

# Non-urban water compliance and enforcement - Review of framework and governance arrangements

Murray-Darling Basin Compliance Compact Actions  
1.1, VIC 1.1, 2.1, VIC 2.1

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# Executive Summary

## Introduction

The Murray-Darling Basin Compliance Compact 2018 (Compact) is a collaborative, joint commitment by the Australian Government and Basin States. It aims to restore public confidence in water resource management in the Murray-Darling Basin (the Basin) by building a consistent approach to compliance and enforcement practices by governments across the Basin.

This report fulfils Victoria's commitment under Compact actions 1.1 and VIC 1.1 to review our internal governance arrangements for non-urban water management to ensure that there is a strong culture of compliance that is led from the top, and Compact actions 2.1 and VIC 2.1 to publish a revised compliance framework.

The Compact states that it aims to restore public confidence in water resource management in the Basin by providing transparency and accountability of surface and groundwater management and regulation, and a consistent approach to compliance and enforcement practices by governments across the Basin.

In line with this aim, the Compact clarifies that transparency and accountability are essential elements of a compliance culture as they build public confidence in both the legitimacy and fairness of water sharing and extraction arrangements, and the consistent application of those arrangements (Part C.1).

The Compact acknowledges that the Basin States are responsible for regulating water users within their jurisdictions (Part B of the Preamble).

## Background

The Minister for Water for Victoria has delegated her powers under the *Water Act 1989* (the Act) to issue water and works authorisations to six water corporations - Coliban Water, Lower Murray Water, Goulburn-Murray Water, Grampians Wimmera Mallee Water, Melbourne Water and Southern Rural Water corporations (hereafter referred to as 'the relevant water corporations').

The powers in the Act to enforce water offences are mainly direct powers of the water corporations and their officers.

## Good practice in compliance and enforcement governance

Good practices include -

- a. a public compliance strategy that is focussed on compliance by water users, to which the organisation is committed from the top down;
- b. a compliance strategy that reflects the well-known Compliance pyramid actions and sanctions;
- c. Such a compliance strategy should include -
  - i. a general description of the applicable prohibited activity and penalties;
  - ii. the water corporation's priorities for enforcement of water take and use and related offences which reflects the risks to the water resource and meeting water resource plans;
  - iii. the decision-making process that the water corporation follows for taking action in response to a breach of the Act or its by-laws;
  - iv. a clear and logical escalation pathway in response to detected breaches, from warnings through to when prosecutions will be pursued;
  - v. a risk-based program for monitoring and auditing ongoing compliance by water users;
  - vi. a description of the authority of staff to investigate and prosecute and their on-going training requirements to carry out these roles;
  - vii. the first contact points in the water corporation for the public who have concerns about breaches of the law;
  - viii. where timely public reporting on compliance and enforcement activities can be accessed; and
  - ix. a program for improving and maintaining public awareness, to help water users and the public understand and comply with their legal obligations in regard to water compliance.

## Current system of compliance and enforcement governance

The current system of compliance and enforcement governance assessed in the review comprises -

- a. the current compliance and enforcement policies, strategies and procedures of the relevant water corporations; and

- b. governance instruments issued by the Minister, Department of Environment, Land, Water and Planning (DELWP) and the Essential Services Commission which are -
  - i. Statements of Obligations;
  - ii. Corporate Planning instruments such as Corporate Plan Guidelines and Letters of Expectation;
  - iii. Water industry regulatory pricing orders issued by the Essential Services Commission;
  - iv. Codes issued by the Essential Services Commission;
  - v. Minister's directions;
  - vi. delegation instruments; and
  - vii. director induction programs.

## Summary of the assessment of instruments

Instrument	Assessment
Statements of Obligations	Highly suitable for supporting and maintaining good compliance and enforcement practice.
Corporate plan Guidelines and Letters of Expectation	Suitable for supporting and maintaining good compliance and enforcement practice.
Water corporation compliance strategies, guidelines and protocols	Highly suited to supporting and maintaining good compliance and enforcement practice.
Governance induction materials for incoming board directors	Role to play in supporting and maintaining good compliance and enforcement
Water Industry Regulatory Orders	Not suited as a governance tool for compliance and enforcement.
Delegation Instruments	Not suited to supporting/maintaining a compliance culture.
Essential Services Commission Codes of Conduct and other instruments	Not suited as a governance tool for compliance and enforcement.
Directions	Not suited as a governance tool for compliance and enforcement.

## Recommendations

Arising from the review, there are nine recommendations for DELWP and water corporations to strengthen their governance arrangements.

1. Water corporations are to review and update their compliance and enforcement strategies. The key elements to be included in water corporations' compliance and enforcement strategies are -
  - a. a commitment to transparency;
  - b. a description of the water corporation's role and operations, including its functions as a delegated licensing authority;
  - c. traditional owner rights acknowledgement;
  - d. a general description of the prohibited activities that are the focus of the strategy and the penalties applicable;
  - e. the water corporation's priorities for enforcement, which must include water take and use and related offences which reflects the risks to the water resource and meeting water resource plans;
  - f. the decision-making process that the water corporation follows for taking action in response to a breach of the Act or its by-laws;
  - g. a clear and logical escalation pathway in response to detected breaches, from warnings through to when prosecutions will be pursued;

- h. a risk-based program for monitoring and auditing ongoing compliance by water users;
  - i. a description of the authority of staff to investigate and prosecute and their on-going training requirements to carry out these roles;
  - j. the first contact points in the water corporation for the public who have concerns about breaches of the law;
  - k. where timely public reporting on compliance and enforcement activities can be accessed;
  - l. a program for improving and maintaining public awareness, to help water users and the public understand and comply with their legal obligations in regard to water compliance.
  - m. Where the water corporation is in the Basin, arrangements for coordinating with Commonwealth agencies in relation to compliance with water resource plans
2. DELWP to publish a state-wide compliance and enforcement policy.
  3. Water corporations should replace the current range of documents provided to this review with two main instruments -
    - a. a strategy for publication on the water corporation's website; and
    - b. an internal manual or procedure for use by staff directly involved in compliance and enforcement activities.
  4. The strategy should be endorsed at Board level, to demonstrate that the water corporation is committed to a compliance culture from the top down.
  5. Water corporations should publish their compliance and enforcement strategies as transparency and accountability are essential elements of a compliance culture that builds public confidence in the legitimacy and fairness of the water sharing system in the Basin.
  6. Water corporations should also provide on their website information (at a minimum) on:
    - a. the first contact points in the water corporation for the public who have concerns about breaches of the law;
    - b. where timely public reporting on compliance and enforcement activities can be accessed.
  7. To maintain a compliance culture DELWP will investigate potential amendments to:
    - a. **the requirements for preparation of corporate plans by water corporations**, having regard to the Statement of Expectations Framework and Guidelines for Regulators recently published by the Victorian Department of Treasury and Finance, and to the recommendations of this review;
    - b. **Statements of Obligations**, to highlight the important role of the water corporations in maintaining a compliance culture amongst water users to more clearly specify the nature of the obligations to be undertaken under this obligation and to better address the role of water corporations as delegated licensing regulators.
  8. The Director Development Program provided by the Water and Catchments Group in DELWP to water corporation board members should highlight and better explain the role of the water corporations as a regulator, and the importance of the water corporations' powers to enforce compliance with the Act in relation to licensed activities.
  9. The Water and Catchments Group in DELWP should consider how it could improve the consistency of support and guidance in relation to governance compliance and enforcement.

# 1. Overview

## 1.1 Why compliance is important

Water is a precious resource. It needs to be managed fairly to make sure that it continues to be available for all water users, communities and the environment now and into the future.

Effective and strong compliance provides fair access to water and deters people from taking and using water illegally. It helps maintain community confidence in entitlements and water markets as people know that everybody is held to account to the same rules.

While Victoria has low levels of water theft, risks to compliance can increase during drought when there is more competition for the available water or where there are constraints on delivering water during peak demand. Demand for water is increasing and we can expect increased competition in the water market.

## 1.2 Victoria's compliance culture

Victoria has a strong compliance and enforcement system to protect existing entitlement holders and the environment from the illegal take and use of water. This is supported by a 2017 review of water compliance in the Basin by the Murray-Darling Basin Authority (MDBA), which found a culture of compliance and modern metering in Victoria.

Victoria strives to maintain high standards in water compliance by updating its policies, systems and legislation to be more effective in the face of changes in climate, reduced water availability and increased demand for water.

In Victoria, water corporations are responsible for administering entitlements, including metering water use and managing compliance and enforcement. The water corporations that this report applies to are: Coliban Water; Grampians Wimmera Mallee Water; Goulburn-Murray Water; Lower Murray Water; Melbourne Water; and Southern Rural Water ('the relevant water corporations'). Although outside the Basin, Melbourne Water and Southern Rural Water are included to ensure a

consistent approach to compliance and enforcement across Victoria. The relevant water corporations have been consulted during the conduct of this review.

## 1.3 Joint efforts to improve Basin-wide compliance

Allegations of significant water theft and poor regulation in the northern part of the Basin in 2017 have highlighted the importance of having effective compliance and enforcement systems across the entire Basin. As a result, all Basin states and the Australian Government have committed to a Compact that aims to improve the transparency and accountability of water management regimes and implement more consistent compliance and enforcement practices.

Victoria is committed to working with the other Basin States and the Commonwealth to improve transparency, to restore public confidence in the plan, and in the States' and the Commonwealth's management of water resources.

The Compact acknowledges that the Basin States are responsible for regulating water users within their jurisdictions (see Part B of the Preamble). The MDBA has the option of stepping in as a last resort to enforce compliance with the Water Resource Plans in accordance with powers under Part 8 of the *Commonwealth Water Act 2007*. This is reflected in the Basin Plan Implementation Agreement (7 August 2013).

## 1.4 Scope of this report

This report fulfils Victoria's commitment to review its internal governance arrangements for non-urban water management to maintain a strong culture of compliance that is led from the top (Compact actions VIC.1.1 and 1.1) and to publish a revised compliance framework that addresses the requirements of recommendation 6 of the Murray-Darling Basin (MDB) Water Compliance Review (2017) (Compact actions VIC 2.1 and 2.1).



### Box 1: Compact Actions

Actions 1.1 and 2.1 of the Compact that states that the Basin States will –

- 1.1 Review their internal governance arrangements for non-urban water management to ensure a strong culture of compliance that is led 'from the top'. Review outcomes may include publishing a statement of obligations, Ministerial letters of expectations or similar (including an expectation of regulatory best practice; a regulatory policy that is endorsed by the highest responsible body), compliance metrics as a performance indicator for executive staff and ethics training for compliance staff.
- 2.1 Each Basin State and the MDBA will publish a revised compliance framework addressing the requirements of recommendation 6 of the MDB Water Compliance Review.

In the context of these actions, Victoria commits to (Schedule 3 of the Compact):

VIC 1.1 To implement Action 1.1 by undertaking a review of governance arrangements for non-urban water compliance and enforcement to ensure Victoria's strong compliance culture is maintained by 31 December 2018.

VIC 2.1 Victoria will publish risk-based compliance strategy guidelines to support the development of consistent compliance strategies by rural water corporations. The guidelines will include requirements for:

- i. a commitment to transparency;
- ii. a risk-based approach for guiding compliance monitoring effort;
- iii. clear assignment of decision making responsibilities;
- iv. annual audit priorities; and
- v. an escalation pathway to apply once non-compliance is detected; and
- vi. consideration of education, communications and engagement.

## 2. Context

The Compact states that it aims to restore public confidence in water resource management in the Basin by providing transparency and accountability of surface and groundwater management and regulation, and a consistent approach to compliance and enforcement practices by governments across the Basin (Part A of the Preamble).

In line with this aim, the Compact clarifies that transparency and accountability are essential elements of a compliance culture as they build public confidence in both the legitimacy and fairness of water sharing and extraction arrangements, and the consistent application of those arrangements (Part C.1).

The Compact acknowledges that the Basin States are responsible for regulating water users within their jurisdictions (Part B of the Preamble).

The MDB Water Compliance Review (2017) identified a culture of compliance in Goulburn Murray Water (GMW) irrigation districts:

*“In Victoria, the compliance function has been undertaken since 1994 by regional water authorities.*

*..The Goulburn-Murray is a networked, largely regulated system, served by modern, remote sensed meters. It shows all the benefits of modern technology. Remote sensed meters efficiently provide accurate, real-time data on take. As a networked system, the interdependence of irrigators yields a culture of compliance. Whereas excess take by an entitlement holder pumping from a river might be seen to be a victimless crime, in a network system it is a crime against neighbours.*

*.. As a result GMW has a strong commitment to compliance underpinned by sound governance arrangements.”*

This finding is broadly true across Victoria and most water users voluntarily comply with the Act. Maintaining high voluntary levels of compliance is an important part of a cost-effective compliance regime.

A strength of Victoria’s compliance system is the layers of safeguards against large-scale or systematic water theft including extensive metering and measurement systems, comprehensive specification of entitlements, modernised irrigation systems, sophisticated water register and comprehensive water accounting.

Victoria continues to work on improving and strengthening these systems.

There are a range of challenges to the effective performance of water compliance and enforcement functions including:

- Risks to compliance can increase during drought when there is more competition for the available water or where there are constraints on delivering water during peak demand. Demand for water is increasing and we can expect increased competition in the water market.
- The need for legislative amendments has been recognised but has not yet occurred. The Water Law Review in 2014 recommended substantial changes to the compliance and enforcement tools in the Act, which were not enacted by the Victorian Parliament. The government’s water plan *Water for Victoria*, released in 2016, again recognised that the compliance and enforcement regime in the Water Act is outdated and proposed that the government would modernise the enforcement regime to align with best practice regulation.
- Many of the governance instruments considered in this review emphasise the importance of customer services. However, the activities of these customers are sometimes the object of regulatory control under the Act. There is an inherent tension between these types of functions which water corporations (and governments) must manage.
- The MDB Water Compliance Review identified that
  - .. *“There is a notable lack of transparency in NSW, Queensland and Victoria.*
  - .. *Transparency is necessary for the community to have confidence the compliance system is doing its job.*
  - As well, by exposing the level, pattern and outcomes of compliance activity, transparency exerts a pressure on water agencies themselves to work effectively. The lack of transparency reflects not only a closed culture but is also the result of many aspects of compliance not being codified and therefore not able to be published.”*
- corporate knowledge in the area of water compliance and enforcement is of a specialist nature, managed by relatively few specialist staff in water corporations.

## 2.1 Key concepts in compliance and enforcement

**Compliance** means taking actions in conformity with the legal conditions or obligations imposed by law that relate to those actions. This includes getting the right authorisation to undertake an action and undertaking the action in accordance with the conditions imposed in the authorisation or other legislated requirements for licence holders.

This review describes many of the legal obligations imposed by the Act that are the subject matter of water compliance. There are other offences in the Act, and in the By-laws made by the water corporations under the Act, which are compliance obligations.

**Enforcement** relates to the actions that a regulator or issuer of an authorisation may take to ensure or compel the observance or compliance with a law, rule or legal obligation. Enforcement tools include education about what actions a person needs to take to comply with the law, the issue of warnings and direction notices, the suspension or cancellation of an authorisation, and ultimately prosecution before the Courts.

To undertake enforcement actions, a regulator needs to be able to **detect** breaches of the law. Depending on nature of the regulatory scheme, **detection tools** may include powers of entry, powers to seek information and powers to seize or obtain evidence. Detection may also be assisted by information provided by the public to the regulator

## 3. The Regulatory Compliance Scheme in Victoria

### 3.1 Authorisations

Under the Act, the Minister, rather than water corporations, is empowered to issue the main authorisations relating to water take and use and construction of works -

- a. a licence to take and use water under section 51, mainly applicable (subject to some specified exceptions) in non-declared water systems;
- b. a water share under section 33F that authorises the taking of water under the water allocation for the share during the water season for which the water allocation is allocated in a declared water system;
- c. a water-use licence or a water-use registration under sections 64L and 64P that authorises the use of water for purpose of irrigation (in the case of the licence) or for another purpose (in the case of the registration) on certain land in a declared (unbundled) water system; and
- d. a licence to construct certain works on a waterway or a bore under sections 67 and 75.

The Minister for Water has delegated her powers under the Act to issue the authorisations described –

- in (a) and (d) above to Coliban Water, Melbourne Water and Southern Rural Water; and

- in (a), (b), (c) and (d) above to Grampians Wimmera Mallee Water, Goulburn-Murray Water, and Lower Murray Water corporations

by means of instruments of delegation issued under section 306 of the Act.<sup>1</sup> See Figure 1 for a map of the relevant water corporations in Victoria with delegated functions.

### 3.2 Water offences

Illegal take, and the tampering with associated metering equipment and other works, is central to the concerns which led to the Compact actions.

The Independent Panel to the MDB Water Compliance Review characterised this class of water offence as follows –

*“illegal take is the take or use of water without authorisation from the relevant state regulatory authority. It occurs when a person takes water when they do not have a water access right, or takes in contravention of conditions attached to a water access right (such as conditions as to total volume, rate or timing of take) or a works approval (such as location, pump size or use of a compliant meter). Illegally built works that interfere with the flow of water for the purpose of taking it (for example, bores or surface water diversion structures like levees) are also considered by this report as part of illegal take.”<sup>2</sup>*

#### Box 2: Offences in the Act

##### Take and use offences

It is an offence -

- b. to take or use water from certain water sources in an undeclared water system without being authorised under the Act or any other Act to do so; section 63.
- c. if the water is supplied for domestic and stock purposes, to use the water for a different purpose; section 143.
- d. In a declared water system, to-
- e. take water from certain water sources without being authorised to do so by a water share or under any other authorisation to do so - section 33E;

<sup>1</sup> Section 306 of the Act allows the Minister to delegate, by instrument, to any person or class of persons any power, discretion, function, authority or duty of the Minister under this or any other Act or under any subordinate instrument made under this Act, subject to some exceptions.

<sup>2</sup> See Part B - page 118. The Report is available at <https://www.mdba.gov.au/publications/mdba-reports/murray-darling-basin-water-compliance-review>

- f. use water for irrigation on land, or knowingly cause or permit water to be used for irrigation on land unless the person does so under a water-use licence that authorises the use of water for that purpose on that land; section 64J(1);
- g. use water on land or knowingly cause or permit water to be used on land for purposes other than the purpose of irrigation unless the person does so under a water-use registration that authorises the use of water for purposes other than irrigation on that land; section 64J(2).;
- h. fail to comply with certain conditions imposed on a water-use licence; section 64AF.

#### Related works and use offences

- a. Construct, alter, operate, remove or decommission any works on a waterway, obstruct or interfere with any works on a waterway, without being authorised to do so by or under this or any other Act; section 75.
- b. waste and misuse of water supply; section 143.
- c. alteration or removal of any works that are connected to the works of a water corporation without consent; section 145.
- d. failure to comply with a notice to repair works; section 150.
- e. failure to comply with a notice of contravention; section 151.
- f. breach of a water corporation's by-laws relating to water use or works made under sections 160 and 171;
- g. without the consent of the water corporation or without any other lawful authority, to destroy, damage, remove, alter or in any way interfere with any works or other property (whether real or personal) belonging to or under the control and management of a water corporation; section 288.
- h. without the consent of the water corporation or without any other lawful authority –
  - i. take, use or divert water that is under the control and management of an Authority or that is supplied by a water corporation for the use of another person; or
  - ii. interfere with the flow of water in any waterway, aquifer or works under the control and management of a water corporation; section 289.

### 3.3 Role of water corporations in compliance and enforcement

The powers in the Act to enforce the offences above are direct powers of the relevant water corporations and their officers, or powers delegated by the Minister to water corporation staff.

In addition to the formal powers under Act, the Minister and Authorities are able to take administrative action to support compliance including education programs and warning letters.

### 3.4 What enforcement tools are available to water corporations?

Enforcement tools<sup>3</sup> currently open to the relevant water corporations under the Act include -

- warnings and guidance for customers on the need for compliance – inherent in the power of a water corporation to do all things necessary to perform its functions in section 123(1).<sup>1</sup>
- The issue of notice of contravention requiring the licence holder or other person to take action to remedy a contravention, under section 151. This notice allows the Authority to identify the breach of the Act and determine action for the person to remedy or address the breach. Where a person fails to comply with the notice, they may be subject to penalties.
- The power to reduce, restrict or discontinue delivery of water under section 231, which allows an Authority to reduce, restrict or discontinue the delivery of water to a serviced property in certain circumstances. These circumstances include where the Authority believes the owner of the

<sup>3</sup> Water corporations and their authorised officers also have powers to detect breaches of the law such as land entry powers.

serviced property has contravened the Act, regulations or by-laws relating to the taking of water. This function is relevant in systems where water shares are issued.

- Prosecution powers under section 296 under which an authorised officer of a water corporation may institute court action to seek criminal penalties for conduct in contravention of the Act.
- If there is a failure to comply with a condition of a licence, suspension or cancellation in some circumstances. This power applies to all licences issued under the Act that are relevant to the take and use of water and to works of any kind.



Figure 1: Water corporations with delegated functions

## 4. Governance of compliance

### 4.1 What is good practice in compliance and enforcement governance?

The MDB Water Compliance Review proposes elements for achieving good or best practice for governance of water compliance and enforcement activities in recommendation 6 (summarised in Box 3 – see attachment A for more details). These elements are generally present in Victoria’s approach to compliance, but there is scope for them to be clarified and applied more consistently.

To do this:

1. DELWP will publish a state-wide non-urban water compliance and enforcement policy by the end of March 2019; and
2. the relevant water corporations will update their compliance and enforcement strategies by the end of 2019 (VIC 2.2) according to guidelines proposed in this report that reflect recommendation 6 of the MDB Water Compliance Review (VIC 2.1)



Figure 2 The Compliance Pyramid

#### Box 3: Good Practice – Summary

1. A public compliance strategy that is focussed on compliance by water users, to which the organisation is committed from the top down;
2. A compliance strategy that reflects the well-known Compliance pyramid actions and sanctions (Figure 2);
3. Such a compliance strategy should include –
  - a. a general description of the applicable prohibited activity and penalties applicable;
  - b. the water corporation’s priorities for enforcement of water take and use and related offences which reflects the risks to the water resource and meeting water resource plans;
  - c. the decision making process that the water corporation follows for taking action in response to a breach of the Act or its by-laws;
  - d. a clear and logical escalation pathway in response to detected breaches, from warnings through to when prosecutions will be pursued;
  - e. a risk based program<sup>4</sup> for monitoring and auditing ongoing compliance by water users;
  - f. a description of the authority of staff to investigate and prosecute and their ongoing training requirements to carry out these roles;
  - g. the first contact points in the water corporation for the public who have concerns about breaches of the law;
  - h. where timely public reporting on compliance and enforcement activities can be accessed;
  - i. a program for improving and maintaining public awareness, to help water users and the public understand and comply with their legal obligations in regard to water compliance.<sup>11</sup>

4. A risk-based program is one that identifies “at risk” water resources and targets breaches of water resources legislation most likely to further stress the resource or which undermine the public’s confidence in effective water resource management (National Framework for

Compliance and Enforcement Systems for Water Resource Management).

## 4.2 Assessment of the current governance system

### 4.2.1 Process for the review

The review has been led by DELWP. DELWP has considered the current compliance and enforcement policies, strategies and procedures of the relevant water corporations subject to this review.

The review has considered governance instruments issued by the Minister and DELWP which may be relevant to compliance and enforcement.

### 4.2.2 Review questions

The main question asked was –

**Do the current instruments and policies promote or support good compliance and enforcement practices by water corporations in a consistent and integrated manner?**

Follow up questions included -

- **Is the instrument or policy suited to supporting and maintaining good compliance and enforcement practice?**
- **Is there potential to strengthen the instrument to ensure good compliance and enforcement practices are maintained?**

Further detail about the instruments and the assessment is provided in the sections below. The assessment considers that the relevant water

corporations are required to undertake a multiplicity of functions, some of which are service provision in nature, while others are regulatory and enforcement in nature.

## 4.3 Statements of Obligations

The relevant water corporations are subject to the *Statement of Obligations (General)* issued by the Minister for Water on 20 December 2015, under section 4I(2) of the *Water Industry Act 1994 (Vic)*.

Section 4I(2) enables the Minister, after consultation with the Treasurer, to issue Statements of Obligations to regulated entities, which includes the relevant water corporations, specifying obligations of the water corporations in performing their functions and exercising their powers.

Section 4I(4) provides that regulated entities must comply with an applicable Statement of Obligations, but does not specify the consequences of a failure to comply. Section 4I(3)(f) provides that a Statement of Obligations may include provisions relating to the failure to comply with any obligations imposed by the statement.

It should be noted that Part 8 of the Statement of Obligations is about compliance of the water corporations with the Statement of Obligations, and not about the compliance and enforcement powers or functions of water corporations under the Act.

Table 1: Relevant parts of the Statement of Obligations (General)

Part No.	Summary of Obligation
Part 7.3	Licensing administration functions – this part requires water corporations to exercise the licensing powers delegated to them by the Minister in accordance with the terms and conditions of their delegation and any guidelines and policies of the Minister.
7.3 A	To manage and prioritise risks associated with non-compliance with the <i>Water Act 1989</i> , water corporations must <ul style="list-style-type: none"><li>• develop and implement policies, standards and systems, based on risk based regulatory models; and adhere to any guidelines issued by the Department.</li><li>• report annually to the Secretary of DELWP on monitoring and compliance activities and enforcement action.</li></ul>
Part 7.4	Corporations providing non-urban water supplies or delivery services must prepare and implement Metering Action Plans that comply with the Victorian Implementation plan for the National Metering Standards for Non-Urban Water Meters.



Part No.	Summary of Obligation
Part 8.1	Compliance by water corporations with the Statement of Obligations - <ul style="list-style-type: none"> <li>• requirement to monitor its compliance with the obligations</li> <li>• requirement to report on major failure to comply with the obligations to the Minister</li> <li>• proposes a plan of action to address major non-compliance with its obligations and implement it.</li> </ul>
Part 8.2	Provides for water corporations to conduct audits of their compliance with obligations in the Statement of Obligations when requested by the Essential Services Commission.
Part 8.3	Provides for water corporations when requested by the Minister to arrange for an audit or review of any matter specified by the Minister in relation to the performance of its functions and powers.

#### 4.3.1 Assessment of Statement of Obligations

The extent of compliance of the relevant water corporations with their obligations in the Statement of Obligations is one of the important means by which the Minister may assess the performance of the board of directors of water corporations. Part 1A of the *Water Industry Act 1994*, which enables the issue of Statement of Obligations, is essentially about the regulation of water industry entities, that is water corporations.

The Act gives the water corporations a host of functions and powers. Statements of Obligations may be used to focus the attention of water corporations and their boards on how those functions and powers should be exercised in the context of current high priorities for the water industry.

Accordingly, Statement of Obligations are an appropriate instrument for embedding a strong compliance culture in water corporations from the board level down.

#### 4.4 Corporate Planning in the Water Sector

Section 247 of the Act requires water corporations to prepare and submit corporate plans to the Minister and the Treasurer. Corporate plans must be in the form approved by the Minister and must include a statement of corporate intent, a business plan and financial statements, containing the information that the Minister requires.

The Act specifies that water corporations are not to make a major deviation from a corporate plan without notifying the Minister.

Water corporations prepare their corporate plans having regard to corporate planning and reporting

guidelines issued by DELWP and Letters of Expectation (LOEs) issued by the Minister.

#### 4.4.1 Corporate Planning and Reporting Guidelines

The *Water Industry Corporate Planning and Reporting Guidelines 2018-19* (Guidelines) are prepared by DELWP and issued to each water corporation with the Minister for Water's LOEs. The Guidelines require that corporate plans to be submitted to the Minister to cover the forthcoming four financial years.

These Guidelines also specify that a water corporation's statement of corporate intent should include, amongst other things, performance targets and other measures by which the water corporation's performance may be judged in relation to its business objectives. The Guidelines and LOEs are regularly reviewed and updated to capture current priorities.

The Guidelines include a set of Key Performance Indicators (KPIs) against which the relevant water corporations are required to specify targets during the corporate planning period. These KPIs include indicators in respect of the seven priority areas specified by the Minister in the LOEs.

The current guidelines do not make any mention of the role of the relevant water corporations in compliance and enforcement of unauthorised use or other breaches of the Act.

#### 4.4.2 Letters of Expectation (LOEs) issued by the Minister for Water

For the previous and current financial years, the Minister for Water has issued a LOE to each water corporation. The LOE outlines the Victorian Government's key priorities for the water sector and includes the Guidelines discussed above (Table 2).

The LOEs also specify the date by which water corporations must submit corporate plans to the Minister and the Treasurer and the information the corporate plans must contain for the purposes of section 247 of the Act.

The current LOEs do not make any mention of the role of the relevant water corporations in compliance and enforcement of unauthorised use or other breaches of the Act.

**Table 2: LOE priority areas**

Priority Area	Summary
Climate Change	Provide services that minimise environmental impacts, mitigate climate change and put in place adaptation strategies
Customer and Community Outcomes	All aspects of service delivery will be customer and community centred. Communicate and engage effectively and transparently with customers and local communities
Aboriginal Inclusion	Deliver water for Aboriginal cultural, spiritual and economic values Recognise and support Aboriginal cultural values and economic inclusion in the water sector
Recognise recreational values	Support the wellbeing of rural and regional communities by considering recreational values in water management
Resilient and liveable cities and towns	Contribute to healthy communities by supporting safe, affordable, high quality services and resilient environments
Leadership and culture	Water corporations reflect the needs of our diverse communities Strategies that will increase both gender equity and Aboriginal inclusion, participation
Financial Sustainability	Delivering safe and cost-effective water and wastewater services in a financially sustainable way

#### 4.4.3 Assessment of corporate plans and LOEs

The current corporate plans make little or no reference to support for compliance and enforcement in respect of unauthorised use as an objective or priority in water corporation business planning or provide any KPI targets in respect of this function or activity. This simply reflects that the current LOEs and corporate planning guidelines do not deal with this activity.

The corporate plans emphasis is on the customer and service delivery, in line with the themes of the seven priority areas in the LOEs.

The Department of Treasury and Finance (DTF) has recently published a Statement of Expectations Framework and Guidelines for Regulators, which should be considered as they specifically cover KPIs for regulators with compliance and enforcement roles.

#### 4.5 Water corporation policies and procedures

Part 7.3 A of the current Statement of Obligations requires all water corporations, in order to manage and prioritise risks associated with non-compliance with the Act, to develop and implement policies, standards and systems, based on risk based regulatory models, and adhere to any guidelines issued by DELWP.

##### 4.5.1 Assessment

Water corporations provided a range of documents based on work completed under *The National Framework for Compliance and Enforcement Systems for Water Resource Management*.

The following general issues were identified:

- the elements of a compliance strategy identified in the 'good practice' box on page 13 were not always present.

- there is potential for greater consistency in the treatment of unauthorised take
- roles and responsibilities and training programs could be clarified
- inadequate maintenance of compliance and enforcement policies
- the status or provenance of some documents was not clear
- websites contained little information for the public about compliance with the Water Act.

DELWP is developing an overarching compliance and enforcement policy that will support the development of consistent compliance strategies by the relevant water corporations and assist the relevant water corporations in demonstrating compliance with Part 7.3A of the Statement of Obligations. This policy is targeted for completion in March 2019.

As a result, the water corporation documentation considered in this report may not necessarily reflect the elements listed above. Accordingly, whether a water corporation has satisfied all elements is not a criticism. Rather, it is a starting point for DELWP to consider in developing its overarching compliance and enforcement policy in response to Action 2.1 of the Compact.

#### 4.6 Water Industry Regulatory Orders

Water Industry Regulatory Orders (WIROs) are made by the Governor in Council (on the recommendation of the Minister for Water) under section 4D of the *Water Industry Act 1994*. In summary, WIROs set the framework for the Essential Services Commission (ESC), established under the *Essential Services Commission Act 2001*, to determine or regulate prices and services of water corporations that are specified in the WIRO.

The ESC has recently completed reviews and issued price determinations for each water corporation<sup>5</sup>, for the current regulatory period of 1 July 2018 to 30 June 2023, except for pricing determinations with respect to Basin water charges levied by Goulburn Murray Water and Lower Murray Water.

#### 4.6.1 Assessment of Water Industry Regulatory Orders

Rather than being described as a service for which a price can be set, compliance is better categorised as a cost incurred by a water corporation in carrying out its functions and powers under the Act, including the functions delegated to it.

The ESC's guidance does, however, allow water corporations to make a case for recovering costs of compliance and enforcement activities to be associated with the provision of diversion services.

In Victoria, cost recovery is in place, with charges for metering and licence fees, which cover administration including compliance and enforcement, set by ESC and recovered by water corporations from their customers and private pumpers.

It is considered that the nature of a WIRO means that it is too indirect for promoting a compliance culture in water corporations or in its customers. The WIRO appropriately leaves it to the ESC as the independent market regulator to determine the method for conducting pricing reviews.

#### 4.7 Other ESC instruments - Codes

The ESC may issue codes to water corporations under section 4F of the *Water Industry Act 1994* requiring them to develop, issue and comply with customer-related standards, procedures, policies and practices (including with respect to the payment of compensation to customers). The ESC is not subject to general Ministerial direction in how it exercises its powers. Codes issued by the ESC are not subject to Ministerial approval.

#### 4.7.1 Assessment of ESC Codes

The ESC's *Rural Water Customer Codes August 2018*<sup>6</sup> is concerned with issues mainly related to customer billing and outstanding fees, service standards and interruption to services. The Codes are not considered to be a relevant instrument in respect of water corporation compliance and enforcement activities, which are regulatory in nature.

<sup>5</sup> with the exception of price determinations with respect to Basin water charges levied by GMW and LMW.

<sup>6</sup> Available at [https://www.esc.vic.gov.au/sites/default/files/documents/customer-](https://www.esc.vic.gov.au/sites/default/files/documents/customer-service-codes-rural-water-customer-service-code-august-2018-20180801.pdf)

[service-codes-rural-water-customer-service-code-august-2018-20180801.pdf](https://www.esc.vic.gov.au/sites/default/files/documents/customer-service-codes-rural-water-customer-service-code-august-2018-20180801.pdf)

## 4.8 Minister's powers of direction

Under section 307 of the Act, the Minister, after consulting with the Treasurer, may give a written direction to a water corporation in relation to the performance of any of its functions or the exercise of any of its powers. The Minister must give a water corporation 14 days' notice of his or her intention to give a direction. A water corporation to which a direction has been given must comply with the direction.

Under section 91 of the Act, the Minister may, by determination, appoint an administrator to carry out the functions of a water corporation, if the water corporation has failed to comply with a direction of the Minister under section 307. During the period for which an administrator is appointed, the administrator acts in substitution for the board of directors in performing the functions of the water corporation.

### 4.8.1 Assessment of Directions

The Minister rarely issues directions under section 307 of the Act. Given that a failure to comply with a direction may lead to replacement of the board of directors by an administrator, directions are more suited to dealing with a major or systemic governance failure in the Board that may threaten the viability of the water corporation as a going concern. For this reason they are not considered to be a suitable governance instrument for ensuring good compliance and enforcement governance in water corporations.

## 4.9 Delegation Instruments

By instruments of delegation made under section 306 of the Act, the Minister for Water has delegated her powers, duties and functions in the Act, subject to certain limitations<sup>7</sup>, to the water corporations and to specified classes of water corporation officers, in respect of the issuing of water take and use licences, water use licences and works licence

### 4.9.1 Assessment of delegation instruments

These delegation instruments do not address good practice in compliance and enforcement governance by water corporations. However, the advisability of amending of these delegation instruments to include specific limitations, conditions or "Notes", in a manner that addresses good practice or would aim

to promote or support a compliance culture in water corporation is questionable.

Most of the tools available to water corporations to take action for illegal water use or associated works offences are powers or discretions vested in the water corporations by the Act itself, and not (except for the powers to review licences for breaches of conditions) powers or discretions of the Minister that have been delegated to them. Accordingly, the delegation instruments are not a direct way to regulate the water corporations' approach to compliance and enforcement for breaches of the Act, regulations or their by-laws.

The risk of adding more complex conditions or limitations, such as those around a compliance and enforcement culture, is that these can increase the uncertainty about a delegate's valid exercise of a particular power in a delegation and thus increase the risk of litigation or challenges to the delegate's decisions. Conditions or limitations included in a delegation instrument should be clear, precise and directly relate to the power being exercised by the delegate

## 4.10 Induction for incoming Directors of water corporations

The scope of this assessment relates to the inductions guidance provided to incoming directors provided by DELWP.

DELWP provides induction guidance for incoming water corporation directors -

- *Governing the Victorian Water Industry* -an overview of the governance and legislative framework that regulates the Victorian water industry;
- *The Inductions Program*, provided by Water and Catchments Sector Governance in DELWP; and
- *On Board – Governance guidance* - a collection of useful information and resources to help directors who want to understand their role and responsibilities as a board member of a public entity. This Guide is applicable to members of boards of *any* statutory body associated with DELWP.

Some water corporations have their own package of material for new directors. This material was not considered during this review.

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<sup>7</sup> Section 42A of the *Interpretation of Legislation Act 1984* applies to delegation instruments made under an Act. Under Subsection (1)(b), the delegation may be made subject to conditions or limitations.

#### 4.10.1 Assessment

It may be appropriate for DELWP to provide more detailed information to directors of water corporations on the regulatory role of some water corporation as a delegate of the Minister in respect of water use licensing and the associated role of ensuring that the Act is complied with. Currently, *Governing the Victorian Water Industry* and the *Inductions Program* do not have any specific information or guidance on this role.

It is acknowledged that the role of water corporations in providing services to water use customers may sometimes create tensions with their role as a regulator. However, this is a tension that has to be managed by good governance commencing at the board level.

#### 4.11 Summary of assessments

Several governance instruments are suited to maintaining and supporting a culture of compliance led from the top (Table 3). The Letters of Expectations, Corporate Planning Guidelines and Statement of Obligations set the framework for water corporations to determine their resource priorities. There is scope to strengthen the focus on compliance in these instruments, and the appropriate strengthening of these instruments is a priority for Victoria to maintain and support a culture of compliance led from the top.

Table 3: Assessment of governance instruments

Instrument / Tools	Assessment
Statements of Obligations	Highly suitable for supporting and maintaining good compliance and enforcement practice. Contains basic obligations with potential to strengthen and provide greater guidance to water corporations.
Corporate planning for water corporations and Letters of Expectation	Suitable for supporting and maintaining good compliance and enforcement practice. Currently, no reference to compliance and enforcement - potential to provide greater guidance to water corporations.
Water corporation compliance strategies, guidelines and protocols	Highly suited to supporting and maintaining good compliance and enforcement practice.
Governance induction materials for incoming board directors	Suitable for supporting and maintaining good compliance and enforcement practice.
Water Industry Regulatory Orders	Not suited as a governance tool for compliance and enforcement.
Delegation Instruments	Not suited to supporting/ maintaining a compliance culture.
Essential Services Commission Codes of Conduct and other instruments	Not suited as a governance tool for compliance and enforcement.
Directions	Not suited as a governance tool for compliance and enforcement.

## 5. Recommendations

This review has nine recommendations:

1. The relevant water corporations are to review and update their compliance and enforcement strategies. The key elements to be included are:
  - a. a commitment to transparency
  - b. a description of the water corporation's role and operations, including its functions as a delegated licensing authority;
  - c. traditional owner rights acknowledgement;
  - d. a general description of the prohibited activities that are the focus of the strategy and the penalties applicable;
  - e. the water corporation's priorities for enforcement, which must include water take and use and related offences which reflects the risks to the water resource and meeting water resource plans;
  - f. the decision-making process that the water corporation follows for taking action in response to a breach of the Act or its by-laws;
  - g. a clear and logical escalation pathway in response to detected breaches, from warnings through to when prosecutions will be pursued;
  - h. a risk-based program for monitoring and auditing ongoing compliance by water users;
  - i. a description of the authority of staff to investigate and prosecute and their on-going training requirements to carry out these roles;
  - j. the first contact points in the water corporation for the public who have concerns about breaches of the law;
  - k. where timely public reporting on compliance and enforcement activities can be accessed;
  - l. a program for improving and maintaining public awareness, to help water users and the public understand and comply with their legal obligations in regard to water compliance.
  - m. Where the water corporation is in the Murray-Darling Basin, arrangements for coordinating with Commonwealth agencies in relation to compliance with water resource plans
2. DELWP will publish a state-wide compliance and enforcement policy by 30 March 2019.
3. Water corporations should replace the current range of documents provided to this review with two main instruments -
  - a. a strategy for publication on the water corporation's web site; and
  - b. an internal manual or procedure for use by staff directly involved in compliance and enforcement activities.
4. The strategy should be endorsed at Board level, to demonstrate that the water corporation is committed to a compliance culture from the top down.
5. Water corporations should publish their compliance and enforcement strategies as transparency and accountability are essential elements of a compliance culture that builds public confidence in the legitimacy and fairness of the water sharing system in the Basin.
6. Water corporations should also provide on their website information (at a minimum) on:
  - a. the first contact points in the water corporation for the public who have concerns about breaches of the law;
  - b. where timely public reporting on compliance and enforcement activities can be accessed;
7. To maintain a compliance culture DELWP will investigate potential amendments to:
  - a. **the requirements for preparation of corporate plans by water corporations**, having regard to the Statement of Expectations Framework and Guidelines for Regulators recently published by the Victorian Department of Treasury and Finance, and to the recommendations of this review.
  - b. **Statements of Obligations**, to highlight the important role of the water corporations in maintaining a compliance culture amongst water users, to more clearly specify the nature of the obligations to be undertaken under this obligation and to better address the role of water corporations as delegated licensing regulators.

8. The Director Development Program provided by the Water and Catchments Group in DELWP to water corporation board members should highlight and better explain the role of the water corporations as a regulator, and the importance of the water corporations' powers to enforce compliance with the Act in relation to licensed activities.
9. The Water and Catchments Group in DELWP, should consider how it could improve the consistency of support and guidance in relation to governance, compliance and enforcement and the exercise of delegated functions

## 6. Next steps

The Compact sets ambitious targets for jurisdictions to implement the many priority actions it contains. The review and compliance framework described in this report will be implemented over the next two years, subject to detailed policy development and approvals processes.

DELWP will review the Statements of Obligations, requirements for the preparation of corporate plans and induction materials as part of its governance program.

**Table 4: Milestones**

Milestone	Date	Lead
Victoria to release state-wide compliance and enforcement policy	30 March 2019	DELWP
Water corporations to publish updated compliance and enforcement strategies	31 December 2019	Water corporations
Victoria reports on progress implementing compact actions	31 December 2019	DELWP
Improve accessibility of compliance information	30 March 2019	DELWP and water corporations



# Appendix A Victoria's response to Recommendation 6 of the Murray-Darling Basin Water Compliance review

Murray-Darling Basin Water Compliance Review Recommendation 6	Victorian response
<p>It is recommended that by 30 June 2018 each state publish compliance strategies that include:</p>	
<p>a. a risk-based strategy for guiding compliance monitoring effort</p>	<p>a – c: Addressed in this report (VIC 2.1, VIC 2.2)</p>
<p>b. annual audit priorities</p>	
<p>c. an escalation pathway to apply once non-compliance is detected</p>	
<p>d. a mandatory protocol for entitlement holders to follow in the event of meter failure</p>	<p>d: Addressed by VIC 2.5, VIC 3.2 [completed]</p>
<p>e. a statement of the penalties and sanctions regime, and any improvements required</p>	<p>e: Addressed by VIC 2.3 [completed]</p>
<p>f. annual reporting of data on compliance activities by location including the timeliness with which allegations are addressed</p>	<p>f: Addressed in this report (VIC 2.1, VIC 2.2) and by VIC 2.6 [completed], VIC 2.7 [completed], VIC 2.8 [ongoing]</p>
<p>g. provisions to ensure compliance staff are adequately trained</p>	<p>g: Addressed in this report (VIC 2.1, VIC 2.2) and by VIC 2.9 [to commence in 2019]</p>
<p>h. a program of community awareness and education including a program to ensure that water plans, licences and management rules are expressed as simply as possible and guides for these instruments are published</p>	<p>h: Addressed by VIC 2.10 [completed]</p>
<p>i. a program to ensure information about entitlements, allocations, licence conditions, meter readings, account balances and so on are easily accessible to the public in real-time</p>	<p>i: Addressed by VIC 1.2 [completed]</p>
<p>j. a program to ensure meters are identified by a unique reference number, and entitlement and pump details are publicly accessible</p>	<p>j: Addressed by 3.1 [in progress], 1.2 [in progress], VIC1.2 [completed]</p>
<p>k. a commitment to effectiveness and efficiency, including the adoption of new technologies</p>	<p>k: Addressed by 2.2 [completed], VIC 2.11 [ongoing]</p>
<p>l. adequate resourcing based on a cost recovery pathway, with compliance budgets protected from the normal exigencies of government budgets.</p>	<p>l: Not included. Victoria has a price determination process for water corporations to recover costs, which is regulated by the Essential Services Commission.</p>