

Compliance and Enforcement Review

DELWP and delegated water corporations' responsibilities within
the *Water Act 1989*

Summary Overview Report

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for
Minister for Water
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Background

Risks (and related harms) in the effective delivery of the compliance function have become heightened because of ongoing drought conditions and high water market prices in Northern Victoria.

It was therefore considered timely to review systems and processes for oversight of compliance and enforcement functions as there is significant potential for confidence in the integrity of water resources management and markets to be undermined if this function is not effectively delivered.

This review covered DELWP's and (non-urban) water corporations' delivery of compliance and enforcement functions. Water corporations with delegations for this purpose are Goulburn Murray Water, Grampians Wimmera Mallee Water, Lower Murray Water and Southern Rural Water. Section 51 of the Act is also delegated to Coliban Water and Melbourne Water. Section 67 is also delegated to Melbourne Water.

This review was undertaken during a period of travel restrictions and physical distancing requirements with most people working from home. Accordingly all communication was by telephone, video conferences, emails and shared drives.

All staff dealt with are to be commended for their obliging and constructive approach. Without their co-operation and contribution, the completion of this review would have been all the more challenging, if not impossible.

Summary Conclusions

Considerable progress has been made against the Murray Darling Basin (MDB) Compliance Compact commitments overall as acknowledged in the MDB Compliance Compact Assurance Report 2019 and by DELWP and the water corporations (WCs) in responding to the *Non-urban water compliance and enforcement - Review of framework and governance arrangements Report 2018*.

All WCs have approved Compliance and Enforcement (C&E) Strategies in place except for Melbourne Water which plan to do so by the end of 2020.

Progress with Compliance Manuals is mixed with three WCs having updated their manual, consistent with the recommendations of the 2018 DELWP review. Two WCs are proposing to adopt the DELWP training manual which is scheduled for finalisation in July 2020.

A related legacy issue is that policies and procedures across three of the WCs generally require updating to complement and support their C&E Strategies.

The residual immediate and universal challenge however is to fully operationalise the C&E Strategies to apply the zero tolerance of negative ABAs policy, and to be able to demonstrate the effectiveness of the Strategies in practice.

Over 40 specific recommendations were made across the six individual WCs and DELWP. These have been addressed collectively for systemic attention in the following core tasks proposed to be undertaken over the next twelve months, as set out in the attached Program to operationalise C&E Strategies:

- Communicating that unauthorised take is not a victimless offence and that zero tolerance provides for equity of access to limited water resources,
- Establishing more consistent criteria for identification of unauthorised take and of approaches to compliance management,

- WCs more rigorously managing and monitoring the C&E function
- Relevant and appropriate Annual Reporting on C&E,
- Addressing enforcement issues which inhibit compliance management,
- Finalising metering action plans, and
- Embedding DELWP's ongoing oversight and monitoring.

These matters are dealt with below.

1. Communicating that unauthorised take is not a victimless offence and that zero tolerance provides for equity of access to limited water resources

There has been a variable approach across WCs to launching their C&E Strategies and communicating the zero tolerance policy.

Various WCs have engaged with their advisory groups, included the zero tolerance policy in presentations at industry conferences, amended their customer charter, planning further communication as part of end of season water usage statements, while another is holding off on finalising its own plan pending finalisation of DELWP's Communications Plan.

Compounding this is what appears to be a legacy practice across some WCs of an accommodating approach to dealing with 'overuse' by water users. It is not evident that all WCs have yet fully embraced and operationalised the zero tolerance policy.

There has been a tendency by some WCs not to take a rigorous approach to managing compliance within allocations: e.g. accepting rectification within the year, rarely going beyond issuing advisory and warning letters when unauthorised take is identified at mid-season. Compounding this is that warning letters have to date generally not been actively followed up except at end of financial year.

Proposed action- That DELWP finalise its Communication Plan by 31 July 2020 and focus the particular messaging respectively to WCs, water users and the public. This would enable DELWP to focus its engagement with WCs towards achieving a more co-ordinated and targeted communication and engagement approach. Clear messaging across the next year would appropriately complement the more rigorous and equitable operationalisation of the zero tolerance approach across the state.

2. Establishing more consistent criteria for identification of unauthorised take and approaches to compliance management

There is a need to more consistently define what is unauthorised take and what zero tolerance represents as there are a range of interpretations across WCs, generally reflecting historical practice.

Across WCs unauthorised take is being variously identified as exceeding allocation by 0.1ML in one case, as exceeding by 1ML in another through to the meter reading exceeding the allocation by more than 5%, to exceeding the allocation at year end even when the allocation was exceeded at mid year read, and allowing users with multiple allocations to offset to a net position retrospectively.

Similarly domestic and stock (D&S) take was being accounted for differently across WCs, ranging from including D&S as non-urban water, deeming usage and excluding from consideration of non-urban water take, and managing D&S separately from non-urban water.

Notwithstanding the variability in approach to identifying unauthorised take, an assessment of indicated unauthorised take was made using available information. This indicated unauthorised take ranged from 0.1-3.6% when expressed as a per cent of non-urban water volume and from 1-6% when expressed as a per cent of Allocation Bank Accounts.

There is not an established benchmark against which to assess this indicated level of unauthorised take. Comparative analysis using judgement about the nature of the business of the respective WCs however indicates the current level of unauthorised take while higher than desirable is not excessive.

The scope for more timely and rigorous follow up of detected unauthorised take however indicates there is scope to reduce the incidence of negative ABAs. Initial indicative targets should be considered around the 1% level in volume terms and up to 3% in ABA terms. This recognises current indicated levels and the scope for a more timely and business-like approach to managing compliance.

Similarly compliance and enforcement actions reported by WCs for 2018-19 indicates significantly different approaches which warrant review and more purposeful ongoing monitoring. There is a clear disposition to the use of advisory and warning letters with notably only one WC using notice of contravention and another more routinely initiating prosecutions.

Developing a more complete understanding of the respective approaches is required.

A further dimension of unauthorised take is the period until the situation is rectified. Reports available in relation to two of the WCs indicate that a significant proportion of their un-rectified unauthorised take has been outstanding for greater than 12 weeks while another two have generally only followed up rectification of unauthorised take at year end.

Proposed action- That DELWP convene, as soon as practicable, a workshop of WCs to collaboratively assess the respective interpretations of the zero tolerance policy, approaches to and timeliness of compliance management in use, criteria being used for escalation and entering into arrangements for rectification particularly recognising there are timing and pricing considerations in some contexts. As a shared core framework and approach is a prerequisite for more consistency in the management of and reporting on outstanding unauthorised take, it is proposed this framework and approach should be finalised by 31 August 2020.

3. WC managing and monitoring the C&E function

A universal matter raised with WCs was how the C&E Strategy was to be 'operationalised' in a way that enabled activities undertaken to be assessed for effectiveness in operation.

While 'take and use of water' should be primarily covered by meter reads, the 'construction and works' dimension particularly warrants description of its elements and the establishment of a cyclical approach to checking compliance to demonstrate adequate coverage of all elements over time. It is notable that across WCs between 16 and 23 prohibited activities were identified in their C&E Strategies.

It is proposed that the respective C&E Strategy and the associated risk analysis across the identified prohibited activities be used to develop a three to five year strategic compliance plan from which annual compliance work programs for WCs could be prepared. This approach would over time demonstrate that all risks identified are being appropriately tested, on a cyclical basis at least, to provide assurance regarding the veracity of the risk assessments.

Proposed action- That each WC develop a strategic C&E plan and associated annual work programs by 30 September 2020 to provide a reference point for managing and monitoring the operation of the C&E function. These would also facilitate more structured governance reporting so exceptions and matters of significance can be highlighted and enable provision of informed assurance about the level of compliance being achieved.

4. Annual Reporting on C&E

Reporting on C&E activities in annual reports was variable across the WCs.

On 23 March 2020 the Minister issued Ministerial Reporting Direction 04 which set out Compliance Reporting obligations for the six WCs covered by this review. They are required to provide as part of their annual report of operations information on compliance and enforcement activities in relation to water shares, take and use licences and works licences along with an overview of their risk-based C&E strategy and a summary of how it is being implemented.

A consistent interpretation and approach to this new requirement would benefit individual WCs, customers and the community.

Proposed action- That DELWP brief WCs on the context and intent of the Ministerial Direction and contribute to the development of a model approach to or template for meeting this annual reporting obligation in time for the 2019-20 annual reporting cycle, recognising that that this is a transitional year and that full compliance with the Ministerial Direction may not be possible until 2020-21.

5. Enforcement issues inhibiting compliance management

In the course of the review a number of concerns were raised about enforcing legislative provisions and experience with prosecutions.

Concerns included:

- propensity of Courts to divert offenders and to impose small penalties of the commercial advantage obtained from unauthorised take,
- Water Act requirement to provide notice (7 days s133, 2 days s151) and lack of clear ability/authority to operate customer works to suspend or discontinue supply,
- the reliability of meter readings as evidence,
- one WC has successfully adopted an approach of serving 'enduring' notices for repeat and significant offenders which have a 12 month duration,
- one WC enforces by replacing meter with a blank end whereas another says their meter cannot restrict flow.

It was also noted that generally there are limited prosecutions initiated. While recognising prosecutions are rightly a last resort, they also pose a public and high risk in terms of effectiveness and reputation should they not succeed. It would therefore be prudent to use the recently re-constituted Community of Practice to provide counsel and advice, particularly for WCs who do not regularly prosecute.

Proposed action- That DELWP convene a workshop by 31 October 2020 to canvas the full range of concerns and difficulties and to prioritise these matters for attention and determine others as not viable to address in the immediate term, to be followed by using the recently re-constituted Community of Practice approach for ongoing collaboration in the development of a shared core framework for addressing enforcement action in relation to repeat, pattern and significant incidents of unauthorised take.

6. Metering action plans

The Victorian Non-Urban Water Metering Policy was published in March 2020 and applies to non-urban water meters of water corporations. All high risk take was to have AS4747 meters and telemetry in place from the date of approval of the policy (March 2020). There is a June 2025 target date for installation of new meters and telemetry with replacement of non-compliant meters and automated reporting of water take.

Relevant WCs are required to prepare metering action plans. DELWP is working with WCs in this regard.

Draft action plans seen in the course of this review are quite detailed and very technical, an observation consistent with advice provided by DELWP to WCs in May 2020. The Policy document summarises at Table 1, page 8, water meters and meters with telemetry by WC as at 2019. Appendix B sets out an implementation program. A high-level gap analysis however, by WC, costed and assessed for achievability within the available timeframe is not yet available.

Proposed action- That DELWP:

- a) prepare a summary position report as at March 2020 to establish whether all high risk take had AS4747 meters, and
- b) co-ordinate the compilation of an overview, costed and resourced gap analysis by WC to assess the achievability of the 2025 policy goal, to provide a means to confirm the deliverability of the 2025 policy goal, by 31 December 2020.

7. DELWP ongoing oversight and monitoring

DELWP has recently commenced providing an unauthorised take quarterly report to the Minister. This is a very positive initiative and serves to provide a basis for consolidating the ongoing oversight and monitoring of the C&E function in practice.

This report currently focusses primarily on two WCs however the information provided if expanded to cover all six WCs this would provide the basis for an authoritative summary table of unauthorised take.

Developing this report to provide by WC, the allocation available and the number of ABAs involved to inform consideration of relativity, unauthorised take by volume and by number of accounts as a per cent of the respective available allocation and of the number of ABAs, would provide headline indicators of the effectiveness of the respective WC C&E functions. Over time this table could also be developed to indicate a trend over time, by WC and collectively.

This would then provide a dashboard summary for monitoring that unauthorised take is being kept at as low a level as possible.

This summary table could also be complemented by

- a report by WC of outstanding unauthorised take in the form of an age analysis (such as <1 month, 1-2 months, 2-3 months and >3 months (or alternative time periods determined by multiples of the normal time required to effect a water trade to rectify the unauthorised take), and
- a summary analysis of categories of arrangements entered into and of enforcement action in course in relation to unauthorised take which has been outstanding for more than 3 months (or alternative period).

On an annual basis this report could be augmented by a comparative analysis of the annual compliance and enforcement action returns.

This process would provide both for ongoing monitoring visibility for the effectiveness of the C&E function, and a reliable indicator of the overall comprehensiveness and integrity of the C&E framework in operation.

Proposed action- That DELWP progressively through 2020-21 further develop this quarterly monitoring of unauthorised take, and augment it annually with an analysis of the broader compliance and enforcement activities over the course of the 2020-21 year by working with WCs to build on their current Victorian Water Register and annual 'summary of compliance and enforcement actions' reporting obligations.

Conclusion

The elements of a reliable C&E framework exist however there is a residual need to better align approaches and practices across WCs as the C&E Strategies are fully operationalised.

This can be achieved by further developing the ongoing engagement and collaboration with, and across WCs.

The existing constructive and mutually respectful relationships should be leveraged to share better practice and to avoid unnecessary duplication of effort.

In the attachment a three phased approach is proposed to achieving this greater alignment of practices and more consistency of approach which would provide better assurance of the effectiveness of compliance and enforcement functions in operation.

DELWP is well positioned to undertake a more purposeful yet facilitative role while WCs appear very receptive to such an approach. The recent re-constituting of the Community of Practice approach is commended as an important means of facilitating such a constructive and collaborative approach.

Similarly some WCs have made significant advances that could readily be leveraged by others.

For example Coliban Water and GMW have comprehensively revised their policies and procedures, LMW and GMW have developed comprehensive compliance manuals and GMW has an established approach to prosecutions. LMW well advanced on a Rural Unauthorised Take Implementation Plan (RUTIP), a comprehensive initiative to address gaps in functionality and capability to achieve best practice for the management of unauthorised take compliance and enforcement.

In addition to capitalising on LMW's extensive real time metering regime, this project is leading to a more structured approach to risk categorisation, escalation criteria and decision tables as well as the development of risk metrics, tolerances and reporting across preventative, responsive and operational dimensions. There would be benefit across WCs in leveraging the approach and work undertaken by LMW.

Attachment A - Proposed Work Program to operationalise C&E Strategies

Phase 1 Alignment (July to September 2020)

Communication and engagement

DELWP to finalise its Communication Plan and specifically tailor messaging respectively to WCs, water users and the general community to encourage a more coordinated and targeted communication and engagement approach.

- Facilitating measured delivery within agreed timelines across the next year would complement the more rigorous and equitable operationalisation of the zero tolerance approach across the state.
- Finalise the Compliance and Enforcement Training Manual

Confirm operational framework on unauthorised take

Convene a workshop of WCs to:

1. Assess and harmonise the respective interpretations of the zero tolerance policy (e.g. any take >1ML is unauthorised take), approaches to and timeliness of compliance management (e.g. incidental unauthorised take of 1-10ML or <10% of allocation managed administratively via mechanisms such as a 'small customer drawdown facility' whereas any unauthorised take over 10 ML or >10% of allocation is rigorously managed via contravention notices and PINs while unauthorised take exceeding 50ML or >20% of allocation is escalated to Executive level for expedited formal management), agree criteria to be used for escalation and entering into rectification arrangements as well as to develop a framework and approach to provide for more consistency in the management of and reporting on outstanding unauthorised take e.g.:

- Any negative balance at any time is deemed unauthorised take and should be rigorously managed
- Warning letters should be used pro-actively, e.g.
 - real time meters use as ABA balance nears zero (e.g. 80%, 90%, etc.), is significantly ahead of pro rata time elapsed or out of line with prior usage.
 - Manual read meters, issued routinely say two months before reading for all users who exceeded allocation at previous read, or in the past 24 months.
 - be tailored to address pattern and serial unauthorised take.
- Determine a consistent approach to managing Domestic & Stock.

2. Establish fit for purpose criteria for escalation of enforcement action, e.g.

All unauthorised take to be followed up in a consistent and timely manner, say within 14 or 30 days to:

- where no trade to rectify ABA has been advised, to seek advice of any trade effected and threaten escalation if a negative or no response is received within 14 days, and that,
- Breach notices be provided and acted on consistent with the statutory notice periods, and
- where escalation does not result in rectification of ABA, further action be guided by debtors management type action.

3. Establish an approach to managing and reporting on outstanding unauthorised take in a manner similar to management and reporting of aged debtors.

Annual Reporting on C&E

DELWP to brief WCs on the context and intent of the Ministerial Direction and develop a model approach to meeting this annual reporting obligation in time for the 2019-20 annual reporting cycle, recognising that that this is a transitional year and that full compliance may not be possible until 2020-21.

Strategic C&E Plans and Annual Work Programs

WCs develop a strategic C&E plan and associated annual work program to provide a reference point for managing and monitoring the operation of the C&E function. These to also facilitate more structured governance reporting so exceptions and matters of significance can be highlighted, and enable provision of informed assurance about the level of compliance being achieved.

Phase 2 Consolidation (October 2020 to March 2021)

Compliance management and enforcement

DELWP convene a workshop (or use the re-constituted Community of Practice approach) to catalogue the full range of concerns and difficulties experienced by WCs in undertaking enforcement and prosecution actions, and to definitively prioritise these matters for attention.

Metering action plans

DELWP to:

- a) prepare a summary position report as at March 2020 to establish whether by WC, all high risk take had AS4747 meters, and
- b) co-ordinate the compilation of a summary costed and resourced gap analysis by WC to assess the achievability of the 2025 policy goal, and to provide a means of progressively monitoring progress with achieving this goal.

Phase 3 Embedding (April to June 2021)

Ongoing oversight and reporting

DELWP progressively develop the quarterly monitoring of unauthorised take report to the Minister so it provides a dashboard summary of the level of unauthorised take by WC, and augment it annually with an analysis of the broader compliance and enforcement activities over the course of the 2020-21 year, by working with WCs to develop a 'single source of truth approach' by building on their current VWR and annual 'summary of compliance and enforcement actions' reporting obligations.