

Correcting the record: Investigation into water compliance and enforcement 2007-17

A special report to Parliament
under sections 26 and 31 of
the *Ombudsman Act 1974*.

8 March 2018

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Contents

Executive Summary	e
1. Introduction	1
1.1. Background	1
1.2. The need for a further investigation - the WaterNSW Investigation	1
2. The statistical information in question.....	3
3. The investigation into WaterNSW’s provision of statistics	5
3.1. Complaints and initial evidence	5
3.2. The investigative process.....	6
4. Key evidence	9
5. The correction of the statistical information.....	13
6. Analysis.....	14
7. Conclusions.....	16
8. Section 26 findings and recommendations	16
9. Requirement under s 26 (5) of the Ombudsman Act	16

Executive Summary

This is a report pursuant to sections 26 and 31 of the *Ombudsman Act 1974* of an investigation into the acts and/or omissions of WaterNSW in compiling and providing information to the Ombudsman as to the enforcement actions taken by or on behalf of WaterNSW between 1 July 2016 and 3 November 2017 pursuant to the *Water Act 1912* and the *Water Management Act 2000* (the WaterNSW investigation).

The investigation was commenced on 15 December 2017 following receipt of information indicating that statistical information about enforcement actions provided by WaterNSW to the Ombudsman on 9 November 2017, which was subsequently published in the Ombudsman's special report to Parliament (*Investigation into water compliance and enforcement 2007-17*) on 15 November 2017, was incorrect to a significant degree.

The primary purpose of this report is to correct the public record in relation to the enforcement statistics published in the special report and to examine how WaterNSW came to provide the Ombudsman with statistics that were inaccurate.

The statistical information provided by WaterNSW on 9 November 2017 was part of a larger voluntary submission in the context of the Ombudsman's ongoing investigation into water compliance issues (the water investigation).

The submission updated the number of individual enforcement actions allegedly taken by WaterNSW under the two water statutes in the period between 1 July 2016 and 3 November 2017, showing a significant increase.

During consultation prior to the tabling of the Ombudsman's special report on the water investigation, WaterNSW maintained that the updated enforcement figures should be included in the report in order to provide a fair and balanced picture of WaterNSW's performance. Following some clarifications by the Ombudsman this request was agreed to.

On 15 November 2017 the Minister for Primary Industries, Regional Water and Trade and Industry relied on and quoted the updated statistics in an answer to a question without notice in the NSW Legislative Council.

Shortly after the tabling of the special report, the Ombudsman received complaints and information from a number of current and former staff of WaterNSW indicating that the updated statistical information was significantly incorrect and that there had been no referrals for prosecutions and no penalty infringement notices issued in the relevant period. In response to a requirement by the Ombudsman, Revenue NSW confirmed that no penalty infringement notices were issued by WaterNSW in the relevant period.

The investigation included the review of a range of documentation, including all internal communications, and obtained evidence from eleven witnesses in hearings and interviews.

The investigation has confirmed that the updated statistical information was incorrect to a significant degree.

On 22 December 2017 WaterNSW wrote to the Ombudsman and admitted its error. WaterNSW advised that they had manually reviewed all actions taken and provided new information which indicates the number of enforcement actions taken in the relevant period is more similar to the lower numbers initially provided on 30 June 2017 as follows:

Table 1. Amended enforcement outcome statistics

Enforcement Action between 1st July 2016 to 3rd November 2017	Column A: incorrectly scoped data extracted from CIRaM and reported to Ombudsman 9/11/17	Column B: Properly scoped data extracted from CIRaM 4/12/17	Column C: manually QA'd data from CIRaM extract 21/12/17
Formal Warnings	115	49	53
Advisory Letters	192	128	121
Penalty Infringement Notices	105	2	0
Prosecutions	12	0	0
Statutory Directions	63	16	19
Others	187	N/A	N/A
Total	674	195	193

During the procedural fairness phase of the investigation, WaterNSW agreed to undertake a further review of the amended statistical information based on a number of additional clarifications sought by the Ombudsman. The outcome of that review will be included in the water investigation report, if warranted.

The evidence suggests that the senior executives of WaterNSW failed to give the task of providing statistical information on enforcement actions sufficiently careful consideration. Even when doubts were raised (or should have been raised) about the likely accuracy of the information there was insufficient rigor in following through to ensure correct information was provided. Consequently, I have found that the conduct of WaterNSW was based wholly or partly on a mistake of fact¹ and was otherwise wrong².

However, the evidence does not support a conclusion that it was the intention of those senior executives to wilfully provide misleading information to the Ombudsman. Accordingly, no offence under the Ombudsman Act is made out.

To ensure any similar errors are prevented in future I make a recommendation to the CEO of WaterNSW to initiate a review of the systems and polices used by the agency for storing, collating and verifying data to ensure that reports provided to regulatory authorities and external bodies are accurate and reliable.

1. Ombudsman Act, s 26(1)(e)
2. Ombudsman Act, s 26(1)(g)

1. Introduction

1.1. Background

On 15 November 2017 the former Acting NSW Ombudsman made a special report to Parliament (*Investigation into water compliance and enforcement 2007-17*) pursuant to s 31 of the *Ombudsman Act 1974* (first progress report). That report detailed the progress of the Ombudsman's investigation into the performance of water compliance and enforcement functions by the former Department of Primary Industries Water (DPI Water)³ and the State Owned Corporation, WaterNSW (water investigation).

The administration of surface and ground water resources in NSW, and the enforcement of compliance with water legislation in particular, was and remains a focus of intense public scrutiny following the airing of ABC's Four Corners program, *Pumped*, on 24 July 2017. The program sparked a number of concurrent inquiries into water management. These inquiries impacted on the existing Ombudsman water investigation, which was commenced in July 2016 (with respect to DPI Water) and May 2017 (in relation to WaterNSW).

The Ombudsman has been investigating the performance of water compliance and related administrative conduct for the past decade. The issues highlighted in the Ombudsman's current, and ongoing, water investigation are strikingly similar to those encountered in previous Ombudsman investigations. The Ombudsman's reports in relation to those earlier investigations were not made public, as assurances were received from the relevant agencies that the Ombudsman's concerns and recommendations would be considered and appropriate action taken. While some actions were taken after each of the earlier investigations, for a range of reasons the underlying structural and systemic problems were either not properly addressed and/or the impetus behind those reforms was not maintained.

The first progress report placed on the public record insights gained by the Ombudsman in the course of the earlier investigations and provided an historical perspective on issues relating to compliance and enforcement in this area. The primary intention of that report was to further inform the considerations and actions the Government was taking in response to the problems identified and recommendations made by the Ken Matthews inquiry following the Four Corners program.

The former Acting Ombudsman identified four main concerns that have, in his view, contributed to the troubled history of water compliance and enforcement in NSW: chronic under-resourcing; variable competence of staff and standard of investigative skills at various times; organisational culture; and the impact of frequent restructures on performance.

1.2. The need for a further investigation - the WaterNSW Investigation

The first progress report outlined the procedural steps that had already occurred in the water investigation and noted that further witness examinations were taking place, which would be followed by a procedural fairness process. It noted that a final report to Parliament would likely be made some time after April 2018 and would include findings and recommendations, the results and lessons learnt from the in-depth examination of: three individual compliance matters handled variously by DPI Water and/or WaterNSW; the impact on the compliance and enforcement function of the 1 July 2016 transfer of various functions from DPI Water to WaterNSW, which arose out of the NSW Government's 2013 Bulk Water Delivery Review and is commonly referred to as 'Transformation' or 'water integration'; and the state of the compliance function immediately prior to Transformation.

3. DPI Water is now Lands and Water, part of the Department of Industry.

The first progress report had a largely historical focus, and as such the issues discussed primarily related to DPI Water and its predecessor agencies.

Prior to 1 July 2016, WaterNSW had no role in investigating and enforcing compliance with the *Water Management Act 2000* or the *Water Act 1912*. Some of those functions were conferred on WaterNSW on 1 July 2016 as part of the Transformation. The first progress report did not address WaterNSW's compliance performance in detail. However, some statistical information about enforcement outcomes taken by both DPI Water and WaterNSW in the twelve months post-Transformation (as published in the Questions and Answers No. 122 on 14 September 2017 by the NSW Legislative Council) was included in the report to illustrate the impact of frequent restructures on performance. In addition, WaterNSW provided statistical information relating to its enforcement outcomes for the period 1 July 2016 through to 3 November 2017 and requested that this information be included in the report. This request was agreed to.

Shortly after the first progress report was tabled in Parliament, the Ombudsman received information, and subsequently took evidence, from a number of current and former DPI Water and WaterNSW staff (the whistle-blowers) indicating that some of the statistical information on enforcement outcomes in the report provided by WaterNSW was inaccurate and misrepresented, or inflated, the amount of enforcement actions undertaken by the State Owned Corporation during a four-month period between 1 July 2017 and 3 November 2017. A number of staff who voiced these concerns were distressed by what they felt those statistics implied about the respective performance of DPI Water and WaterNSW.

The Hon. Niall Blair, NSW Minister for Primary Industries, Regional Water and Trade and Industry, relied on and quoted these statistics in an answer to a question without notice in the NSW Legislative Council on 15 November 2017.⁴ Given the information provided by the whistle-blowers to the Ombudsman, questioning the accuracy of the statistics, this raised the possibility that Parliament may have been misled.

An Ombudsman's office must be able to rely in good faith on the accuracy and completeness of information provided by agencies within jurisdiction in response to both formal and informal requests for information. This is vital if the office is to properly perform its oversight and investigative functions. It is not possible, nor should it be necessary, for the Ombudsman to scrutinise all source documents to verify every piece of information provided in the course of an investigation. This principle is recognised by s 37 (1) of the Ombudsman Act, which makes it an offence to wilfully make any false statement or mislead, or attempt to mislead, the Ombudsman. Consequently, the possibility that inaccurate information had been provided to this office and to Parliament through the publication of the first progress report was a serious concern that warranted investigation.

Consequently, on 15 December 2017, a formal investigation was commenced into the acts and/or omissions of WaterNSW in compiling and providing information to the Ombudsman and any other parties as to the enforcement actions taken by or on behalf of WaterNSW between 1 July 2016 and 3 November 2017 pursuant to the Water Act and the Water Management Act (the WaterNSW investigation).

This report is the result of that investigation. Its primary purpose is to correct the public record in relation to certain enforcement outcome statistics published in the first progress report and quoted in Parliament and to examine how WaterNSW came to provide the Ombudsman with statistics that were inaccurate and misleading.

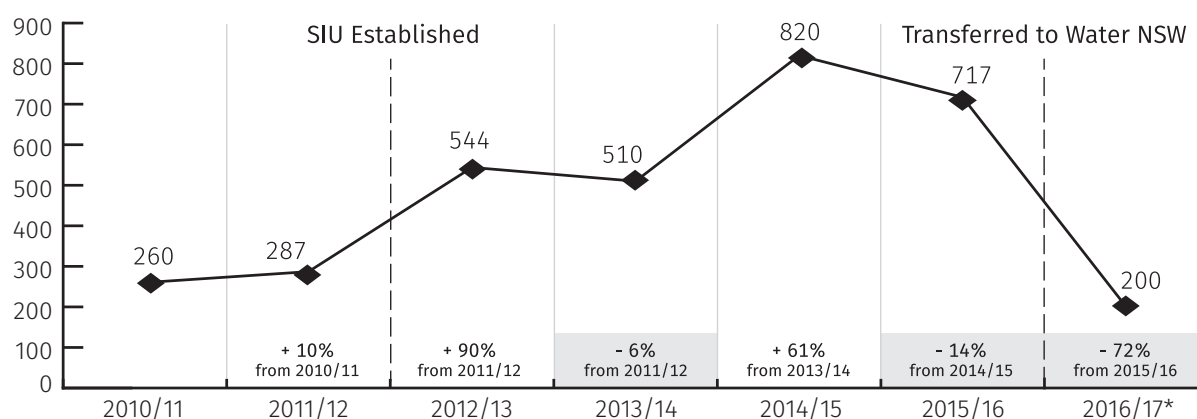
4. The Hon. Niall Blair, Minister for Primary Industries, Regional Water and Trade and Industry, New South Wales Parliamentary Debates (NSWPD), 15 November 2017, pp. 32-33.

2. The statistical information in question

Section 6.3.5 of the first progress report (Organisational culture and the impact of restructures) discussed the impact of frequent restructures and expressed the view held by the NSW Ombudsman that the restructures had a significant detrimental effect on the ability of the relevant water agency to deliver an effective compliance and enforcement program. The report noted that the frequent changes led to a loss of corporate knowledge, productivity and morale, which hampered the agency's ability to foster a positive culture and develop and maintain effective compliance and enforcement systems.

A figure in the first progress report (Figure 5 below) showed there was a 72% drop in total enforcement actions taken in 2016/17 compared to the previous year; an 80-85% drop in penalty infringement notices issued compared to the two preceding years; and an approximate 80% drop in warning letters. It noted that no prosecutions occurred between 1 July 2016 and 30 June 2017.⁵

Figure 5 - Enforcement actions taken annually from 2010 – 17⁶



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

An advance draft of the first progress report was provided to the CEO of WaterNSW following a meeting with the Ombudsman on 10 November 2017.

The day prior to this meeting, on 9 November 2017, WaterNSW provided this office with a submission, comprising of a letter and table, about the performance of its compliance and enforcement functions (Submission). The purpose of the Submission, as advised by WaterNSW, was to update the Ombudsman on the compliance and enforcement actions taken by WaterNSW since 30 June 2017 and to clarify certain information provided in June 2017 in response to an Ombudsman investigation notice to produce documents. The Submission detailed a range of policy and management actions taken to improve WaterNSW's compliance performance, including the engagement of an external compliance specialist to provide nine additional investigators to assist with the case burden. Relevantly, the Submission updated the total number of enforcement actions taken by WaterNSW under the two water statutes in the period 1 July 2016 to 3 November 2017.

After reviewing the advance draft of the progress report, WaterNSW strongly expressed the view that the additional information provided to the Ombudsman in its 9 November 2017 Submission should be incorporated in the report and, in particular, took issue with the statement that suggested that the Transformation had impacted negatively on the performance of compliance and enforcement

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

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

functions. In WaterNSW's view, that statement did not represent a fair or balanced picture of its performance. Consequently, WaterNSW requested that the updated statistics be included in the first progress report to rectify this perceived misrepresentation. Following a number of clarifications sought by the Ombudsman about some of the statistics, namely the prosecutions and the category "others", the below text (uplifted from WaterNSW's 9 November 2017 Submission) was added under Figure 5 in the first progress report:

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

- 115 – formal warnings
- 192 – advisory letters
- 274 – no action
- 105 – Penalty Infringement Notices
- 12 – Prosecutions
- 63 – statutory directions
- 187 – others⁷

Two footnotes (55 and 56), quoting information provided by Water NSW, clarified the above figures as follows:

55. *The '12 – prosecutions' are on-going matters that include a prosecution in their case history, so a related action may have been necessary during the reporting period for the purposes of enforcing a judgement or order made preceding the reporting period.*
56. *'Others' includes a range of entries into the WaterNSW compliance database covering informal education/advice correspondence; referrals to other compliance bodies such as local council; etc. As such this total of 187 are not additional 'enforcement actions' (in the same way that '274 – no action' are not enforcement actions) but are relevant as they generally amount to preventative actions or potentially led to other authorities taking action.⁸*

7. Ombudsman, *Investigation into water compliance and enforcement 2007-17 – November 2017*, pp. 25-26.

8. Ombudsman, *Investigation into water compliance and enforcement 2007-17 – November 2017*, p. 26.

3. The investigation into WaterNSW's provision of statistics

1.3. Complaints and initial evidence

Shortly after the publication of the first progress report on 15 November 2017, the Ombudsman received information from several current and former staff of both DPI Water and WaterNSW questioning the adjusted enforcement outcome numbers and suggesting that very few or no penalty infringement notices (PINs) were issued, and no prosecutions were commenced, between 1 July 2016 and 3 November 2017. The information provided to the Ombudsman included data from the compliance database (CIRaM) that is shared by DPI Water and WaterNSW. Documents received by the Ombudsman at this time also indicated that WaterNSW compliance staff did not receive PIN books, which are necessary to issue a PIN, until August 2017.

It was clear to the Ombudsman, from statistical information provided by WaterNSW in response to an earlier notice to produce information (dated 10 May 2017), that a substantial amount of work and resources would have been required to achieve the increase reported in the 9 November 2017 Submission. For example, the number of PINs issued since 1 July 2016 had reportedly increased from 6 (as at 31 May 2017)⁹ to 105 (as at 3 November 2017).

The 10 May 2017 notice had required WaterNSW to produce, among other things, the number of all enforcement actions taken by it (such as no action taken, advisory letters issued, draft notices, warning letters, stop work orders, licence cancellations, statutory directions, penalty infringement notices and referrals for prosecution) broken down by month between 1 July 2016 and the date of the notice. On 30 June 2017, WaterNSW responded to the notice and provided monthly workload reports from CIRaM. The last available monthly report recorded the year to date enforcement actions for the 11 months to the end of May 2017 as follows:

Table 2. Extract from the May 2017 CIRaM Monthly Workload Report¹⁰

Enforcement action taken			235
Advisory Letter	80	No breach	58
Draft notices & Stop Work Orders	4	Action by other agency	3
Warning Letter	31	Applicable exemption	4
Stop Work Order	2	Authorised by licence/approval	0
Cancellation/Suspensions	0	Duplicate entry	0
Statutory Direction	13	Insufficient evidence	6
Penalty Infringement Notices	6	Associated suspect actioned	38
Referrals for Prosecution	0	Other	9
Investigated - No Action Required	118	Investigative Notices (s 338, s 339)	0

The large increase in enforcement actions over a relatively short period of five months, taken together with the new information received from current and former staff, cast doubt on the veracity of the statistics provided by WaterNSW on 9 November 2017 and included in section 6.3.5 of the first progress report.

9. WaterNSW, *Water Regulations Group Monthly Workload – May 2017*, 30 June 2017, p. 1.

10. Table adapted from WaterNSW, *Water Regulations Group Monthly Workload –MAY 2017*, p. 1.

1.4. The investigative process

On 20 November 2017, a further notice to produce information was issued to WaterNSW to verify the statistics provided on 9 November 2017. The notice sought a range of information, including monthly workload reports as well as details of all formal warnings, advisory letters, PINs, prosecutions, statutory directions and other actions taken, as referred to in the statistics. This information was required to be produced by 28 November 2017. With the agreement of the Ombudsman, WaterNSW complied with the notice in stages between 30 November 2017 and 22 December 2017.

On the same day, a formal notice was served on Revenue NSW (formerly State Debt Recovery Office) requiring all documents relating to the issue of any PINs on behalf of WaterNSW under the Water Management Act and the Water Act. On 29 November 2017, Revenue NSW advised that WaterNSW did not issue any PINs under either of the water statutes or any related regulation during the relevant period.

In addition, on 23 November 2017, the WaterNSW 2016-17 Annual Report was tabled in Parliament. The Annual Report contained statistics for enforcement and compliance actions undertaken by WaterNSW in the 12 months to 30 June 2017 as follows:

Table 3. Extract from the WaterNSW Annual Report for 2016/2017¹¹

Function Exercised under <i>Water Management Act 2000</i>	Number of Times Exercised
Stop Work Order	4
Notice for removal of unlawful works	16
Directions	2
Requirement to provide information pursuant to section 338A(1)	1
Requirement to provide information pursuant to section 338A(2)	4
Penalty Infringement notices	6
Prosecutions	0
Warning & advisory letters	117

The annual report statistics were similar to those provided originally by WaterNSW on 30 June 2017 in its monthly workload reports, and substantially less than the updated statistics that were included in the first progress report.

The Ombudsman conducted hearings under oath¹² throughout November. Oral evidence from WaterNSW staff confirmed that personnel who undertook compliance and investigations did not receive PIN books until August 2017, and therefore did not have the ability to issue PINs until that date. All staff questioned under oath confirmed they did not issue any PINs and were not aware of any PINs being issued or prosecutions being commenced. A number of staff expressed surprise at the large number of enforcement actions claimed and expressed a view that they were unlikely and would have required a '*massive effort*'.

As noted above, under the Ombudsman Act s 37(1)(c) it is an offence to wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's powers under the Ombudsman Act or any other Act. Based on the documentary and oral evidence before the Ombudsman, it became apparent that there was a real possibility that the Ombudsman, and by implication Parliament, had been misled. In the event that the

11. Table adapted from, WaterNSW, *WaterNSW Annual Report 2016-17* (report), p.106.

12. Pursuant to the Ombudsman Act 1974, s 19.

statistics provided to the Ombudsman were misleading, it was important to determine whether this had been done wilfully.

The WaterNSW investigation was commenced on 15 December 2017. In addition to the information and documents already requested on 20 November 2017, WaterNSW was required to provide the Ombudsman with information about the process engaged in to collate the statistics, details and responsibilities of staff involved, the approval and verification processes, and the parameters and/or criteria that were applied to determining the number of 'total enforcement actions taken by WaterNSW' in the relevant period.

Following an approved extension of time to respond to the notice, WaterNSW produced answers and documents on 22 December 2017. In a covering letter accompanying the documents, the CEO of WaterNSW advised that the statistics and information supplied on 9 November 2017 were inaccurate and unreservedly apologised for the error. The letter offered the following explanation:

The information is inaccurate in two fundamental respects.

First and most importantly, the information (incorrectly) included any enforcement action undertaken during the life cycle of a case (whether actioned by DPI Water or WaterNSW) if:

1. *that case transferred to WaterNSW **and***
2. *between 1 July 2016 and 3 November 2017 WaterNSW undertook some other action on that case (eg, took other enforcement action or finalised the case during that period).*

*Second, there are some errors in the way that enforcement action is captured and reported in the Compliance and Investigation and Management tool ("**CIRaM**").*

The inaccuracy of the information provided to the Ombudsman on 9 November 2017 became apparent to WaterNSW only after we commenced responding to your notice to produce documents dated 20 November 2017 which, among other matters, sought "2.4 details of all enforcement actions under the Water Management Act and Water Act taken during the period 1 July 2016 – 3 November 2017."

In answering the question of why the information provided on 9 November 2017 was inaccurate the, CEO explained:

The inaccuracy occurred because WaterNSW's quality assurance procedures, in this instance, were not applied to the same standard as is standard practice in our business. That oversight on this occasion failed to ensure that information was compiled with clarity as to the purpose for which it was intended to be used and was not adequately checked to ensure that the information actually conveyed what it was intended to convey.

In short, we extracted data from the CIRaM system that was wrongly scoped by us. It captured all cases finalised (closed) during the period, reported only finalised cases with outcomes attached and excluded any open cases that may have also had outcomes attached. Accordingly, before providing the information to your office, WaterNSW failed to identify that the information included actions attributable to both Water and DPI Water.

In performing subsequent quality assurance to provide updated statistics to the Ombudsman, WaterNSW has also identified that a number of actions have been recorded incorrectly in the CIRaM system, due to human error. This results in differing statistics between CIRaM generated reports and manually generated, quality assured reports. The information provided to your office on 9 November 2017 was system generated and not manually generated.

The WaterNSW investigation consisted of an independent review by the Ombudsman of the documentary evidence, include source enforcement outcome documents, and a root cause analysis to determine how the incorrect statistics came to be provided. The investigation included the following steps:

- seeking independent verification of the purported PINs issued through Revenue NSW

- conducting a forensic analysis of all internal email communications among WaterNSW staff and contractors who were involved in the provision of the statistical information on 9 November 2017
- requiring WaterNSW to substantiate the number of enforcement actions purportedly taken with documentary evidence such as copies of all formal warnings, advisory letters, penalty infringement notices, referrals for prosecution, statutory directions and others
- reviewing the above source data once it was provided
- examining eight witnesses under oath pursuant to s 19 of the Ombudsman Act and three witnesses in a recorded interview pursuant to s 18 of the Ombudsman Act; the witnesses examined included contractors, such as data analysts and managers, staff of WaterNSW who are involved in compliance investigations and senior executives who were either involved in the compilation of data or the sign off/approval processes.

On 2 February 2018 WaterNSW was provided with a document outlining the Ombudsman's preliminary conclusions and findings. WaterNSW provided submissions on 12 February 2018, which have been considered and incorporated in the report where relevant. A consultation with the Hon. Niall Blair, Minister for Primary Industries, Regional Water and Trade and Industry pursuant to s 25 of the Ombudsman Act occurred on 12 February 2018.

4. Key evidence

Following the ABC Four Corners program, which aired on 24 July 2017, and the ensuing concurrent inquiries into water management, WaterNSW took a number of actions to deal with the increased scrutiny and the need to respond to multiple requests for information from various parties, including the Ombudsman. A company that provides expert investigative services (company) was engaged to assist WaterNSW to deal with open compliance cases that were transferred to it from DPI Water on 1 July 2016 (so-called legacy cases). The company was also engaged to provide enhanced data analytics and compliance reporting capability. By the time of the company's engagement, an internal working group had also been formed within WaterNSW to ensure that requests for information, among other things, were dealt with efficiently and consistently. The working group (referred to internally as Project Harvey) comprised senior WaterNSW executives, including in-house legal, advisors from the company and others as needed. One of the objectives of Project Harvey was to ensure consistent and correct messaging.

In early to mid-October 2017 WaterNSW commenced drafting the Submission to the Ombudsman. A senior legal officer was given responsibility for the preparation of the Submission although she relied on other staff to provide her with the relevant information. The desire to provide the Submission was twofold: it was prompted by WaterNSW's increased emphasis on compliance activities through the work being undertaken by the company contractors and also by WaterNSW staff identifying errors in the information provided on 30 June 2017. The Submission's cover letter noted the additional work that WaterNSW had undertaken in the compliance and enforcement space since 30 June 2017 and indicated that clarifications needed to be made to the 30 June response. An attached table provided an update to the answers to questions previously provided on 30 June 2017. The Submission did not point out that errors had been detected in the 30 June information nor alert the Ombudsman as to what 30 June information had been corrected. Relevantly for the purposes of the WaterNSW investigation, the table, at point 1.19, contained the statistical information, eventually published in the first progress report which was incorrect.

On 2 November 2017, WaterNSW was informed by DPI Water that the Ombudsman planned to table the first progress report. On this same day, a meeting was organised between the Ombudsman and the CEO of WaterNSW for 10 November 2017 to discuss issues related to the water investigation. From WaterNSW's perspective, the upcoming meeting with the Ombudsman created a sense of urgency for finalising the Submission to enable WaterNSW to present what was described in internal email communications between senior staff as its *'best foot forward'* in time for the meeting and in advance of the Ombudsman releasing his first progress report.

On 3 November 2017, one of the company's managers sent an email to the company's data analyst requesting *'another bit of data'* as follows: *'Including dealing with the "legacy" cases, in the period from 30 June 2017 to 3rd November 2017, WaterNSW has issued advisory [sic.] letters, draft notices, warning letters, stop work orders, licence cancellations, statutory directions, penalty infringement notices and referrals for prosecutions.'* The company manager and data analyst initially believed that a response was required that afternoon and that the request was due to a summons by the Ombudsman, a copy of which was not provided to them. After seeking some clarification on what was required, the data analyst assumed, on the basis of the request given to her, that, relevantly, the information sought was for all outcomes on cases closed within the period 1 July 2016 to 3 November 2017 including the DPI Water legacy cases, as opposed to actions taken by WaterNSW within that period.

A data analytics program (PowerBI) was applied to the CIRaM database applying the date and file status filters to extract the data. The program was then able to complete a count on the number of enforcement outcomes relating to cases that were closed during the relevant period. The data was incorporated into the Submission and then circulated to the appropriate WaterNSW staff for review

and endorsement. The data analyst's evidence revealed that, at that point in time, she had limited understanding of CIRaM, and water compliance, as she only commenced in the role ten days prior and had received only basic training. She also gave evidence that she had felt stressed and rushed and that receiving the request for assistance on the Friday afternoon did not allow for sufficient time to evaluate the numbers prior to providing the data to the Ombudsman, the deadline for which she believed was that same evening.

While some discussion occurred within WaterNSW on 3 November about the enforcement outcome category 'other', the evidence indicates that the actual data outputs, and how the numbers were arrived at, were not questioned and were not part of a focussed discussion. The company contractors and WaterNSW staff assumed the data to be correct and assumed it answered the question asked of WaterNSW in the original notice to produce information by the Ombudsman, namely, the number of all enforcement actions taken by WaterNSW since 1 July 2016.

On 6 November 2017, the draft cover letter to the Ombudsman, and the table attachment containing the erroneous numbers of enforcement actions at point 1.19, was sent on behalf of the senior legal officer to the CEO for review and endorsement.

On 8 November 2017, the CEO replied and copied in members of the Project Harvey working group. He noted that the draft Submission looked "ok", although he was not in a position to know whether all the figures were correct. He wrote that, assuming that the figures were accurate, it would be good to get the Submission to the Ombudsman before the meeting scheduled for the following day.

Also on 8 November 2017, the WaterNSW Executive Manager pointed out that some numbers that appeared in both the draft cover letter and the table attachment did not match or add up. However, no verification or discussion occurred in relation to the accuracy of the numbers themselves.

The following day, on 9 November 2017, as there was some confusion about what the errors were, the company data analyst was asked to check all the numbers again through the data analytics software. The data analyst, and her manager, confirmed that there were no anomalies. As the same filters with the incorrect underlying assumptions were applied again, the same numbers were produced as on 3 November 2017. Whether the statistical information was answering the precise question asked by the Ombudsman was not queried, despite the fact the Ombudsman's question was restated in the table attachment and appeared immediately next to the statistics, and the predominant purpose for providing the Submission was to correct erroneous figures previously provided in June.

In the afternoon, the senior manager queried the following sentence at point 1.3 in the draft cover letter to the Ombudsman: *'Including dealing with the "legacy" cases, in the period from 30 June 2017 to 3 November 2017, WaterNSW has issued 178 advisory letters, draft notices, warning letters, stop work orders, licence cancellations, statutory directions, penalty infringement notices and referrals for prosecution.'* The senior manager sent an email to the company contractors and in the draft cover letter, which was attached to the email, made the following comment: *'This number seems high – 178. Is it really between 30/06/17 to 3/11/17?'* The response from the company manager (appearing as a further comment in the attached draft letter and immediately underneath the comment made by the WaterNSW manager) was copied to a number of WaterNSW and company staff. It stated:

What should be clarified is this is ALL the actions taken on cases finalized 01/07/2017 to 03/11/2017, including action prior to 01/07/2017. For example, on an older DPI case that was closed any PINs, directions, etc taken at any time are included. I will need to check if it can be reported differently.

The response of the company manager made clear the underlying assumption on which the data extraction was based: that the enforcement actions included actions taken before 1 July 2016 and included actions taken by DPI Water, as opposed to WaterNSW. Later that afternoon, the company manager further alerted Project Harvey members as follows:

In addition for item 1.3 in the letter, it must be noted the 178 outcomes includes 50 "No Action", which in hindsight may be misleading, although this is aligned with how the same data is presented in the table.

Despite these qualifications and cautions, with the exception of the senior legal officer, which is discussed below, none of the recipients of that email appeared to either question or realise that the numbers did not answer the original question posed in the Ombudsman's notice to produce information and, instead, gave the impression that the numbers reflected enforcement actions undertaken solely by WaterNSW post-Transformation. The actual numbers were still assumed to be correct and were not re-examined, the focus being on ensuring the numbers in the covering letter and the accompanying table added up.

At some point prior to the Submission being received by the Ombudsman, most likely on 9 November, the senior legal officer, upon reading the letter and the table, noted that point 1.19 in the table specified that 12 matters had been referred for prosecution between 1 July 2016 and 3 November 2017. Her evidence was that she had responsibility for referring WaterNSW matters for prosecution, and that, during the relevant period, she had not referred any prosecutions pursuant to either of the two water statutes to the CEO or Board for approval. When she observed the number of prosecution referrals in the table, the number 12 stood out to her. When she queried this number within the legal team, they were similarly baffled and unable to offer an explanation. She did not make any further inquiries, or seek clarification, as she assumed that the numbers related to work that the company was undertaking on behalf of WaterNSW. Her primary focus was on getting the Submission sent rather than on the details, as she felt that the accuracy of the data was the responsibility of those providing the information to her.

Throughout the afternoon of 9 November 2017, the company manager continued to work with the senior legal officer on other aspects of the Submission. The evidence shows that, as with the first data collation on 3 November 2017, the company manager was acting under similar time pressures. When the company manager requested more time to confirm other aspects of the Submission, her request was denied and she was told that the Submission had to go to the Ombudsman that night. This was despite the fact that no formal requirement or deadline had been imposed by the Ombudsman and that the information was being provided voluntarily. Subsequently, the Submission was emailed to the Ombudsman shortly after 7 pm on 9 November 2017.

On 10 November 2017, the CEO of WaterNSW and a number of executives from WaterNSW met with the former Acting Ombudsman and the Deputy Ombudsman to discuss a related but discrete issue in the ongoing water investigation. During this meeting, the Ombudsman informed WaterNSW of his intention to table the first progress report in Parliament. An advance copy of the report was provided to WaterNSW following the meeting. During the meeting, WaterNSW pressed for the statistics provided the evening before to be included in the report to correct the record in relation to WaterNSW compliance performance. The Deputy Ombudsman queried the meaning of the 'other actions' category and the number of prosecutions in the statistics that WaterNSW had provided. WaterNSW undertook to clarify those numbers and later advised that the 'other' category included actions such as informal education and advice correspondence such as referrals. WaterNSW further clarified that the 12 prosecutions included any prosecution in the case history and not necessarily during the identified period but that a further enforcement action or judgment may have occurred during that period. These clarifications were included in the first progress report along with the updated statistics.

All staff examined during the investigation, with the exception of the senior legal officer and the senior manager, conceded that they did not turn their minds to questioning the accuracy of the enforcement numbers.

When the Ombudsman's 20 November 2017 notice to produce information was received by WaterNSW, in contrast to the events of early November, a copy of the notice was given to the company contractors when they were requested to extract further data to enable WaterNSW to respond to the notice. The 20 November 2017 notice asked for documentary evidence to confirm the total number of enforcement actions taken by WaterNSW between 1 July 2016 and 3 November 2017. The evidence obtained from the company contractors was that, as soon as they read the request, they realised the numbers they originally provided were not correct and in fact answered a different question, namely the total number of actions taken on any cases closed in the relevant period.

5. The correction of the statistical information

On 22 December 2017, WaterNSW provided the Ombudsman with the below information (see Table 4) which compares the number of enforcement outcomes provided to the Ombudsman on 9 November 2017, numbers extracted from CIRaM on 4 December 2017 with correctly scoped parameters, and numbers that have been quality checked through a manual line by line review. As advised by WaterNSW, the manual process involved a line by line review of every case recorded on CIRaM that, according to CIRaM, had an enforcement action such as a notice to a suspect (e.g. stop work order) endorsed by a manager since 1 July 2016. It further involved reviewing and validating the data captured in CIRaM as well as assessing whether the documentary evidence in CIRaM supported the enforcement action captured for those cases.

This office has compared the updated statistical information provided by WaterNSW with the supporting documents (copies of formal warnings, advisory letters, PINs and statutory directions issued). The outcome of this comparison with a number of additional queries has been separately provided to WaterNSW. In its submission to the preliminary investigation report, WaterNSW committed to undertaking a review of the information based on the Ombudsman's queries. The outcome of that review will be included in the water investigation report, if warranted.

Table 4. Amended enforcement outcome statistics

Enforcement Action between 1st July 2016 to 3rd November 2017	Column A: incorrectly scoped data extracted from CIRaM and reported to Ombudsman 9/11/17	Column B: Properly scoped data extracted from CIRaM 4/12/17	Column C: manually QA'd data from CIRaM extract 21/12/17
Formal Warnings	115	49	53
Advisory Letters	192	128	121
Penalty Infringement Notices	105	2	0
Prosecutions	12	0	0
Statutory Directions	63	16	19
Others	187	N/A	N/A
Total	674	195	193

6. Analysis

The evidence indicates that a number of key factors led to or contributed to the provision of incorrect statistical information to the Ombudsman, namely:

- lack of experience with the CIRaM database by those who compiled the data
- lack of clear guidance given to the data analysts on what data was being sought and what question was to be answered by the data
- lack of general water compliance experience by those who approved WaterNSW's Submission to the Ombudsman
- no comparison carried out between the original data provided in June 2017 and the 9 November 2017 data
- acute work and time pressures.

Prior to the engagement of the company, it appears that WaterNSW senior executives had little visibility of the agency's compliance performance. This was, among other reasons, due to the limited reporting capacity of CIRaM. One of the contracted company's agreed objectives was to improve compliance reporting. By October 2017 work had commenced on the development of consistent and reliable reporting through the data analytics software PowerBI, which extracted data from CIRaM and presented it in a dashboard reporting format.

On 3 November 2017, the reporting was still being refined. The company data analyst who extracted the statistics from CIRaM through PowerBI had been employed only ten days prior and was still familiarising herself with CIRaM when she was asked to produce updated enforcement outcome statistics in a short timeframe. The initial request for data received by the company contractors did not include the full wording of the Ombudsman's original notice to produce information of 10 May 2017, even though the request was to update or correct the original answers to that notice. This led to the misinterpretation of the question being asked, which led to the application of erroneous parameters to the data extraction. The wrong parameters led to the inclusion of pre-July 2016 enforcement outcomes that were taken by DPI Water, and not WaterNSW, in the statistical information provided.

In addition, the evidence indicates that the company contractors were initially only given a few hours to compile the data, making it difficult to validate both its accuracy and the parameters applied. In evidence, both the company contractors and WaterNSW staff advised that one week would have been a more realistic timeframe for the request. Although the deadline set by WaterNSW was later extended to 9 November 2017, the evidence shows that the collation of the data was again subject to significant time pressures, and the initial misunderstanding in the underlying assumptions and parameters applied to the data was replicated throughout the process, thereby leading to a collective assumption that the numbers correctly answered the question that was asked.

The senior manager agreed that, had the enforcement outcome numbers been compared to the total numbers previously provided, the large increase in some actions (eg the increase in PINs from 6 to 105) should have prompted further scrutiny. However, such comparisons did not occur. Furthermore, the staff and contractors involved in the compilation of the statistics had limited direct experience in compliance and no or limited experience with CIRaM, which reduced the opportunity to properly interrogate the statistics. For example, when WaterNSW staff who had compliance experience became aware of the statistics that were published in the first progress report, they immediately knew that the statistics were questionable and that further inquiries were warranted. As none of these staff were consulted during the compilation process, the opportunity to probe the numbers was missed.

WaterNSW executives were presented with several opportunities, or red flags, that should have alerted them to the fact that the claimed number of enforcement actions in the data provided to the Ombudsman's office on 9 November 2017 was unrealistic, particularly in relation to the number of PINs and prosecutions. For example, on 9 November 2017 the company manager clearly articulated the fact that actions may have included actions taken by DPI Water on older cases closed and pointed out that the total number of actions included 'no action' which could have been misleading. A simple comparison of the new data with the annual report data as well as the data previously provided to this office should have raised questions about its accuracy. The Deputy Ombudsman's request for clarification on 10 November 2017 should have triggered a more careful examination of the veracity of the numbers. The senior legal officer's evidence confirmed that all referrals for prosecutions were the responsibility of the legal team. She was aware that no referrals for prosecutions under the water statutes had been received by the legal area in the relevant period and that as a consequence, she had some concerns about the number of prosecutions included in the Submission at point 1.19. The senior legal officer, despite not understanding the remit of the company, assumed the prosecution figures had something to do with the company's activities. Notwithstanding this, reasonable inquiries about how the number of prosecutions had been arrived at were not made.

WaterNSW, in its response to the preliminary report, submitted that footnote 55, as replicated in section 2 above, informed the Ombudsman that no prosecutions had been commenced between 1 July 2016 and 3 November 2017. It is not clear how the wording of footnote 55 could lend itself to such an interpretation. It seems to be a convoluted way of expressing a relatively simple proposition and if that was the intent it could have been stated in much clearer terms.

WaterNSW had taken steps to address issues with compliance performance, including the engagement of the company to deal with the legacy caseload. Legacy cases were being closed and monthly reports indicating reductions in the number of open files started to be produced and presented to the executive. The case reduction and increased visibility appear to have created a positive perception of compliance performance amongst senior executives. This perception is reflected by statements made by the CEO of WaterNSW in a media release and staff communications. An internal email to all WaterNSW staff on 16 November 2017 reiterated to staff the fact that the Ombudsman's report highlighted the '*strong performance*' of WaterNSW. In particular, the CEO pointed to the substantial reduction in the number of open files. Documentary evidence obtained by this office confirms the accuracy of this statement. The CEO's subsequent evidence to the Ombudsman was that he believed there had been substantial progress in the compliance and enforcement space.

None of the staff who were involved in compiling the statistics or who looked at the information to be provided to this office, perceived anything sufficiently unusual about the numbers to cause them to raise concerns about their accuracy. The impact of the multiple concurrent inquiries and requests for information to WaterNSW and the increased stress, unrealistic workloads and significant time pressures this imposed on the executive and staff should not be underestimated. In my view these pressures contributed to the failure to identify that the statistics were significantly inaccurate, as did the then existing narrative among the executive of WaterNSW that the organisation was performing its compliance functions effectively. In this regard the evidence of one of the witnesses was that:

I took those numbers as being those numbers, to be honest. I didn't question them, and [name] did as well. He truly believed in those numbers, and it was – looked fantastic, didn't it? It looked like we were doing such a great job.

7. Conclusions

WaterNSW provided to the Ombudsman statistical information about its enforcement actions that it knew was relevant to a formal investigation the Ombudsman was undertaking which it now acknowledges was inaccurate to a significant degree.

That appears to have occurred because of the factors discussed in section 6 of this report that call into question the level of awareness of the compliance function among senior managers responsible for its performance; the adequacy of training in the use of IT systems; the way in which the company contractors extracting the data were briefed and the failure to involve staff that may have had the required knowledge to validate the data.

The evidence also suggests that the senior executives of WaterNSW who were ultimately responsible for the provision of the incorrect and misleading information failed to give the task sufficiently careful consideration. Even when doubts were raised (or should have been raised) about the likely accuracy of the information there was insufficient rigor in following through to ensure correct information was provided.

However, the evidence does not support a conclusion that it was the intention of those senior executives to wilfully provide misleading enforcement statistics to the Ombudsman. Accordingly, no offence pursuant to s 37 of the Ombudsman Act is made out.

Finally, it is acknowledged that the CEO of WaterNSW has apologised for providing the incorrect statistical information on enforcement actions taken by that agency.

8. Section 26 findings and recommendations

I find that the conduct of WaterNSW was based wholly or partly on a mistake of fact within the meaning of Ombudsman Act s 26(1)(e) and was otherwise wrong (s 26(1)(g)) in so far as there has been a failure to apply appropriate rigour and care to ensure correct statistics were provided to the Ombudsman in the Submission of 9 November 2017.

I make the following recommendation:

1. That the CEO of WaterNSW cause to be reviewed the systems and polices used by the agency for storing, collating and verifying data to ensure that reports provided to regulatory authorities and external bodies are accurate and reliable.

9. Requirement under s 26 (5) of the Ombudsman Act

I require that WaterNSW provide a report by 30 April 2018 in relation to the above recommendation.

I will review the above report and may request further information deemed necessary to confirm progress towards implementation of the recommendation.



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