did not make it clear that the ongoing use of water for irrigation was unlawful conduct.

The advisory letter also referred to NOW’s intention to ‘review’ the matter with the property owner. By contrast, the language used in NOW’s form letter for directions under the Water Management Act (even when issued in their draft form) clearly puts the water user on notice of the alleged breach and the next steps. An ‘intention to review’ is vague and not appropriate in circumstances where NOW had evidence of a potential breach involving large amounts of water. The inadequacy of this approach was compounded by the fact that NOW then failed to fulfil its ‘intention to review’ the matter.

Prematurely closing the case

The decision to close the case in 2016 – without any mechanism for follow up for a licensing approach – was not sound or reasonable. There were outstanding issues, including potential breaches of the Water Management Act and a significant volume of water not considered in the WSP that needed to be resolved. In closing the file, the recommendation that the matter be forwarded to Licensing was never followed up. Evidence indicated that closing the file meant there was limited scope for follow up as the case was not allocated to a particular officer or work group. There would also be no reminders or alerts from CIRAM to check on whether the matter had been satisfactorily resolved. The inadequacy of the decision to close the file without a satisfactory plan is highlighted by the fact that, despite a recommendation for ‘Licensing action’, no further action was taken.

4.3.2. The need to understand the legislative framework

One aspect that contributed to the lack of action was an apparent lack of understanding of the legislative framework by some officers.

Officers referred on a number of occasions to a prosecution against the property owner being ‘statute barred’. Proceedings for an offence under the Water Management Act or the regulations may be started at any time within, but not later than, three years after the date on which the offence is alleged to have been committed,⁵⁷ or evidence of the alleged offence first came to the attention of any relevant authorised officer.⁵⁸

The presence of the dams was first known to NOW in July 2006. Therefore, if a prosecution for the unlawful construction of a water supply work under section 91B of the Water Management Act was considered an appropriate compliance strategy, it would be difficult to start a prosecution after the three-year limitation period had expired. When the compliance case was opened in April 2012, the limitation period for a prosecution for the construction of the dams had expired.

Although the construction of the dams may not have been able to have been prosecuted, the dams still required authorisation – given their capacity and the fact they were built on a 3rd order stream. The continued unlawful extraction of water for irrigation on the property without an access licence, also needed to be resolved as it was possibly an offence under section 91A of the Water Management Act. As the conduct giving rise to potential breaches of these offences was ongoing, NOW/DPI Water could have initiated a prosecution within the relevant period if that had been deemed the appropriate response. Even though the limitation period for a prosecution had expired, this did not prevent the agency from initiating other appropriate compliance action to address the unauthorised dams and the licensing issue. At the very least, the property owner should have been put on notice of potential breaches of the Water Management Act and options under the Act to become compliant.

57. *Water Management Act 2000* s 364(2).

58. *Water Management Act 2000* s 364(3).

It was clear that some officers understood the distinction between the offence in relation to the construction of the dam and the offence of taking water. However, there is also evidence that some senior officers did not appreciate the distinction or did not consider all possible compliance strategies to deal with the unauthorised dams.

The regulation of water in NSW is highly complex and technical. Enforcement may not necessarily be the most appropriate course of action in every case, but it is imperative that officers correctly understand the legislative framework of the regulatory environment in which they operate. Senior officers incorrectly relied on the limitation period under the Water Management Act as a basis for decisions that led to inaction. A better understanding by officers of the legislative framework, or significant simplification of that framework, may avoid such errors in the future.

4.3.3. Significant delays

There were unacceptable delays throughout the case that contributed to the unsatisfactory outcome. Despite each case receiving a risk assessment rating of 'high', the matters continually experienced extended periods of delay and inaction over more than a decade.

The first compliance case was opened in November 2012. It was investigated by Compliance and transferred to Water Regulation by May 2013. It was not until February 2014, some 15 months after the complaint that initiated the investigation, that senior officers of Water Regulation agreed to write to the property owner. During that period, officers emphasised and advocated for the need for intervention and decision-making by senior management with appropriate delegations.

The second case was opened in February 2015. It was clear that issues of non-compliance still existed despite the undertaking (and failure) by Water Regulation to 'review' the matter with the property owner. There was no sense of urgency to take appropriate action to ensure the property owner was compliant with (or complying with) the water legislation. During this period, a series of emails between staff show a lack of direction, a reluctance by some to take action, and an unwillingness by senior officers to take responsibility for any decision-making. The case was closed in June 2016 with no further site visit, investigation or contact with the property owner and no follow up action for a possible licensing solution.

There was evidence given to the Ombudsman that delays in the case could be explained by competing priorities – such as other contentious cases and the move towards Transformation in 2016. However, this does not explain other extensive delays through the overall case management. A number of officers acknowledged that they should have followed up the case either individually or with their direct reports.

There were some significant lapses in communication between senior staff and their direct reports. The officer named in the 'Advisory letter' to the property owner was not informed that he was responsible for contacting them. The property owner acted with diligence and contacted NOW on receiving the letter, but regrettably NOW had no further follow up contact with the property owner.

There was also evidence of a view among investigating officers that a lack of communication and a poor working relationship between senior officers in the SIU and Water Regulation may have contributed to delays. This is supported by delays in email correspondence between the two work groups and a lack of direction in how the case should be managed.

Despite evidence of meetings and case management in CIRAM, there is no reasonable explanation as to why this case – given its gravity and extended delays – was not made a priority and actioned. The delays ultimately contributed to the failure of overall case management and created difficulties for DPI Water to take appropriate enforcement action.

The decision not to issue directions in 2016 and to close the case was based on the fact that DPI Water had no recent dealings with the property owner and that directions would 'come out of the blue'. Although the context in which the breach had occurred is a relevant consideration when deciding what action to take (in this case, the lack of follow up and communication by DPI Water), it should not form a basis on which to take no action and allow unauthorised conduct to continue. Officers conceded that the risk that directions would 'come out of the blue' could have simply been addressed by first making contact with the property owner.

It is imperative that agencies ensure that regulatory and enforcement functions are performed efficiently, effectively and without undue or avoidable delay.⁵⁹ Their activities should be carried out in ways that are fair, reasonable and professional.⁶⁰ In particular, agencies with a regulatory function should – as a matter of procedural fairness – conduct an investigation or address an issue without undue delay.⁶¹ Delegated officers should not unreasonably delay⁶² making a decision that they are under a duty to make.⁶³

The delays in this matter not only denied the property owner procedural fairness, but stopped DPI Water from being able to take appropriate action to enforce the law.

Agencies should ensure that their staff have the training that is necessary for them to properly perform their duties. This includes reviewing and prioritising cases with managers to ensure that the agency is exercising its functions with due diligence.

4.3.4. Issues raised by Water Sharing Plans

As part of the compliance strategy in this case, DPI Water may have needed to consider any licensing issues within the context of a WSP. There was evidence that one option would have been to establish if the property owner had WALs for other properties in the area and if there was the possibility of transferring water entitlements. It does not appear that this option was fully explored.

There was also evidence that if the property owner was to be granted a WAL, the volume of the water concerned may have meant that the existing WSP for the area where the property is located may have needed to be amended. This raised a number of issues. Firstly, the preliminary assessment suggested there was little allocation available to be purchased in the WSP to cover the allocation that the property owner might claim it required. Secondly, there would be likely to be objectors to any amendments to the WSP. Finally, an amendment to the WSP would ultimately need to be a decision made by the Minister or the Secretary. DPI Water would then need to explain how such large dams had not been identified when the WSP was created – and that it had failed to take action in relation to the dams, despite being made aware that the dams were unauthorised since 2006.

It is understandable that officers may have felt apprehensive about raising the matter with the Minister, given that it would have highlighted deficiencies in DPI Water's handling of the matter. However, such concerns are not relevant to sound decision-making. Executive and senior officers should be competent and prepared to respond to significant, complex and rare challenges – and take accountability for any frank and difficult discussions that were needed to address the situation. Public officials and agencies should correct any mistakes, errors, oversights or improprieties (whether personal or organisational) of which they become aware.⁶⁴

4.4. The Farm Dams Case Study Two – Conclusions

DPI Water's response to the complaints made about the dams was inappropriate. There was a clear reluctance of senior officers to take compliance or enforcement action, despite having knowledge of potential breaches of the Water Management Act. A lack of understanding among some officers of the legislative framework – and the compliance and enforcement options available under the Water Management Act – meant that all compliance options were not explored. The unreasonable delay and absence of a compliance strategy created an environment in which a landholder (who tried to engage with DPI Water) could continue to access and use water without relevant approvals and licences under the Water Management Act.

59. See *BIX15 v Minister for Immigration and Border Protection* [2017] FCA 1116, [31]-[43] and *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2005) 228 CLR 470.

60. NSW Ombudsman, *Good conduct and administrative practice, Guidelines for state and local government*, March 2017, p 51.

61. NSW Ombudsman, *Good conduct and administrative practice, Guidelines for state and local government*, March 2017, p 68.

62. See *BIX15 v Minister for Immigration and Border Protection* [2017] FCA 1116, [31]-[43] and *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2005) 228 CLR 470.

63. NSW Ombudsman, *Good conduct and administrative practice, Guidelines for state and local government*, March 2017, p 49.

64. NSW Ombudsman, *Good conduct and administrative practice, Guidelines for state and local government*, March 2017, p 69.

5. Compliance Case Study Three

5.1. Introduction

Although the evidence in this case is equivocal on whether offences under the water legislation occurred, the case study highlighted:

- Poor investigative practices.
- A failure to enforce the NSW Interim Metering Standards for non-urban water meters leading to a compromised regulatory effort.
- Extraordinary delays in rolling out the existing commitment under the National Water Initiative to have all non-urban water taken in NSW metered.

5.2. The complaints and the breach allegations

An irrigator complained to the Ombudsman that DPI Water failed to take appropriate action on his reports about the taking of water in excess of entitlements on a number of properties in a cotton producing area of NSW.

In early 2015, the irrigator alleged that a cotton producer had been taking water far in excess of the entitlement through a sophisticated scheme of meter manipulation that was likely to be occurring at night. It was alleged that – based on crop production by the cotton producer – close to 30,000ML of additional water would have been required to grow the crop that was produced. Based on current cotton and water prices, the complainant estimated that, if proven, the alleged theft of water would be in the vicinity of \$10 million. It was alleged that the crop produced was not consistent with the rainfall in 2014 to 2015. A complaint was initially made to the former Minister at a meeting in 2015.

There was some initial confusion about whether WaterNSW or DPI Water was dealing with the allegations. After some involvement by WaterNSW, DPI Water began an investigation.

The complainant provided further information directly to DPI Water in October and November of 2015. As he did not receive advice about the outcome of the investigation, he escalated the matter through the WaterNSW Customer Service Committee for the relevant area – and eventually received a response from DPI Water’s Director of MIB in late May 2016 via another staff member. The Director advised that there was insufficient evidence to support taking compliance action against anyone.

The complainant made a request to DPI Water in June 2016 for an internal review of the decision not to take action. DPI Water agreed to conduct a review, but the complainant was again not advised of the outcome. The complainant made a complaint to the Ombudsman in June 2016.

In addition to disagreeing with DPI Water’s technical assessment of the evidence, the complainant raised a number of points in his complaint to the Ombudsman. These were that:

- In his opinion, the investigation was not sufficient and proportionate given the potentially large volume of water unlawfully extracted.
- Many of the meters on the properties were not sealed against tampering, despite the fact they were checked by compliance officers and certified as installed and working properly.
- Irrigators were paying significant monies to fund the resources required to investigate these cases and they should be directed into protecting the community’s most precious resource – water.

5.3. Action taken by DPI Water

After receiving a notification from WaterNSW who conducted some initial investigations, DPI Water registered the case on CIRAM in June 2015. It was assigned a risk rating of 'very high'.

An anonymous email was received around the same time about an adjoining property. In late July 2015, five additional compliance cases were registered on CIRAM as six potential suspects (companies and individuals) were identified.

The potential offences under the Water Management Act were recorded as:

- section 60B – contravention of terms and conditions of access licence.
- section 91G – contravention of terms and conditions of approval.

The investigation included two site inspections of the relevant properties (in June and October 2015), during which the farm manager was informally interviewed. The investigation also did 'panametric' testing of bores, inspected meters, reviewed WALs, reviewed Bureau of Meteorology (BOM) rainfall records for the relevant period, and reviewed and analysed data from river gauges.

Interviews were also conducted with the complainant, the property owner and the farm manager.

In November 2015, the SIU concluded its investigation and recommended 'no action – no breach' as no evidence of any unauthorised activity was found during the investigation. In making this recommendation, the investigator noted that inspections did not reveal the means by which the alleged unauthorised taking of water may have occurred and did not find evidence of non-compliant or unauthorised activity on any of the properties. It noted that the complainant's concerns, while appearing genuine, were based on presumption, estimation, comparison and anecdote without supporting or corroborative evidence being presented. For example, no direct eyewitnesses to unauthorised activity were prepared to be identified. Although BOM rainfall records showed that from 2012 to June 2015 the rainfall was below mean average, it was above the rainfall readings that formed part of the complaint.

The case was reviewed by SIU management in May 2016, almost one year after DPI Water had received the initial complaint. The recommendation was endorsed and the cases were closed on CIRAM.

The complainant was not advised of the outcome of the investigation and followed it up several times. In May 2016, the Director MIB advised the complainant that due to privacy DPI Water was limited in what it could disclose about individual cases. However it was noted that the allegations had been investigated, no offences had been detected, and there was insufficient evidence to take enforcement action.

The complainant was not satisfied with this response and sought a review.

There is no evidence that an internal review was properly conducted despite an undertaking to do so, plus the complainant was not provided with an outcome.

5.4. Analysis of relevant issues

An initial review of DPI Water's investigation raised a number of concerns and questions about whether:

- the evidence collected by the investigators was the most relevant evidence and sufficient to prove or disprove the allegations
- the evidence collected was properly evaluated
- the rainfall analysis was relevant to the allegations
- the so-called panametric testing had evidentiary value given the nature of the allegations
- the analysis of the data from the river gauges was adequate
- the surveillance/investigation methodology was appropriate
- the undertaking given to the complainant to conduct an internal review of the investigation was genuine.

In particular, it was conspicuous that the underlying issue evident from the complainant's allegation was that the meters at the take-off points on the properties were not sealed or tamper proof – yet there was no record of the investigators having inspected all the meters and no record of whether the meters were properly sealed or tamper proof.

Also, the complainant's suggestions that the volume of cotton production far exceeded the available water and the crop production of comparable properties in the area did not appear to have received appropriate consideration.

Due to the highly technical nature of the matter, the Ombudsman sought an expert opinion from the UNSW Water Research Laboratory.

5.4.1. The expert report's conclusions

The expert review found that unauthorised extraction could not be established based on the available evidence. However, the report noted that the evidence collected had little value in proving the allegations and the evidence that was available was not fully or accurately analysed. The report pointed out that only accurate offtake metering could have clarified if there were illegal extractions. As the meters on the properties were unlikely to have been sealed, any compliance effort was undermined from the start.

In one example, the investigators used an external ultrasonic flow meter (also referred to internally as 'panametric testing') to measure flows in one place. According to the expert report, although this is a quick check that one flowrate out of the many flowrates possible is being measured correctly, it does not provide evidence that the meter was in calibration for all flows. The purpose of this test was to provide confidence that any water being extracted from one particular bore on the property while the meter was properly installed was being accurately measured. However the test did not provide any information on any of the other meters on the property, nor did it provide any evidence of the meter's operation during other periods. In other words, the test was irrelevant to proving the allegations.

5.4.2. The investigation process

The Ombudsman had a number of concerns about DPI Water's investigation process.

Firstly, there was no investigation plan. Although not always necessary, in complex investigations an investigation plan helps the investigator to clarify and determine the approach they should take, and identify the most appropriate evidence to be collected and lines of inquiry to be pursued. In this case, an investigation plan would have helped to identify which questions needed to be asked and what information/evidence would have answered those questions. This would have avoided, at least in part, collecting evidence that had little value in proving the allegations. Many investigations into contraventions of the Water Management Act are complex due to their technical nature and the onerous evidentiary requirements. For this reason, there should be more rigour into what evidence should be collected and whether expert assistance may be required.

Secondly, from the records, the interviews conducted appeared informal. The property owner and farm manager responded to allegations by citing practices on the property to improve water usage and storage. These claims were accepted at face value and not tested.

In contrast, the investigator recorded the meeting with the complainants with apparent scepticism. While evidence from complainants needs a level of credibility, it is the role of the investigator to take the information and test it against the allegations.

5.4.3. The internal review

DPI Water did not fulfil its commitment to the complainant to undertake an internal review. It is likely that other priorities took precedence as, at that time, compliance and other functions were being transferred to WaterNSW.

The internal review should have been referred to an independent person who had no previous involvement in the matter.

In 2015, section 24 of the Privacy and Personal Information Protection Act 1998 was amended to allow an exemption to investigative agencies – which includes any public sector agency with investigative functions exercised under an Act – to use personal information for the purpose of exercising their complaint handling functions or other investigative functions or to disclose such information to a complainant. There was therefore a lawful basis on which DPI Water could provide some information to the complainant. Although the level of information provided is not always a straightforward decision, there is a basis on which a regulatory agency can provide meaningful feedback to a complainant about action taken on a breach allegation and reasons for decisions. This should be supported by policies to assist staff deciding how much information they can give.

5.4.4. The importance of tamper proof meters for compliance

The complainant alleged that none of the meters at the properties were sealed to prevent tampering and that the new electronic meters were not connected to power. DPI Water explained to the Ombudsman that when the complainant was asked who had seen the unsealed and disconnected meters, he talked in anecdotal terms and could not supply credible information about the works or any witnesses. DPI Water also said its examination of meters revealed no anomalies or instances of non-compliance.

Although DPI Water's initial risk assessment recommended an audit of all meters, this did not occur. Only some meters were checked during the inspections and flow tested. An inspection of all the meters and a record of whether they were sealed or not would have been essential given the allegations. The expert report pointed out that offtake metering is the only way to accurately ascertain water usage. However, to rely on such data requires an assurance that the meters are tamper free. Checking all the water meters on the properties concerned was an integral part of the investigation and a failure to do so undermined the investigation and evidence collection process. If the meters were not tamper proof as alleged by the complainant, over extraction of water could easily have gone on undetected. In the circumstances, none of the other evidence collected had any relevance to proving or disproving the allegations because the meters had not been checked.

What were the metering requirements?

National Water Meter Standards were developed under the Commonwealth National Water Initiative (NWI). A key requirement of the National Standards was that meters must be pattern approved, which was not achievable in the short term at that time. To enable the metering requirements of the NWI to be progressed, in 2009 NSW developed Interim Water Meter Standards to cover new meters installed and any meters replaced.

The Interim Standards require that a meter is provided with a seal that is approved by the NSW Commissioner for Water to prevent tampering and is maintained in accordance with any requirements of the manufacturer and Australian Standard 4747 Meters for non-urban water supply. The 2013 NSW Metering Implementation Plan (under the National Framework for Non-Urban Water Metering) noted that under the Water Act and the Water Management Act the government had all the powers necessary for it to install, operate and maintain meters in accordance with the National Water Meter Standards where it chooses to, or to require water extractors to do so through conditions on licences and approvals.⁶⁵

The Water Management Act requires meters to be installed where required (usually under conditions associated with the approvals for water use) and makes it an offence to interfere with such meters.⁶⁶

A review of the statements of conditions for the WALs and nominated works in this case showed that there were no clear conditions imposed in relation to metering and no clear requirements for the meters to be installed in accordance with the National Water Meter Standards or the Interim Water Meter Standards. This, coupled with the fact that the existing meters were not inspected to find out if they were tamper proof, meant it was nearly impossible to prove a potential offence. Lax approval conditions and investigations that lack appropriate rigour create a regulatory environment where it may be relatively easy to do the wrong thing and not get caught.

The Ombudsman heard evidence about problems associated with meters. Officers said that in their experience it was rare to find a meter that was sealed. Proving an offence of tampering with meters was also difficult. For

65. DPI Water, *NSW Metering Implementation Plan*, September 2013, p 20.

66. See *Water Management Act 2000* ss 91H(1), 91I, 91J, 91K and 326(1).

example, if a meter was sealed and then unsealed the investigator would have to prove who unsealed it. Officers also said that conditions could be placed on the approval for meters to be sealed, but this rarely occurred in practice. There was also inconsistency in how conditions were drafted, with some specifying that meters should comply with the Interim Standards and some simply directing that a meter should be installed.

In December 2017, the Government released the Water Reform Action Plan in response to the Matthews Report and the *Murray–Darling Basin Water Compliance Review* (the MDB Compliance Review).

In June 2018, the Water Management Amendment Bill 2018 was passed and amended the Water Management Act to enact a number of mechanisms to enable key elements of the reform. Among other matters, the Bill includes a number of provisions to support the implementation of the government's proposed metering policy. For example:

- Holders of water supply work approvals will be required to install, use and maintain meters unless they are exempt.
- Metering conditions can be included on water access licences as well as licences still in force under the Water Act.
- The Bill authorises the regulations to set the standards and requirements the meters must meet, including in relation to installation and maintenance, and for the protocol that must be followed in the event of meter failure.
- Offence provisions relating to a failure to install, use or maintain a meter, providing false or misleading information and failing to notify when the meter is faulty are clarified.
- The Bill allows the regulations to prescribe a methodology for estimating the quantity of water taken for the purpose of taking action under section 60G for water illegally taken.

After consultation earlier this year, the government released the Draft NSW Metering Framework to be implemented by regulations and through further consultation. The draft framework proposes thresholds for metering linked to the size of the infrastructure for taking water. All new and replacement meters must be Pattern Approved and meet the Australian Standard 4747, while existing meters must be independently verified for accuracy. All meters will be required to have tamper-evident seals and data loggers.

The complete roll out of the metering requirements, as envisaged by the draft framework, will take five years to the end of 2023.

The constraints arising from an increased demand for pattern-approved meters and a shortage of certified meter validators is acknowledged. However, the development of the non-urban water metering standards started in 2005. A key requirement of the National Water Meter Standards under the NWI was that meters had to be pattern approved and installed in accordance with ATS 4747. As the number of meters that were pattern approved was small at that time, the NSW Interim Water Meter Standards were issued nearly nine years ago in October 2009 as an interim measure pending full compliance with the National Water Meter Standards.

Among other requirements, the Interim Standards already require meters to be installed and maintained in accordance with the Australian Standard ATS 4747, inspected by an approved person, and provided with an approved seal to prevent tampering.⁶⁷

It appears DPI Water failed to oversee and enforce the Interim Water Meter Standards and put in place adequate measures to ensure NSW complied with the commitments under NWI to the National Meter Standards in a timely fashion. With the current completion targets, the roll out of full metering for non-urban water will have taken close to twenty years since its inception. Given the extraordinary delays in progressing this important public policy issue to date, measures must be put in place to avoid further delays and speed up the current roll out of meters.

The current metering commitment also does not address the issue of existing meters not being compliant with the Interim Standards – potentially leading to the undermining of regulatory or enforcement efforts as this case study illustrates.

67. NSW Office of Water, *NSW Interim Water Standards*, 2 October 2009, p 6.

5.5. Compliance Case Study Three – Conclusions

The investigation process in this case fell short of best practice. No investigation plan was prepared, the interviews lacked appropriate rigour, and not all relevant evidence was collected. Communication with the complainant was not adequate – for example, DPI Water failed to advise the complainant of the outcome of the investigation or include an adequate level of detail when it responded to a request for an explanation.

The expert report concluded that the available evidence did not in isolation prove the allegations of illegal water extraction from the properties. However, it also noted that the evidence collected had little use in assessing the allegations and emphasised that offtake metering is the only way to accurately ascertain water usage. However, to rely on such data to prove illegal extraction requires an assurance that meters are tamper free.

DPI Water failed to enforce its 2009 Interim Water Meter Standards, which would have ensured that existing meters were appropriately sealed and maintained. Lack of firm requirements for tamper proof meters undermines compliance efforts – as illustrated by this case study.

DPI Water failed to take appropriate and timely action to ensure NSW complied with the commitments given under the National Water Initiative in relation to rolling out metering for non-urban water extraction. This led to a thirteen-year lag to date since the inception of the initiative in 2005. The current ‘no meter no pump’ initiative is a welcome development, but more could be done to achieve the objective earlier. The policy also does not address the lack of compliance with the Interim Metering Standards as far as existing meters are concerned.

6. Findings and Recommendations

6.1. Findings

Having regard to the conclusions reached, I make the following findings in relation to each case.

In relation to the Transformation, I find that:

- The conduct of the Department of Industry was unreasonable or otherwise wrong under sections 26(1)(b) and (g) of the Ombudsman Act in so far as:
 - the Department failed to take appropriate action to secure funding for ongoing compliance roles, including the Strategic Investigations Unit, in that the Department delayed taking decisions to secure funding which resulted in it being unable to have the staff necessary to give effect to the legislative and policy framework
 - the Department did not promptly and effectively communicate to staff the changes arising from Transformation which left staff feeling uncertain and disenfranchised. This was a failure to meet acceptable standards in good public administration.
- The conduct of WaterNSW was unreasonable or otherwise wrong under sections 26(1)(b) and (g) of the Ombudsman Act in so far as:
 - WaterNSW failed to have sufficient regard for its compliance functions under the Water Management Act in that it did not adequately address staff concerns about the role of compliance within WaterNSW’s service delivery model. This was a failure to meet acceptable standards in good public administration.
 - WaterNSW failed to adequately resource compliance functions on having those responsibilities transferred to it in that once it was aware that there were deficiencies in its resources it took twelve months to engage contractors to perform those functions. This delay was unreasonable and a failure to meet the standards of good public administration.

In relation to the Farm Dam Case Study One, I find that:

- The Department's conduct was unreasonable or otherwise wrong under sections 26(1)(b) and (g) of the Ombudsman Act in so far as:
 - the Department failed to take appropriate and prompt action in response to reports of unlawful conduct by the property owner from 2014 to 2017
 - the by-wash solution devised by the Department was inadequate to ensure proper compliance with the Water Management Act.
- The Department's conduct was based partly on irrelevant considerations under section 26(1)(d) of the Ombudsman Act in so far as the decisions made departed significantly from standard practice in response to persistent representations by the property owner's local Member of Parliament.
- The conduct of WaterNSW was unreasonable or otherwise wrong under sections 26(1)(b) and (g) of the Ombudsman Act in so far as it devised the nutrient control pond solution that was not in keeping with the public interest or the objects of the Act. The decision to create the nutrient pond, while not unlawful, was a failure of good public administration as it resulted in an inequitable outcome and had the potential to erode public confidence in the regulator.

In relation to the Farm Dam Case Study Two, I find that:

- The Department's conduct was unreasonable or otherwise wrong under sections 26(1)(b) and (g) of the Ombudsman Act in so far as the Department failed to take appropriate and prompt action in response to reports of unlawful conduct by the property owner in 2006, 2012 and 2015.

In relation to the Compliance Case Study Three, I find that:

- The Department's conduct was unreasonable under section 26(1)(b) of the Ombudsman Act in so far as it failed to conduct proper and thorough investigations and failed to ensure existing meters were compliant with the Interim Metering Standards.

I acknowledge that work is already underway to reform water regulation in NSW.

The Water Management Amendment Bill 2018 passed into law in June 2018 by amending the Water Management Act and introduced a range of measures to strengthen water management in NSW.

The changes are targeted in three reform areas.

Firstly, the amendments create a framework for implementing the proposed water reforms for metering and transparency measures – including a single public register that details water licences, entitlements, allocations, approvals and use.

Secondly, the amendments aim to provide certainty around the delivery of water management in NSW, which includes enhanced compliance measures. The government recognises that it is important that the legislative framework is able to be enforced and that the penalties for non-compliance are appropriate.

To this end, the amendments:

- Allow the regulations to prescribe a methodology for estimating the quantity of water taken
 - for the purpose of taking action under section 60G for water illegally taken.
- Enable the introduction of compliance audits and enforceable undertakings as new compliance tools. Written undertakings will be able to be accepted as an alternative to other enforcement action, including bringing a prosecution or civil enforcement proceedings.
- Increase maximum penalties for offences for individuals and corporations.
- Recognise that distinguishing between licensed water take and basic landholder rights had been a barrier to successful prosecutions in the past. The amendments create a new rebuttable presumption. This presumption will operate to assist in prosecutions for illegal water take where a licence holder takes water under both a licence and a basic landholder rights. Licence holders will need to show how much water was taken under their basic landholder rights instead of the regulator having to prove that the take was not basic landholder rights.

Thirdly, the amendments also provide mechanisms aimed at better protecting and managing environmental water. This aims to enable NSW to meet its obligations under the Basin Plan and intergovernmental agreements, including the delivery of NSW water resource plans.

I also note the work being done by the NRAR and efforts to build its regulatory capability towards best practice – including various actions to increase transparency, establish and communicate the strategic vision, and establish reporting and ethical practices.

I note the extensive work that the NRAR has reported it has or will undertake, including:

- A regulatory policy that outlines a risk based approach and principles to be applied when undertaking enforcement.
- Guidelines on compliance with legislation which include how to complain to NRAR, and outlines how NRAR will keep complainants informed.
- Prosecution guidelines that explain and guide the approach that NRAR will take in determining the appropriate response to non-compliance.
- An investigation manual to provide investigative staff with guidance on how to undertake their functions. This will set out how to apply the regulatory framework, including the exercise of discretion and consideration of public interest factors.
- A checklist for investigations, including recording all decisions.
- Improvements to CIRAM to incorporate new features to track matters and give reminders. There will also be increased reporting of CIRAM data to monitor cases and observe time frames for resolving cases.
- Establishing a committee to determine enforcement outcomes and do enforcement audits. This will include a process for reviewing decisions.
- Centralising the triage of complaints.
- Holding workshops on lessons learnt from investigations/compliance audits, with some feedback sessions having occurred after field visits.
- Rolling out training to investigation/compliance staff. The training will cover new procedures for triage of complaints, the regulatory framework, enforcement review committees, and delegations/authorised officer powers. The training will be delivered by senior officers who have extensive experience in regulation and investigations.
- Establishing a positive ethical culture including a 'speak up' culture. The training being rolled out includes an ethics component.
- Reviewing its resource requirements for investigation and considering what further in-house technical assistance is needed in GIS, modelling, hydrology and meter reading to enable the investigation functions.
- Developing a Memorandum of Understanding (MOU) with various agencies to share information. NRAR has already started establishing links and communication with other regulatory agencies such as the Office of Environment and Heritage, the Department of Planning and Environment, and the Environmental Protection Agency.
- Setting delegations at a higher level. The delegations are supported by checks and balances – such as new dashboards to progress investigations and the committee process.

The NRAR's approach is informed by the NSW Government's Quality Regulatory Services (QRS) framework for quality regulation.

These developments are welcomed and I urge the NSW Government to ensure that the NRAR remains properly resourced to avoid the inadequacies seen in the investigations undertaken by the Ombudsman over the past decade.

I also note the support of the Department for these recommendations, in particular the efforts already made to ensure appropriate legal support is available to the NRAR. The NRAR has accepted a proposal for two additional lawyers to be engaged within the Department to provide advice on NRAR matters. These lawyers will support a range of work undertaken by the NRAR, including policy and enforcement actions.

WaterNSW has advised that it has taken a range of actions as a result of the water investigation – including reviewing its document retention policies and its systems and policies used to store, collate and verify data. It has also developed an Information Assurance Framework and Information Verification Procedure and engaged external assistance for a cultural review.

6.2. Recommendations

Having made findings about the conduct of the Department of Industry and WaterNSW, I make the recommendations outlined below under section 26(2)(a) and (e) of the Ombudsman Act.

The Minister responsible for water in NSW

I recommend that the Minister responsible for water in NSW:

- 1) Ensures the resourcing of the NRAR is sufficient to enable it to undertake efficient and effective compliance operations, and note that additional resourcing of the NRAR to establish IPART regulated revenue will be necessary to achieve this.
- 2) Reviews the evidentiary requirements to prove offences under the Water Management Act and Water Act so that evidence obtained through appropriate technology, such as remote sensing, is prima facie admissible in prosecutions – similar to evidence obtained by speed cameras in driving offences.

The NRAR

I recommend that the NRAR take action to build and maintain a strong culture of independence. In particular, I recommend that the NRAR:

- 3) Continues to use these case studies to help develop guidelines and policies for conducting investigations, including in relation to:
 - investigation plans
 - conducting interviews, both formal and informal
 - providing information to complainants about the progress and outcome of investigations, having regard to section 24 of the Privacy and Personal Information Protection Act
 - developing appropriate electronic and/or hard copy record keeping systems to properly record information and decision-making.
- 4) Provides regular training to ensure compliance officers and senior management have a comprehensive knowledge of the water regulation regime in NSW under the Water Management Act and Water Act.
- 5) Ensures that it has comprehensive policies in place to support compliance officers in properly performing their roles. This should include ensuring that compliance officers understand how to properly exercise discretion within the regulatory regime.
- 6) Implements systems to monitor casework so cases are regularly monitored by managers to ensure that there are no unnecessary delays in investigations.
- 7) Reviews the practice of closing cases (for example, in case management systems like CIRAM) and develops and implements a policy to ensure that cases are not closed when there are outstanding actions or necessary follow up.
- 8) Reviews whether CIRAM is fit for purpose as a compliance case management tool and take action to upgrade or change it if required.

- 9) Develops and implements template documents to assist in documenting decisions, reasons and instructions.
- 10) Reviews 'form' letters to ensure that the language used is clear and devoid of jargon to effectively communicate with members of the public. This should be supported with training.
- 11) Implements clear internal approval processes to ensure incorrect information is not provided to the public.
- 12) Implements a 'peer review' process for continuous improvement whereby learning from cases, such as the case studies discussed in this report, can be used to educate and train staff.
- 13) Introduces quality assurance processes to ensure an appropriate level of consistency exists in decision-making among different areas across the state.
- 14) Takes action, through recruitment and on the job training, to ensure that staff doing proactive enforcement investigations have the right set of skills and personal attributes to cope with the pressures of the role.
- 15) Takes action to create a positive work culture that is clear about goals and expectations and fosters communication between staff and senior management.
- 16) Adopts prosecution guidelines that set out the matters that should be considered by delegated officers in determining whether to recommend a prosecution – to ensure those matters better reflect the specific policy imperatives underpinning a water compliance regime.
- 17) Takes action to ensure appropriate legal support is embedded with and easily accessible to compliance staff to enable early guidance on briefs and evidence collection.
- 18) Takes action to ensure appropriate technical expert advice is easily accessible to compliance staff.
- 19) Takes action to ensure it has negotiated appropriate information sharing and breach notification protocols with all relevant agencies with overlapping roles and jurisdictions.

I also recommend that the NRAR:

- 20) Reviews the two Farm Dam cases, having regard to the information in this report and the expert opinion obtained by the Ombudsman, to consider whether the current situation conforms to the Water Management Act. WaterNSW should provide all relevant documentation to NRAR within ten working days of receiving this report to enable it to carry out the review.

The Department

I recommend the Department:

- 21) Considers what action could be taken to achieve the objectives of the Draft Metering Framework sooner than the current final target date of 2023.
- 22) Takes action to ensure existing meters are compliant with the Interim Metering Standards or relevant regulations.
- 23) Gives executives and managers training, guidance and timely support - including legal and industrial relations support - in how to communicate with staff:
 - a) about change, contentious or confidential matters
 - b) in plain English and devoid of jargon.
- 24) Issues an apology to affected staff for the lack of communication and transparency during the Transformation process.

The Department and NRAR

I recommend the Department and the NRAR:

- 25) Undertake regular training at appropriate levels to ensure compliance officers and senior management have a comprehensive understanding of the fundamental principles concerning delegation powers, including the rule against dictation.
- 26) Ensure that there are comprehensive policies and procedures in place to guide officers in properly exercising delegated powers and to help managers in exercising managerial prerogative.
- 27) Ensure that any limit or condition imposed upon a delegate, such as a requirement that a delegate make decisions consistent with the policies and procedures, is reflected in the Instrument of Delegation.
- 28) Ensure that any such limitation or condition imposed in an Instrument of Delegation does not hinder the delegate from making an independent decision.
- 29) Periodically review instruments of delegations to ensure that the levels of delegate are appropriate for the powers being conferred.

The Department and WaterNSW

I recommend the Department and WaterNSW:

- 30) Review their policies and practices in relation to record keeping and ensure that their staff adopt a culture of recording information and decision-making.
- 31) Deliver training to senior management to identify and address issues between staff, such as a lack of communication.
- 32) Assess the need to audit compliance cases dealt with since Transformation to check if they have been dealt with appropriately.
- 33) Take action to ensure any follow up action required to be taken on finalised compliance cases is clearly communicated to the NRAR.

The Department of Premier and Cabinet

I recommend the DPC:

- 34) Updates and amends the 1992 Memorandum, 'Provision of Information to Members of Parliament' in consultation with this office and the ICAC to provide additional guidance to public sector staff when responding to MPs who directly approach them to advocate on behalf of their constituents.

The Public Service Commission

I recommend the PSC:

- 35) Give consideration to reviewing current or developing new guidelines for agency restructures to ensure they encompass a focus on communication, employee support and the need for clearly articulating the rationale and vision for the restructure.

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 (DLWC) 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. ⁶⁸
18 April 1997		Valuer General's Office (VGO) established as separate agency from DLWC, and was responsible for water regulatory and valuation functions. The State Valuation Office (SVO) was established and remained under DLWC. ⁶⁹
Sometime in 1997		DLWC realignment of water functions under single department. ⁷⁰
Sometime in 1997		State Water 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). Soil Services was established as a commercial business under the DLWC responsible for water conservation earthworks. ⁷¹
March 1999		Administration of the SVO was transferred to the Department of Public Works and Services . ⁷²
August 2000		State Water head office was relocated from Sydney to Dubbo, with staff located at a number of regional sites. ⁷³
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 (MEU). Various other water regulation functions were transferred to the Department of Lands, and Department of Sustainable Natural Resources (DSNR). DLWC water-related areas transferred included: State Water, Town Water & Recycling Services, Department of Public Works & Services, and Soil Services). ⁷⁴
1 July 2003	Department of Infrastructure, Planning and Natural Resources	Department of Infrastructure, Planning and Natural Resources (DIPNR) 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. ⁷⁵
24 September 2003	Department of Environment and Conservation	Department of Environment & Conservation (DEC) was established. ⁷⁶ DEC was responsible for various water-related functions, including under its Environment Protection and Regulation Authority and various other sustainability programs. ⁷⁷
1 January 2004		MEU abolished. Department of Energy, Utilities & Sustainability (DEUS) established. ⁷⁸

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. ⁷⁹
29 August 2005	Department of Natural Resources	DIPNR was abolished and split into 2 departments: <ul style="list-style-type: none"> • Newly established Department of Natural Resources (DNR). Key water-related functions of DIPNR transferred to DNR. • Department of Planning (DP). It appears no water-related functions of DIPNR transferred to DP.⁸⁰
27 April 2007	Department of Water and Energy	DNR was abolished. ⁸¹ Department of Water & Energy (DWE) established. ⁸² DEC was renamed Department of Environment & Climate Change (DECC). ⁸³ 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 (DPI) and DEUS. ⁸⁴
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. ⁸⁵
1 July 2009	Department of Environment, Climate Change and Water (NSW Officer of Water)	DWE was abolished. ⁸⁶ DPI abolished and functions transferred to the Department of Industry and Investment (DII). ⁸⁷ DECC renamed Department of Environment, Climate Change & Water (DECCW). ⁸⁸ 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. ⁸⁹ Office of Water renamed NSW Office of Water (NOW). ⁹⁰
4 April 2011	NSW Office of Water within DITIRIS	DECCW was abolished. ⁹¹ 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) (DITIRIS). ⁹²
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) (DI). ⁹³ NOW water-related functions transferred to newly established DI and renamed DPI Water.
1 January 2015		State Water and the Sydney Catchment Authority are consolidated to form the newly established WaterNSW (a State Owned Corporation). ⁹⁴
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 WaterNSW (a State Owned Corporation). ⁹⁵
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 Natural Resource Asset Division . A separate and new Natural Resource Access Regulator led by a Chief Natural Resource Regulator will also be established as part of this new division. ⁹⁶ Further formalised restructuring is anticipated.

68. NSW Government Gazette Special Supplement No.39, 5 April 1995, p 1859.
69. Department of Land and Water Conservation, *Report of the Department of Land and Water Conservation for the year ended 30 June 1997*, p 7.
70. Department of Land and Water Conservation, *Report of the Department of Land and Water Conservation for the year ended 30 June 1997*, p 9.
71. Department of Land and Water Conservation, *Report of the Department of Land and Water Conservation for the year ended 30 June 2000*, p 14.
72. NSW Government Gazette Special Supplement No.42, 8 April 1999, p 2688.
73. Department of Land and Water Conservation, *Annual Report of the Department of Land and Water Conservation 1999/2000*, p 14.
74. NSW Government Gazette Special Supplement No.67, 2 April 2003, p 4328.
75. 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 accessed 20/11/2003.
76. 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.
77. 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.
78. Department of Energy, Utilities and Sustainability, *Report of Department of Energy, Utilities and Sustainability for 2003-2004*.
79. NSW Government Gazette No.110, 1 July 2004, p 4983.
80. Public Sector Employment and Management (Planning and Natural Resources) Order 2005; NSW Government Gazette No.108, 26 August 2005, p 6385.
81. New South Wales Government Gazette No.56, Special Supplement, 20 April 2007, p 2435.
82. 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).
83. NSW Government Gazette No.47, Special Supplement, 2 April 2007, pp 2102-03.
84. NSW Government Gazette No.56, Special Supplement, 20 April 2007, p 2435.
85. 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.
86. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352); notified on NSW Legislation website, 27 July 2009.
87. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352) cls. 16; notified on NSW Legislation website, 27 July 2009.
88. 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.
89. Public Sector Employment and Management (Departmental Amalgamations) Order 2009 (2009 No 352); notified on NSW Legislation website, 27 July 2009.
90. 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).
91. Public Sector Employment and Management (Departments) Order 2011 (2011 No 184) cls. 19; notified on NSW Legislation website, 3 April 2011.
92. Public Sector Employment and Management (Departments) Order 2011 (2011 No 184) cls. 19; notified on NSW Legislation website, 3 April 2011.
93. 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).
94. Water NSW, *Welcome to Water NSW* <https://www.waternsw.com.au/about/newsroom/2015/welcome-to-water-nsw> (accessed 13 August 2018).
95. NSW Government Media Release, *Water Management: Reforms Pass NSW Parliament*, 1 June 2016; *Water NSW Amendment (Staff Transfers) Act 2016*.
96. Email from Simon Smith, Secretary of the Department of Industry, to Sanya Silver, Manager – Projects & Major Investigations at the NSW Ombudsman, 26 September 2017.

Glossary of terms and abbreviations

BOM	Bureau of Meteorology
CIRAM	Compliance Investigation Reporting and Management System
DPC	NSW Department of Premier and Cabinet
DPI	NSW Department of Primary Industries
FTE	Full time equivalent
GPS	Global Positioning System
IPART	Independent Pricing Regulatory Tribunal
MHRDC	Maximum Harvestable Rights Dam Capacity
MIB	Monitoring and Investigations Branch
ML	Mega litres (1,000,000 litres)
NEF	National Enforcement Framework
NOW	NSW Office of Water
NRAR	Natural Resources Access Regulator
NWI	Commonwealth National Water Initiative
PIN	Penalty Infringement Notice
PLC	People, Learning and Culture
PSC	NSW Public Service Commission
SOC	State Owned Corporation
SIU	Strategic Investigations Unit
WAL	Water Access Licence
WSP	Water Sharing Plan



NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
National Relay Service: 133 677

Email nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au