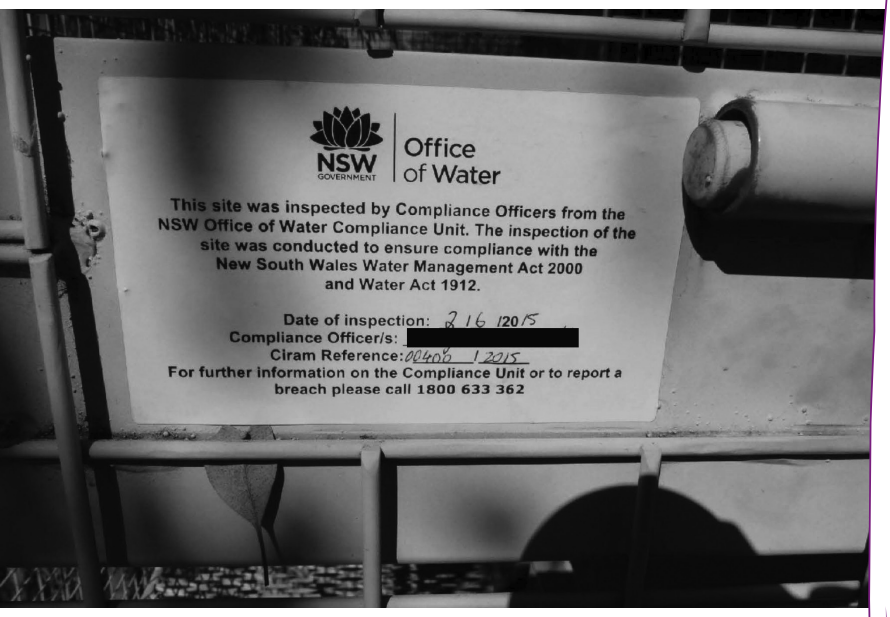
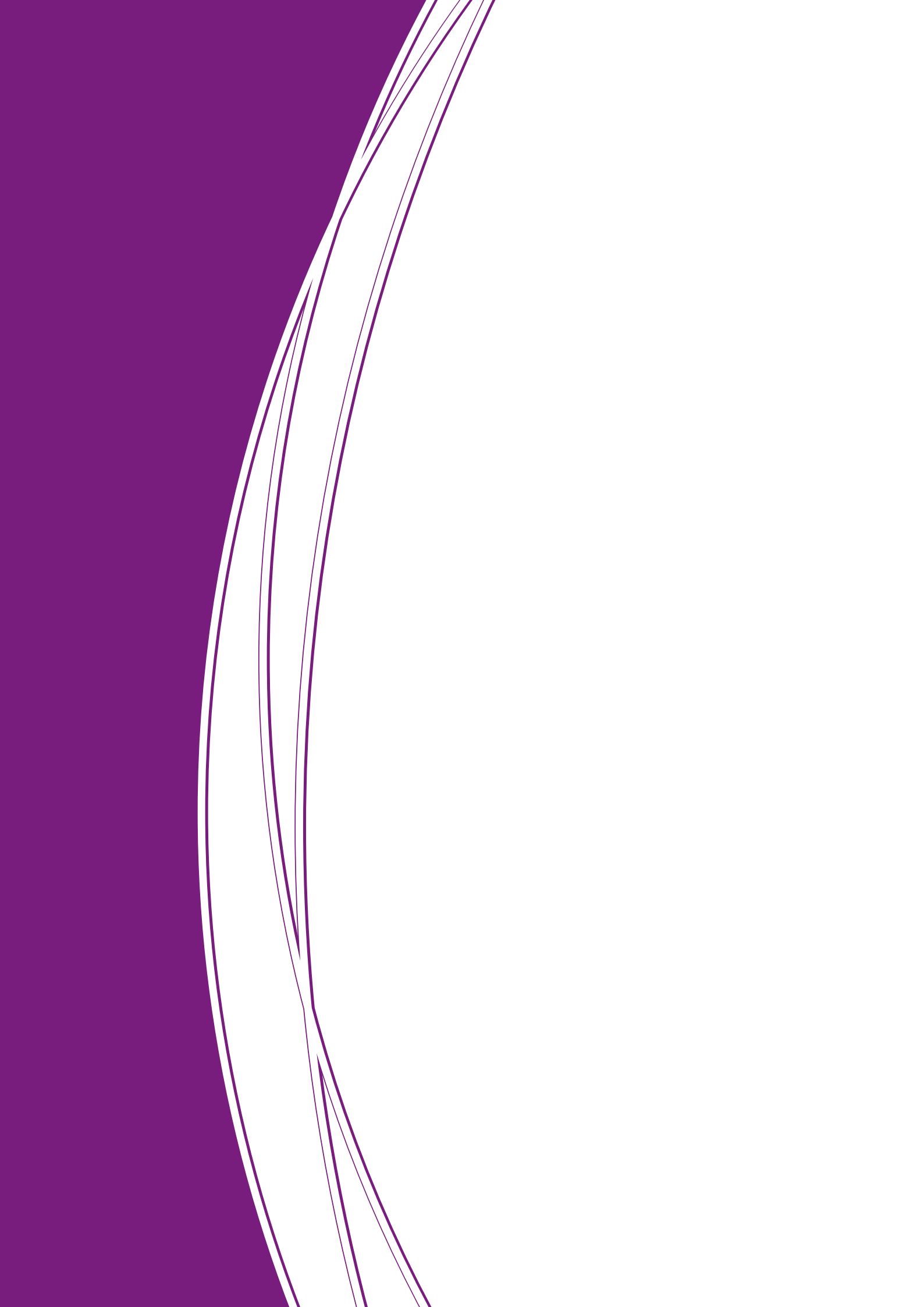


INVESTIGATION INTO COMPLAINTS OF CORRUPTION IN THE MANAGEMENT OF WATER IN NSW AND SYSTEMIC NON-COMPLIANCE WITH THE *WATER MANAGEMENT ACT 2000*

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

ICAC REPORT
NOVEMBER 2020



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Mr President
Mr Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into complaints of corruption in the management of water in New South Wales and systemic non-compliance with the *Water Management Act 2000*.

No public inquiry was held in aid of this investigation.

The Commission's findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

Contents

Summary of investigation and results

Between August 2017 and March 2020, the NSW Independent Commission Against Corruption ("the Commission") conducted two related investigations into complaints about water management in NSW: Operation Avon and Operation Mezzo. This report concerns both investigations.

The Operation Avon investigation was complex. The matters investigated were diverse, wide-ranging and covered a significant period of water management in NSW, with allegations of possible corrupt conduct occurring as far back as 2003. They involved complex, technical and cross-jurisdictional matters of natural resource law. These matters were referred to the Commission from a number of sources following the airing on 24 July 2017 of the ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped").

Operation Mezzo concerned a complaint about the alleged involvement of NSW public officials in the controversial purchase of water entitlements in NSW by the Commonwealth Government in mid-2017. Although referred to the Commission later, it concerned many of the same factual matters, legal and technical issues, and personnel as Operation Avon and was therefore investigated concurrently.

By the conclusion of both operations, the Commission was investigating the following allegations:

a) from November 2011 to October 2012, the Hon Katrina Hodgkinson, when minister for primary industries, acted partially by supporting changes to the 2012 Barwon-Darling Water Sharing Plan (BDWSP) to the benefit of the family of Ian Cole

b) since 4 October 2012, the NSW Department of Primary Industries – Water (DPI-W) and/or NSW Government ministers failed to implement individual daily extraction limits for the Barwon-Darling unregulated and alluvial water sources, as prescribed by clause 52 of the BDWSP, providing irrigators in the Barwon-Darling with additional access to water to the detriment of other water users and the environment

c) at some time prior to February 2015, pumps attached to licences currently held by Bengerang Ltd (owned by Webster Limited) and Peter Harris (Budvalt Pty Ltd) were authorised by DPI-W in contravention of the *Water Management Act 2000* ("the WMA"), to the benefit of the Cole and Harris families

d) in 2015, the Hon Kevin Humphries, former minister for natural resources, lands and water, acted partially to Peter Harris and to Anthony Barlow of Burren Downs by permitting them to pump water in contravention of the BDWSP

e) in 2016, Mark Campbell, DPI-W officer, approved an application by the family of Peter Harris to pump water from a different section of the Barwon-Darling in contravention of s 71S of the WMA (clause 66(1) of the BDWSP)

f) between 2016 and August 2017, the Hon Niall Blair, former minister for primary industries and lands and water, and then minister for regional water, acted partially to Peter Harris and attempted to amend legislation that would give Peter Harris a financial benefit

g) between 20 August 2015 and February 2016, DPI-W failed to properly investigate or take prosecution action in relation to breaches of the WMA by Peter Harris, and properties owned by him, including Miralwyn and Rumleigh

h) a proper investigation was not undertaken when Peter Harris (trading as Budvalt) built a 2-kilometre in-ground irrigation channel in 2015 through Crown lands adjoining his property at Miralwyn without approval

i) in 2016, senior officers from DPI-W were involved in "shutting down" proposed investigations into systemic breaches of the WMA by irrigators in north-west NSW by Jamie Morgan, manager of the Strategic Investigations Unit (SIU) of DPI-W, and disbanded the SIU

j) between February 2015 and August 2017, the Hon Ray Williams influenced Gavin Hanlon (deputy director general of DPI-W), Frank Garofalow (director of water regulation at DPI-W) and Mr Blair to act improperly by causing the non-service of a s 329 direction issued to landowner Gary Bugeja regarding a dam that was on his property

k) two former departmental employees, both of whom currently work for Peter Harris, were given partial treatment by DPI-W staff at the Narrabri and Dubbo regional offices by being given access to DPI-W files and equipment, for the ultimate benefit of Peter Harris

l) between 2003 and 2009, Anthony Manson Hall, a former licensing officer for DPI-W, received a benefit from farmers in the Northern Basin; namely, property transfers and subdivisions for unknown reasons

m) from January 2015, Mr Hanlon and Monica Morona (director of intergovernmental strategic stakeholder relations at DPI-W) inappropriately and partially offered to share or disclose and/or did share or disclose and/or directed others to share or disclose government information with a group of irrigator representatives, in breach of their duties as public officials

n) in or around February 2016, Mr Hanlon acted partially in the permanent appointment of Ms Morona to the position of director of intergovernmental and strategic stakeholder relations at DPI-W in breach of his duties as a public official

o) public officials acted partially or dishonestly by favouring NSW irrigators including by encouraging the Commonwealth Government to purchase Tandou Farm's water entitlements from Webster for an inflated price.

Results

The Commission was not satisfied in relation to any of the matters it investigated that the evidence established that any person had engaged in corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

In a number of the matters it investigated, the Commission could not be satisfied that the particular allegations could be established on the evidence. The Commission formed the opinion, however, that in many of the matters it investigated, the evidence did establish that certain decisions and approaches taken by the department with responsibility for water management in NSW over the last decade were inconsistent with the object, principles and duties of the WMA and failed to give effect to the legislated priorities for water sharing.

The government agency with responsibility for water management and regulation in NSW has been restructured and/or changed its name a number of times during the period with which the Commission's investigation was concerned. Relevantly, from 1 July 2008, a separate Office of Water was established within the Department of Environment and Climate Change (DECC). From 1 July 2009, DECC was renamed the Department of Environment, Climate Change and Water (DECCW) and the Office of Water was renamed the NSW Office of Water (NOW). DECCW was abolished in April 2011 and NOW was transferred to the Department of Industry, Trade & Investment, Regional Infrastructure & Services (DITIRIS). From July 2015, NOW was transferred to the newly established Department of Industry (DOI) and renamed DPI-Water (DPI-W), a division of the Department of Primary Industries within the overarching DOI.

WaterNSW is a state-owned corporation established on 1 January 2015 under the *Water NSW Act 2014*. It is responsible for supplying the state's bulk water needs, operating the state's river systems and providing services to its customers with respect to licensing and approvals, water allocation and licence trades and water resource information. On 1 July 2016, some of DPI-W's compliance functions were transferred to WaterNSW.

In September 2017, following the release of Ken Matthews' interim report, DOI undertook transitional restructuring of water regulation functions by amalgamating DPI-W and Crown Lands into Crown Lands and Water, the natural resource asset division within DOI.

From 1 July 2019, the Department of Planning and Environment (DPE), the DOI, the Office of Environment and Heritage, and the Office of Local Government

were abolished and the majority of their functions were transferred to the new Department of Planning, Industry and Environment (DPIE), including those functions related to water management. Submissions made to the Commission on behalf of the agency responsible for water management over the period investigated by the Commission were made by the DPIE, that agency's most recent iteration.

Most of the matters investigated by the Commission occurred between 2010 and 2017, during which period the agency responsible for water management was called NOW (before July 2015) and then DPI-W (after July 2015). Since many of the matters investigated and public officials involved straddle both iterations of the water management agency, for ease and to convey continuity of responsibility, references in this report to "the department" mean either NOW, DPI-W, or the DPIE, or whichever is the relevant agency name or iteration at the time being discussed.

A significant number of the matters investigated by the Commission illustrated the department's "triple bottom line" approach to the exercise of functions under the WMA, and to the state's implementation of its obligations under the Murray-Darling Basin Plan ("the Basin Plan"). The Commission found that this approach to balancing competing interests in the highly contested space of water management involved giving at least *equal* weighting to social, economic and environmental considerations and, in some cases, clear precedence to economic interests, when the social and economic benefits objective is clearly subject to the environmental objectives of both the state and federal legislative frameworks.

The Commission is satisfied that the practical effects of this approach, particularly in the Barwon-Darling, have often been prejudicial to the environment. Where it has been actively pursued in relation to the exercise of water sharing functions under the WMA, including the planning and implementation of the BDWSP, this approach has been contrary to the WMA's water sharing priorities, which require that protection of the water source and its dependent ecosystems and protection of basic landholder rights must not be prejudiced by any other right.

The evidence did not enable the Commission to find, however, that, where the department's decisions and approach were manifestly partial towards irrigators and industry, this was for corrupt or otherwise improper reasons. The Commission formed the opinion that this approach was motivated by a misguided effort to redress a perceived imbalance caused by the Basin Plan's prioritisation of the environment's needs, which has had adverse effects on irrigators and their communities. It was directed to protecting as much as possible the existing entitlements of productive water users from any further reduction or adverse socio-economic effects that may be occasioned by the state's obligations to implement the Basin Plan requirements in each of the water resource plan areas in NSW falling within the Basin.

The Commission formed the opinion that, in many of the matters it investigated, including that concerning the misuse of official information by the deputy director general of DPI-W, the evidence established that the rights of productive water users were given priority over the rights of other stakeholders and that there was a clear alignment between the department's strategies and goals and those of the irrigation industry.

Notwithstanding the fact that the Commission has made no findings of corrupt conduct, it is satisfied that those matters it found established on the evidence – being among those widely broadcast in the media – have rightly had a detrimental effect on the public's confidence in the ecologically sustainable, equitable, transparent and efficient management of the water sources of the state and in the integrity and good repute of public administration, more generally.

The Commission has power to make findings, form and state opinions, and make recommendations, even if the relevant conduct is not corrupt conduct for the purposes of the ICAC Act but is otherwise in respect of a matter within the Commission's functions. The more significant findings made by the Commission are set out below.

Were irrigator interests favoured in the drafting of the BDWSP?

The consistent approach of the department to the development of the BDWSP was not to push for reforms that met the requirements of the WMA's water sharing priorities, but to codify existing arrangements even where this had adverse implications for the environment and downstream users. This was contrary to the duty to give priority to the water sharing principles in the order in which they are set out in the WMA.

Did irrigators benefit from the BDWSP?

Once it commenced, there were two significant consequences of the BDWSP that provided for the opportunistic extraction by a small number of large irrigators of unprecedented volumes of water at low flows, which are the flows that are critical to riverine ecosystem health.

- The first of these was the removal of a mandated pump-size from each class of licence, which was a direct consequence of the automatic conversion from licences under the *Water Act 1912* to licences under the WMA on commencement of all water sharing plans (WSPs).

- The second of these was that individual daily extraction limits (IDELs) and total daily extraction limits (TDELs) were not implemented at the commencement of the BDWSP.

Were licences and pumps authorised contrary to the WMA?

The Commission was not satisfied that any licences or pumps were authorised contrary to the WMA.

Did Mr Humphries give irrigators permission to pump during an embargo on the Barwon-Darling?

- In his capacity as minister for natural resources, lands and water, Mr Humphries attended a Barwon-Darling Water meeting at Bourke on 25 March 2015; just days before a state election. Mr Humphries told those present that there was no embargo in place on the Barwon-Darling, even though the temporary water restrictions order made under s 324 of the WMA and gazetted on 6 February 2015 was still in force.
- Mr Humphries was wrong to assert that there was no embargo in place but he did not intend by his assertion to give permission to those irrigators present to pump during an embargo in contravention of the WMA.
- The department's practice of effectively varying or lifting the Upper Darling Basin embargo by media release may have contributed in part to Mr Humphries' confusion about the legal status of the embargo and whether future flows or events could become available to irrigators or would be restricted. However, just days out from the state election, Mr Humphries was also in campaign mode and was seeking to placate his constituents and stakeholders about the contentious embargo on the Barwon-Darling.
- By his comments, Mr Humphries did not indicate any consideration for the needs of the environment but rather an approach that prioritised the needs of productive water users and an attempt to have the law implemented in the "least worst" way for them. Allowing opportunistic water take for crops without consideration of the needs of the water source and its ecosystems or downstream users at a time of unprecedented drought would be contrary to the objects, principles and duties of the WMA.

Was there an attempt to amend the BDWSP to benefit Peter Harris?

- The department did not treat Peter Harris and Jane Harris partially when, in February 2016, its delegated officers approved an application, under s 71S of the WMA, to vary the extraction component of an A-class access licence to specify a different river section, contrary to clause 66(1) of the BDWSP. Between January and July 2016, at least seven s 71S dealings that offended clause 66(1) were approved for Barwon-Darling water access licence-holders, only two of which were connected to the Harris family.
- The departmental officers involved in approving the s 71S dealings in the first half of 2016 operated under a belief held in good faith that clause 66(1) had been drafted in error and required removal by amendment because it was inconsistent with clause 66(2) (providing for the trading of the extraction component up to specified limits for each river section), which clearly implies that trading between river sections is anticipated to occur, and gives effect to the true intent of the trading rules.
- While there is no evidence that any departmental officer acted deliberately and dishonestly to circumvent the law and confer a benefit on one or more irrigators, or concealed any of the processes followed in doing so, the decision to approve applications contrary to the law without first obtaining legal advice and/or securing the necessary amendment was not appropriate.
- Mr Blair's requests for concurrence from his environment ministerial counterparts for the proposed removal by amendment of clause 66(1) from the BDWSP were not motivated by the need to retrospectively justify an unlawful decision made in favour of Peter Harris and nor were they the result of any representations made to the minister by particular irrigators.

Was there interference in the department's investigation of water compliance breaches in the Barwon-Darling?

- There were long delays and a lack of progress by the department, and then by WaterNSW, in the investigation and prosecution of a number of serious allegations of illegal water take against the Harris family notified to those agencies between August 2015 and April 2017. There is no evidence, however, that allegations of non-compliant irrigation activities by the Harris family were treated any differently from allegations

against other licence-holders under investigation by these agencies.

- The cause of delays in investigating and bringing appropriate enforcement action against the Harris family for non-compliance with the WMA was multifactorial but essentially came down to the management of the planning and implementation of the restructure process during which the department's compliance functions were transferred to WaterNSW, with effect from 1 July 2016.

  As identified by both Mr Matthews and the NSW Ombudsman in the reports of their respective investigations into NSW water management and compliance, this restructure resulted in:

  – uncertainty around the resourcing of the SIU
  – a loss of skilled and appropriately trained investigators
  – diminished staff morale
  – less than ideal integration of compliance and enforcement functions within a customer service ethos
  – technological and other administrative impediments to compliance activities
  – a significant backlog of cases.

  In addition, WaterNSW continued to fail to demonstrate that it took its compliance functions seriously and to appropriately resource this aspect of its business until after the *Four Corners* program aired.

- In June 2015, Mr Morgan, manager of the SIU, noted in a briefing to the deputy director general of the department, Mr Hanlon, that the SIU had identified a significant area of non-compliance within the Barwon River system, between Mungindi and Lake Menindee, and proposed a joint compliance operation with WaterNSW to identify and bring into compliance all users of the unregulated river system in relation to licence conditions and water take. The proposed operation was planned but did not proceed. The SIU was effectively disbanded following the transfer of the bulk of the department's compliance functions from July 2016 to WaterNSW.

- While there was a certain lack of support for strong compliance and enforcement measures, a preference for customer service over-regulation and a lack of commitment to properly resourcing compliance functions, the available evidence does not rise to the level of establishing a deliberate or intentional course of conduct by Mr Hanlon and others in senior management in the department and WaterNSW to frustrate or prevent enforcement actions. The proactive compliance operation did not proceed and the SIU was disbanded for many of the same reasons that affected the progress of non-compliance investigations and enforcement actions identified by Mr Matthews and the Ombudsman in their reports.

Was there partial treatment of Mr Bugeja in the investigation of water compliance breaches?

- From approximately the end of June 2015, Mr Bugeja, a landowner with a dam in north-west Sydney, was in breach of provisions of the WMA, in that he had undertaken unauthorised water management works contrary to clear and repeated advice given to him by the department concerning his rights and obligations. In the particular circumstances of this matter, which included an extended history of interactions between the department and Mr Bugeja and significant ongoing intervention on his behalf by his local member, Mr Williams, it was initially reasonable for the department to try to negotiate to bring Mr Bugeja into voluntary compliance rather than pursue a more strict policing approach.
- Although Mr Williams' representations on behalf of Mr Bugeja were persistent and protracted and influenced the way the department dealt with his constituent, this does not mean that they were improper. There was no evidence of a pre-existing relationship between Mr Williams and Mr Bugeja or that Mr Bugeja made donations to Mr Williams or his political party. Mr Bugeja received inappropriately lenient treatment in relation to the timeframe allowed for voluntary compliance, but ultimately he did not receive the "free water licence" or other benefits petitioned for by Mr Williams, and was required to reduce his dam's capacity and not use it for anything other than stock and domestic purposes.

Did Mr Hall, former departmental officer, receive inappropriate benefits from irrigators?

The Commission found there was no evidence that Mr Hall received any benefits from irrigators.

Did senior departmental officers release sensitive and confidential information to irrigators?

- Mr Hanlon engaged in conduct that involved the misuse of information or material that he acquired

in the course of the exercise of his official functions, in breach of the code of conduct and his employment contractual obligations. He deliberately disclosed sensitive government information, without proper authority, to an exclusive group of irrigation industry representatives that he formed for the purposes of targeted consultation.

The information that Mr Hanlon provided the Industry Reference Group (IRG) was not generally available outside government and concerned proposed statutory changes and sensitive government policy positions. It was provided to the group in advance of public consultation processes and not to other stakeholders. Mr Hanlon engaged in this conduct on the following occasions:

- during a teleconference on 12 October 2016 with the IRG, when he discussed local water recovery target figures provided in confidence by the chief executive of the Murray-Darling Basin Authority (MDBA) for one of the scenarios in contemplation if the MDBA determined to reduce the overall recovery target for the Northern Basin from 390 gigalitres (GL) to 320 GL, as was expected to happen at their meeting the following day
- during a teleconference on 12 October 2016, when he disclosed that he had received detailed legal advice setting out the implications of NSW limiting its participation in the Basin Plan, including walking away from it altogether, when that legal advice had required that he contact the legal division before the document or its contents were disclosed to a third party
- on 31 October 2016, when he provided the IRG with a draft paper providing updates on the Menindee water savings project for an upcoming Basin Official Committee (BOC) meeting, which was a document classified "For Official Use Only – Sensitive and Confidential Information"
- on 31 October 2016, when he provided the IRG with a PowerPoint presentation containing sensitive information concerning government negotiations of a commercial nature in relation to Tandou Farm
- on 1 May 2017, when he provided to four members of the IRG a draft letter from himself to a Commonwealth public official and a table of toolkit measures relating to the Northern Basin Review marked "For Official Use Only"; both of which contained sensitive government information.

- Mr Hanlon's conduct was motivated by an intention to advance the interests of irrigators represented by the IRG members in relation to matters concerning the state's negotiation and implementation of the Basin Plan. His conduct constituted a serious breach of his public official obligations. His failure to adhere to his confidentiality obligations and his partial treatment of the IRG meant that he did not in fact act in the public interest, and that his belief in what constituted the best interests of the state was not properly considered but skewed to one set of powerful stakeholder interests. Mr Hanlon's conduct was improper in the sense that it was wholly and purposely focused on the industry stakeholder group. His conduct was improper in the sense of being deliberate and not accidental or inadvertent.
- Mr Hanlon was not directed to act in ways that were improper. The decisions to do so were his own. He did so in the misguided belief that the ends justified the means. In so doing, however, he did not stand to personally benefit and nor did he place his personal interests before the legitimate interests of others. Mr Hanlon genuinely believed he was acting in the best interests of the state of NSW. To some extent, the mistaken belief of Mr Hanlon and the aforementioned breach of his public official obligations were induced by the department's misconceived adoption of the triple bottom line approach to water management decisions. While Mr Hanlon's breach of his public official obligations is very serious, his subjective motivation was not improper and he did not wilfully misconduct himself.
- Ms Morona inappropriately disclosed confidential and sensitive information that she acquired in the course of the exercise of her official functions when, on 12 October 2016, she sent a PowerPoint presentation to members of the IRG containing a slide setting out the likely local water recovery targets for NSW Northern Basin catchments, if the MDBA determined to reduce the overall recovery target for the Northern Basin from 390 GL to 320 GL, as was expected.
- Ms Morona knew at the time that this was sensitive information that was not publicly known and that it should not be shared. She did not initiate the disclosure, but was acting in consultation with her senior manager, and in the pursuit of what she understood to be the

objective of her employer at the time to engage more meaningfully with industry stakeholders. Her motivation in disclosing this confidential information was primarily directed to preventing a powerful group of stakeholders from complaining about a continued lack of consultation. She concedes that this constituted an error of judgment.

While Ms Morona's conduct is an example of misuse of official information prohibited by the code of conduct, it was not a wilful or intentional misuse of information for an improper motive.

Did senior departmental officers encourage the Commonwealth Government to buy back Tandou's water entitlements for an inflated price?

The key aspects of the sale of Tandou's water entitlements to the Commonwealth, including the water valuation ultimately accepted by the Commonwealth, the overall price, the compensation component, the agreements in relation to decommissioning and all other entitlements under the sale agreement, were determined as between the Commonwealth and Webster. Neither Ms Morona nor Mr Hanlon, nor any other NSW public official had any substantive input into, or influence over, these matters.

In all the circumstances, the Commission is satisfied that no consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of any person for a criminal offence, the taking of action against any person for a disciplinary offence or the taking of action against any public official with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Corruption prevention

Chapter 13 of this report sets out the Commission's review of the corruption risks identified during its investigation. The Commission makes 15 recommendations to address these risks and to promote the integrity and good repute of public administration in relation to water management. Specifically, the recommendations concern the undue focus on irrigators' interests within water agencies and deal with the:

- lengthy history of failure in giving proper and full effect to the objects, principles and duties of the WMA, and its priorities for water sharing
- failure to fully implement WSPs and ensure they are audited
- need to fund independent scientific audits to determine the ecological health of rivers
- lack of transparency, balance and fairness in consultation processes undertaken by water agencies in relation to external stakeholders
- sidelining of public officials undertaking environmental roles within the NSW Government
- control weaknesses in the classification and handling of confidential and sensitive information
- flaws in the recruitment procedures used to engage Ms Morona
- regulatory failures in the state's water market
- lack of transparency and accountability in water account information.

Accordingly, the Commission has made the following recommendations.

Recommendation 1

That the Department of Planning, Industry and Environment (DPIE) publicly records:

- its water strategy, objectives and priorities for the use and management of NSW's water resources in a manner consistent with the mandatory duty in s 9 of the WMA
- the need to ensure the water management principles in s 5, and in particular those that relate to sharing, as set out in s 5(3) of the WMA, are all given effect.

Section 9 of the WMA should also inform relevant key departmental records, including agency policies, guidelines and role descriptions, concerning the management of NSW water resources.

Recommendation 2

That the DPIE develops and publishes a protocol and procedures for amending WSPs that reflect the principles for water sharing in s 5(3) of the WMA and give priority to those principles in the order in which they are set out in that subsection in accordance with the mandatory duty imposed by s 9 of the WMA. The protocol should also have regard to audits conducted by the Natural Resources Commission.

Recommendation 3

That the DPIE implements all changes it has proposed to the BDWSP rules to ensure its consistency with the WMA, specifically:

- implementing IDELs and TDELs (including trade limits on IDELs)
- raising A-class cease-to-pump thresholds based

on up-to-date environmental water requirements to better protect low-flow water from extraction

- removing imminent flow provisions to prevent extraction of low-flow water even when higher flows are anticipated
- introducing resumption of flow rules to protect the first flow of water after a dry (low or cease-to-flow) period from extraction
- establishing management provisions to protect upstream environmental water releases from being extracted when they reach the Barwon-Darling.

Recommendation 4

That the DPIE establishes a dedicated and adequately funded WSP implementation team to ensure all of the state's WSP rules are implemented effectively.

Recommendation 5

That the DPIE publishes a list of all WSP rules that have not yet been implemented and develops and publishes timelines for implementing these rules.

Recommendation 6

That the DPIE prioritises and seeks to bring forward audits of any WSP that have not, to date, been audited under s 44 of the WMA.

Recommendation 7

That the NSW Government recommences funding of scientific audits that periodically monitor the environmental health of its rivers and river flows to provide independent assurance of the effectiveness of its water management policies.

Recommendation 8

That the DPIE publishes all stakeholder and community engagement plans concerning water management when they are complete.

Recommendation 9

That the DPIE tasks an appropriately qualified and experienced independent reviewer to conduct, on a recurrent basis, reviews of the steps taken to implement its "Water stakeholder and community engagement policy" and the policy's effectiveness. The independent reviewer should have the function of making such recommendations as they think necessary to ensure that all water stakeholders have their interests heard in a fair, balanced and transparent way.

Recommendation 10

That the DPIE develops a model procedure concerning the conduct of meetings with external stakeholders in respect of water management issues that includes requirements to:

- make records of these meetings
- publish meeting details including attendees, organisations represented and meeting agendas, on the water area of the DPIE's website at least monthly.

Recommendation 11

That the DPIE formalises communication, information-sharing and consultation protocols with officers performing the functions of the Environment, Energy and Science Group (formerly the Office of Environment and Heritage).

Recommendation 12

That the DPIE ensures that its staff are properly inducted and receive ongoing training regarding the responsibilities of public officers in respect of the classification and handling of confidential and sensitive information.

Recommendation 13

That the DPIE reviews its recruitment policies and procedures to ensure that they are consistent with the Government Sector Employment (General) Rules 2014 rules and best-practice guidance provided by the Public Service Commission. Particular attention should be given to ensuring that:

- job advertisements run for enough time to allow the market to be tested
- hiring managers undertake the Public Service Commission's recruitment training
- more than one member of a selection panel participates in the cull of candidates, unless exceptional circumstances exist
- clear guidance is provided about the relevance of any independent reports assessing the suitability of candidates.

Recommendation 14

That the NSW Government guarantees the funding of the Natural Resources Access Regulator (NRAR), at least to a level equivalent to the recommendations of the Independent Pricing and Regulatory Tribunal of NSW, over the long term.

Recommendation 15

That the DPIE periodically publishes aggregated water account information on its website and makes individual-level data available to NRAR.

The investigation also highlighted the continual restructuring of water agencies over the last 20 years and the alarming impact that this had on water management in NSW. A related concern is whether the absorption of the former Office of Environment and Heritage into a mega-department will create better water management decision-making, particularly given the order of seniority amongst portfolios within the DPIE and the need for environmental issues to have a strong and independent voice within the NSW Government's administrative arrangements. The Commission, however, is reluctant to recommend further machinery of government changes because of the widespread administrative disruption experienced in the public service over recent years.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as required by s 111E of the ICAC Act, will be furnished to the DPIE, NSW Government and the responsible minister.

As required by s 111E(2) of the ICAC Act, the DPIE and NSW Government must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether they propose to implement any plan of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, the DPIE and NSW Government are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website at www.icac.nsw.gov.au.

Recommendation that this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

Chapter 1: The investigation

This chapter sets out some background information on how the investigation originated, how it was conducted and why the NSW Independent Commission Against Corruption ("the Commission") decided not to conduct a public inquiry.

How the investigation came about

On 24 July 2017, the ABC *Four Corners* program aired a story entitled "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped"). During the program, a number of allegations of possible corrupt conduct or other improper conduct were raised against officers of the agency formerly known as the NSW Department of Primary Industries – Water (DPI-W) and others.

The program aired the following allegations that:

- Gavin Hanlon, the deputy director general of DPI-W, had been recorded in a secretly taped teleconference offering to disclose sensitive government information and share "de-badged" confidential documents, including legal advice, concerning the Murray-Darling Basin Plan ("the Basin Plan") to a select group of irrigators
- in the taped teleconference, excerpts of which were played during the program, Mr Hanlon could be heard consulting with the irrigators and advising on options and actions to assist them to further their interests
- the department had failed to properly investigate or take prosecution action on reported water compliance breaches, namely instances of illegal water take from the Barwon-Darling, at a number of properties on a number of occasions in 2015 and early 2016 and the illegal access of up to 1 billion litres (1 GL) of water for the benefit of properties owned by cotton grower Peter Harris
- Mr Hanlon had refused to approve a major investigation into allegations of non-compliance in the north-west of NSW, which had been recommended by Jamie Morgan, then manager of the Strategic Investigations Unit (SIU) at the department, after evidence had been uncovered by departmental officers of meter tampering, failure to maintain log books and illegal water extractions
- the abolition of the SIU, and transfer of some staff and functions to WaterNSW, was motivated by the department's lack of interest in pursuing compliance matters
- in March 2015, at a meeting of Barwon-Darling irrigators, the Hon Kevin Humphries, then minister for natural resources, lands and water, gave tacit approval to those present to pump water during a gazetted embargo by announcing that there was no embargo in place.

Immediately following the airing of "Pumped", Simon Smith, then secretary of the NSW Department of Industry (DOI), wrote to the Commission to advise it of the serious allegations raised in the program and that he would be commissioning an independent external investigation concerning them.

The NSW Environmental Defenders Office (EDO) also wrote to the Commission shortly after "Pumped" aired, and lodged a formal complaint on behalf of its client, the Australian Conservation Foundation (ACF), concerning matters raised by the program. In addition, the EDO requested that the Commission investigate various other water management matters it had examined. These matters included the circumstances:

- in which a former departmental licensing officer came to be involved in approximately 18 property transfers in north west NSW, whereby he appeared to acquire title to the resulting subdivisions

- surrounding the making of the Barwon-Darling Water Sharing Plan (BDWSP), which was made by the Hon Katrina Hodgkinson, then minister for primary industries, and commenced on 4 October 2012 (it was alleged that changes between the draft and gazetted versions of the BDWSP allowed significantly larger amounts of water to be extracted for consumptive use).

The EDO requested the Commission investigate whether the changes were the result of any improper lobbying of the minister. The EDO also alleged that the department had authorised, in contravention of the *Water Management Act 2000* ("the WMA") and/or the BDWSP, certain pumps attached to licences held by Bengerang Ltd (then owned by the family of Ian Cole and, later, by Webster Limited) and the Harris family; at the time, the two largest licence-holders on the Barwon-Darling River.

On 28 November 2017, the Hon Jeremy Buckingham, then Greens MLC, complained to the Commission about the circumstances of the purchase by the Commonwealth Government of water entitlements from Tandou Farm, owned by Webster. Mr Buckingham referred to the reporting of these matters by Anne Davies of the *Guardian* newspaper and noted the allegation that the $78 million paid by the Commonwealth for Tandou Farm's water was based on a private valuation commissioned by Mr Hanlon, then deputy director general at DPI-W, that was much higher than the valuation made by the Commonwealth's own Australian Bureau of Agricultural and Resource Economics and Sciences. Mr Buckingham's complaint alleged that the purchase did not represent value for money, was made without a public tender, at a time when the Commonwealth had announced the suspension of water buy-backs, and that it resulted in a $36 million windfall profit for Webster.

Why the Commission investigated

One of the Commission's principal functions, as specified in s 13(1)(a) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii) conduct connected with corrupt conduct,*
>
> *may have occurred, may be occurring or may be about to occur.*

It is important to observe at this point that the term "corrupt conduct" is broadly defined in the ICAC Act. It includes the dishonest as well as the partial exercise of official functions by any public official (see s 8 and s 9 of the ICAC Act).

The role of the Commission is explained in more detail in Appendix 1 to this report. Appendix 2 sets out the approach taken by the Commission in determining whether corrupt conduct has occurred.

It is important to understand that the Commission's role in this matter relates to the investigation and exposure of conduct as set out in s 13(1)(a) of the ICAC Act and the broader corruption prevention functions set out in s 13 of the ICAC Act. It is not the Commission's role to comment generally on water policy or whether the application of such policies is appropriate to the needs of water users or the environment.

Certain aspects of the matters brought to the Commission's attention in these complaints could constitute corrupt conduct within the meaning of the ICAC Act. The Commission was concerned that the alleged conduct suggested partial treatment towards

irrigators and industry on the part of those public officials tasked with managing the state's water resources and administering the state's water law equitably, transparently and in the public interest.

The Commission has jurisdiction to investigate any conduct of a public official that constitutes the dishonest or partial exercise of any of his or her official functions. As a public service agency, the department was a public authority, and those employed by it were public officials, for the purposes of the ICAC Act. The matters brought to the Commission's attention suggested not only individual instances of the partial exercise of official functions, but a departmental prioritisation of the interests of irrigators over the interests of other water users and uses, particularly the protection of the environment.

On 22 August 2017, after assessing the information provided, the Commission determined it was in the public interest to conduct a preliminary investigation of the allegations aired in "Pumped", as raised in the complaint from the secretary of the DOI and the additional matters brought to its attention by the EDO. In the days, weeks and months following the airing of "Pumped", the Commission received another 33 related complaints from concerned members of the public, other agencies and public officials, including members of state and federal parliaments and a self-referral from Mr Hanlon himself. The Commission determined to close these matters rather than make them the subject of separate investigations because it considered that the complaints from the secretary of the DOI and the EDO subsumed the vast majority of the matters raised in these related complaints.

On 18 December 2017, the Commission determined that the allegations concerning the Tandou buy-back were relevant to matters already under investigation concerning Mr Hanlon's alleged release of confidential information to, and possible partial treatment of, irrigators. As well, the Tandou buy-back allegations suggested that Mr Hanlon may have acted partially in facilitating the buy-back to benefit Webster rather than in accordance with his public official duties. Accordingly, the allegations relating to the Tandou buy-back were also made the subject of a preliminary investigation.

As he had foreshadowed to the Commission, on 2 August 2017 DOI secretary, Mr Smith, commissioned an independent investigation to determine the facts and circumstances related to the allegations raised in "Pumped". Ken Matthews was engaged to undertake the investigation. He is a former Commonwealth department head and foundation chair and CEO of the now-abolished National Water Commission with significant experience in water management issues. Following the Commission's advice to Mr Matthews on 24 August 2017, that it intended to initiate an investigation into the allegations raised in the program, Mr Matthews made available to the Commission all relevant materials gathered to that point by his investigation team, for which the Commission also issued a formal request by way of notice under s 22 of the ICAC Act.

The Commission reviewed the information provided by Mr Matthews, which included documentation obtained from the department and transcripts of interviews with a number of departmental officers and irrigators, as well as other material obtained by the Commission from its own inquiries. During the course of this preliminary investigation, the Commission identified two additional allegations related to the matters the subject of complaint by the DOI and the EDO.

The first of these concerned the involvement of Mr Hanlon, the Hon Niall Blair (former minister for primary industries and lands and water, and then minister for regional water) and the Hon Ray Williams (former member for Hawkesbury) in the alleged interference in a water compliance notice issued to Gary Bugeja, one of Mr Williams' constituents. The other matter was brought to the Commission's attention by Linton Besser, the ABC investigative journalist behind "Pumped", who alleged that two former departmental officers, currently working for Peter Harris, a major irrigator and cotton farmer on the Barwon-Darling, had been given access to DPI–W files and equipment after their departure from the department.

The Commission determined that the preliminary material raised a considerable number of serious matters concerning the management of water in NSW, particularly in the Barwon-Darling area of the Murray-Darling Basin, that it was in the public interest to investigate and that, to do so, would require substantial Commission resources. Accordingly, on 1 September 2017, the preliminary investigation in relation to the matters raised in the "Pumped" program and related matters was escalated to a full investigation (Operation Avon). The preliminary investigation into matters concerning the Tandou buy-back was escalated to a full investigation on 9 April 2018 (Operation Mezzo). The two investigations, Operation Avon and Operation Mezzo respectively, were conducted in conjunction and will hereafter be referred to as "the investigation".

Matters investigated

The specific allegations investigated by the Commission were that:

a) from November 2011 to October 2012, Ms Hodgkinson, when minister for primary industries, acted partially by supporting changes to the BDWSP to the benefit of the family of Mr Cole

b) since 4 October 2012, the department and/or NSW Government ministers failed to implement individual daily extraction limits (IDELs) for the Barwon-Darling unregulated and alluvial water sources, as prescribed by clause 52 of the BDWSP, providing irrigators in the Barwon-Darling with additional access to water to the detriment of other water users and the environment

c) at some time prior to February 2015, pumps attached to licences currently held by Bengerang (owned by Webster) and Peter Harris (Budvalt Pty Ltd) were authorised by the department in contravention of the WMA, to the benefit of the families of Mr Cole and Peter Harris

d) in 2015, Mr Humphries, former minister for natural resources, lands and water, acted partially to Peter Harris and to Anthony Barlow of Burren Downs by permitting them to pump water in contravention of the BDWSP

e) in 2016, Mark Campbell, departmental officer, approved an application by the family of Peter Harris to pump water from a different section of the Barwon-Darling in contravention of s 71S of the WMA (clause 66(1) of the BDWSP)

f) between 2016 and August 2017, Mr Blair, former minister for primary industries and lands and water, and then minister for regional water, acted partially to Peter Harris and attempted to amend legislation that would give Peter Harris a financial benefit

g) between 20 August 2015 and February 2016, the department failed to properly investigate or take prosecution action in relation to breaches of the WMA by Peter Harris, and properties owned by him, including Miralwyn and Rumleigh

h) a proper investigation was not undertaken when Peter Harris (trading as Budvalt) built a 2-kilometre in-ground irrigation channel in 2015 through Crown lands adjoining his property at Miralwyn without approval

i) in 2016, senior officers from the department were involved in "shutting down" investigations proposed by Jamie Morgan, manager of the Strategic Investigations Unit (SIU) of the department, into systemic breaches of the WMA by irrigators in north-west NSW, and disbanded the SIU

j) between February 2015 and August 2017, the Hon Ray Williams influenced Mr Hanlon, Frank Garofalow (director of water regulation at the department) and Mr Blair to act improperly by causing the non-service of a s 329 direction issued to Mr Bugeja regarding a dam that was on his property

k) two former departmental employees, both of whom currently work for Peter Harris, were given partial treatment by departmental staff at the Narrabri and Dubbo regional offices by being given access to departmental files and equipment for the ultimate benefit of Peter Harris

l) between 2003 and 2009, Anthony Manson Hall, a former licensing officer at the department, received a benefit from farmers in the Northern Basin, namely property transfers and sub-divisions for unknown reasons

m) from January 2015, Mr Hanlon and Monica Morona (director of intergovernmental and strategic stakeholder relations at the department) inappropriately and partially offered to share or disclose and/or did share or disclose and/or directed others to share or disclose government information with a group of irrigator representatives, in breach of their duties as public officials

n) in or around February 2016, Mr Hanlon acted partially in the permanent appointment of Ms Morona to the position of director of intergovernmental and strategic stakeholder relations at the department, in breach of his duties as a public official

o) public officials acted partially or dishonestly by favouring NSW irrigators including by encouraging the Commonwealth Government to purchase Tandou Farm's water entitlements from Webster for an inflated price.

Conduct of the investigation

During the course of the investigation, the Commission:

- obtained a significant number of documents from various sources by issuing 64 notices under s 22 of the ICAC Act and five summonses under s 35 of the ICAC Act
- obtained statements of information by issuing 11 notices under s 21 of the ICAC Act
- conducted 13 compulsory examinations following the issue of summonses under s 35 of the ICAC Act
- interviewed and/or obtained statements from 75 individuals, including departmental officers and public officials from the DOI and the Office of Environment and Heritage (OEH), and irrigators

- commissioned a report from an environmental scientist and water expert to assist its understanding of the rationale for, and mechanics of, the Commonwealth's buy-back of Tandou Farm's water.

Improper conduct and flawed policy

As set out in the preceding summary chapter, the Commission's investigation confirmed that certain confidential and sensitive government information was disclosed by senior departmental officials to a select group of irrigator representatives. While the Commission was satisfied that the conduct of Mr Hanlon and Ms Morona in providing this information to members of the Industry Reference Group (IRG) contravened applicable policies, the applicable code of conduct and their employment contracts, it was not satisfied that it amounted to serious corrupt conduct within the meaning of the ICAC Act.

The evidence available to the Commission enabled it to find that the approach to the drafting of the BDWSP was not to actively give priority to protection of the water source and its dependent ecosystems, but to avoid as much as possible any further socio-economic impacts for the valley's consumptive users, who were unhappy at the prospect of their entitlements being further eroded. This resulted in an attempt to protect the existing entitlements of consumptive water users or preserve the status quo. The effect of such an approach for too long has been prejudicial to the protection of the environment in addition to being contrary to the priorities mandated by the management principles for water sharing in the WMA, which require that protection of the environment and basic landholder rights must not be prejudiced by any other right.

The evidence did not enable the Commission to find, however, that this was done for corrupt reasons. It is a key example of what the Commission finds to be the consistent, so-called "triple bottom line" approach adopted for at least the last decade by the state agencies responsible for the implementation and enforcement of water management law, both within the state and inter-jurisdictionally in the federal-state compact of the Murray-Darling Basin Plan. This incorrect approach has sought to balance the competing interests of the environment and industry in this complex and highly contested natural resource management setting, by according equal weight to environmental, social and economic considerations.

Despite submissions made to the contrary on behalf of the NSW Department of Planning, Industry and Environment (DPIE), the Commission is satisfied that this approach does not adhere to the legislated mandatory principles for water sharing, which require protection of the environment and basic landholder rights to be the overriding principle (the legislative principles set out in the WMA are discussed in chapter 2).

In relation to the other allegations investigated by the Commission, where the evidence enabled the Commission to be satisfied that the allegation was established in fact, the "triple bottom line" approach often manifested itself as an explanation for many of the decisions taken by senior departmental officials that gave rise to the allegation. As an avowed departmental policy approach, it cannot be considered a corrupt or improper motivation able to be attributed to any individual.

Decision not to hold a public inquiry

After taking into account each of the matters set out in s 31(2) of the ICAC Act, the Commission determined that it was not in the public interest to hold a public inquiry. Instead, the Commission was satisfied that the matters investigated could be satisfactorily addressed by way of a public report pursuant to s 74(1) of the ICAC Act.

In making that determination, the Commission had regard to the following considerations:

- the Commission obtained and reviewed a significant amount of cogent evidence in the course of the investigation that indicated the possibility of corrupt conduct
- careful review of this evidence and of the submissions received from affected persons and interested parties led to the conclusion that no corrupt conduct findings could be made
- a public inquiry would only duplicate the evidence already obtained and would not materially assist the investigation
- a public inquiry would risk undue prejudice to peoples' reputations, given the Commission's findings in relation to the majority of the allegations investigated
- a public inquiry would involve an unnecessary use of Commission resources.

On 23 March 2020, Counsel Assisting the Commission prepared submissions which were provided to 23 affected persons and interested parties. The submissions set out the evidence on which it was proposed the Commission should rely and addressed the findings and recommendations it could make on that evidence.

The Commission received written submissions in response from nine parties, including the DPIE. The last submission was received on 18 June 2020. All submissions

were considered in the preparation of this report. Further information concerning submissions is set out in Appendix 3 to this report.

Investigation outcomes

The Commission's findings in relation to the specific allegations are set out in the chapters that follow and are addressed as far as practicable in the chronological order in which the conduct the subject of the allegations occurred.

Given the widespread media reporting of the matters that the Commission investigated, the seriousness of the allegations and their relevance to public trust in public administration, the public has a legitimate interest in knowing the outcome of the Commission's investigation and the reasons for its findings. As well as making certain adverse findings short of findings of corrupt conduct in relation to the misuse of official information by two senior departmental officers, the Commission has formed the opinion that there is considerable evidence of the department's consistent failure to give effect to the priorities for water sharing, as set out in the WMA.

Contrary to the submissions on behalf of the department, that s 5 of the WMA sets out principles, not mandated outcomes, and that these are expressed in general terms, as distinct from mandated rules which will either be obeyed or disobeyed, the Commission considers that the water management principles in relation to water sharing are expressed in mandatory terms. They constitute a formulation of statutory principles that are central to the management of water resources and must be given effect by all those bound by the statutory duty or obligation to do so imposed by s 9 of the WMA. The provisions of s 5(3) of the WMA explicitly require that, in relation to water sharing, the protection of the rights of irrigators must not prejudice the protection of a water source and its dependent ecosystems, and the protection of basic landholder rights, which include native title rights.

Contrary to the submissions on behalf of the department, the Commission also considers that the duty at s 9 of the WMA to give effect to the water management principles *is* a duty to achieve a particular outcome. It is the duty of all persons exercising functions under the WMA, as between the principles for water sharing set out in s 5(3), to give priority to those principles in the order in which they are set out in that subsection. Many of the allegations investigated by the Commission expose the reverse of this legislatively mandated priority, whereby protection of the environment has not been allowed to prejudice the rights of consumptive water users at a state level.

The consistent failure by the department to act in accordance with the duty imposed by s 9 of the WMA represents a gross failure by the department to understand and fully implement the water management principles prescribed by the WMA and was inimical to the interests of good government and to the public interest.

The written submissions made on behalf of the department requested that the names of a list of non-senior executive departmental employees not be published in this report. It was submitted that, given the lack of findings by the Commission of corruption or other misfeasance in public office in respect of any of these employees, it is desirable in the public interest not to publish their names. This was said to be because the public scrutiny that would accompany the publication of their names in this report would not accord with the positions these individuals held at the relevant times, in terms of seniority and responsibility for decision-making within the department.

The Commission concludes that there are sound grounds for rejecting this submission. It is appropriate, in the public interest, that relevant actions of public officials and others are identified and reported in the context of the matters investigated by the Commission so that the conduct that occurred and why it occurred can be fully understood. In the present case, this is of importance in understanding the systemic failures identified in this report. The fact that a person is merely named in a Commission report in such a context does not, of itself, constitute any adverse finding against the person. Where adverse findings have been made in the report, such as in the cases of Mr Hanlon and Ms Morona, such findings are clearly articulated.

In accordance with its principal functions under s 13 of the ICAC Act, the Commission has the power to make findings and form opinions on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerns, whether or not the findings or opinions relate to corrupt conduct. It also has the power to formulate corruption prevention recommendations for the taking of action it considers should be taken in relation to those findings or opinions. The Commission's power to make such findings and recommendations allows it, as a matter of significant public interest, to draw attention to important failings in public administration and to advance proposals by way of recommendations to prevent their repetition. The Commission's recommendations about the action it considers should be taken are set out in chapter 13.

Chapter 2: Legal framework for water resource management in NSW

This chapter sets out briefly the legal framework governing water resource management in NSW, including the state's obligations under the Murray-Darling Basin Plan ("the Basin Plan"). This background seeks to contextualise the conduct investigated by the Commission, in particular, on the timeline for the Basin States' negotiation and implementation of the Basin Plan and in relation to the key objectives of that negotiation. The Basin States, across which the Basin extends, are NSW, Victoria, Queensland, South Australia and the Australian Capital Territory, with the largest being NSW.

This chapter also aims to set out relevantly the development of NSW's *Water Management Act 2000* ("the WMA"), which is underpinned by the concept of ecologically sustainable development (ESD). This fundamental concept is also echoed in the objectives of the Commonwealth *Water Act 2007* ("the Water Act") and the Basin Plan it requires.

An understanding of the legal framework for water resource management in NSW is critical in the assessment of issues concerning the propriety and lawfulness of *official action* undertaken in the name of the management of NSW resources. In that regard, official action includes the exercise of power and official functions both at a whole-of-government level and at the individual level.

Overview

As Ken Matthews noted in his September 2017 interim report, "water is a community-owned resource and members of the public have the right to satisfy themselves that it is being used in compliance with the law". The law governing the management of NSW's water resources is not, however, so readily understood. It comprises a complex architecture of intersecting state and Commonwealth legislative regimes and intergovernmental agreements. Constitutionally, it is the states that have responsibility for the management of land and water resources but, for well over a century, political conflict and power jostling over the sharing and control of water in the Murray-Darling Basin ("the Basin") between and among the affected states and the Commonwealth, has seen increasing intervention by the Commonwealth in the management of Basin water resources.

This intervention culminated in the enactment of the Water Act and the subsequent development of the Basin Plan, made under Part 2 of the Water Act, which became law in 2012. The Water Act is directed to ensuring the "return to environmentally sustainable levels of extraction for water resources that are overallocated or overused". It does so primarily through the development of the Basin Plan, which provides for limits on the quantity of water that may be taken from the Basin water resources as a whole for consumptive use, and from the water resources of each water resource plan area within the Basin, and a recovery target for an amount of water to be returned to the environment to meet the objectives of the Water Act.

It is the responsibility of the Basin States, the largest of which is NSW, to give effect to the Basin Plan through the development and implementation of water resource plans. Those plans are required to include the long-term sustainable diversion limits for each Basin water resource area. They were required to be completed by mid-2019. Water resource plans will dictate in large part the recovery of water for the environment at a local level. Decisions about how water is to be recovered for the environment, who it is to be taken from and how it is to be accounted for, are at the centre of some of the allegations of corrupt conduct against NSW public officials investigated by the Commission.

The Basin is the largest and most complex river system in Australia. All of NSW's inland rivers drain into it. Because of this, the legal framework for the management of the Basin's natural and environmental resources has a significant bearing on water resource management law and policy in NSW.

The Basin is home to approximately 2.6 million people and is colloquially known as Australia's "food bowl", producing over one-third of the country's food supply. It supports 9,200 irrigated agriculture businesses, which produce $22 billion worth of food and fibre every year. This geographical area of over one million square kilometres in south-eastern Australia is also an extremely important one in terms of complex ecosystems and biodiversity, including over 77,000 kilometres of rivers and more than 25,000 wetlands, which are home to at least 35 endangered species of birds, 16 endangered species of mammals and 46 known species of native fish. Over more than 100 years, the impacts of human activity in the Basin, particularly increasing regulation of the river system and the over-allocation of water for consumptive uses such as irrigated agriculture, have resulted in serious ecological degradation and loss of biodiversity.

In 2007, in order to remedy the detrimental environmental impact of over-allocation of water in the Basin, the Commonwealth Government sought a referral of power from the affected states. Victoria resisted and the Commonwealth had to rely on its own law-making powers. Despite the fact that the Commonwealth Government does not have a specific constitutional "head of power" in relation to water, it does have wide powers to protect the environment.

The High Court decided in *Commonwealth v Tasmania* (1983) 158 CLR 1, and in subsequent cases, that the external affairs power enables the Commonwealth to enact legislation that is reasonably capable of being considered appropriate and adapted to fulfil Australia's international legal obligations. The Water Act primarily relies on the external affairs power for its constitutional validity. Its objects include enabling the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources "in the national interest". A primary objective is to give effect to relevant international agreements, which are defined to include several environmental treaties, including the Ramsar Convention on Wetlands and the Convention on Biological Diversity.

As set out in s 20 of the Water Act, the purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of the Water Act, in particular by:

(a) giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources); and

(b) the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities); and

(c) Basin wide environmental objectives for water dependent ecosystems of the Murray Darling Basin and water quality and salinity objectives; and

(d) the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and

(e) water to reach its most productive use through the development of an efficient water trading regime across the Murray Darling Basin; and

(f) requirements that a water resource plan for a water resource plan area must meet if it is to be accredited or adopted under Division 2; and

(g) improved water security for all uses of Basin water resources.

The objects of the Water Act are also to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused and to protect, restore and provide for the ecological values and ecosystem services of the Murray Darling Basin.

It is first and foremost an environmental plan. A key concept enshrined and defined in the Water Act, as noted above, is that of ESD. The Water Act requires that, in the development of the Basin Plan, the Murray-Darling Basin Authority (MDBA) and the minister must take into account the principles of ESD. The principles of ESD that must be taken into account are set out by the Water Act as:

> *(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations*
>
> *(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation*
>
> *(c) the principle of inter-generational equity—that the present generation should ensure that the health, biodiversity and productivity of the environment is maintained or enhanced for the benefit of future generations*
>
> *(d) the conservation of biodiversity and ecological integrity should be a fundamental consideration in decision-making*
>
> *(e) improved valuation, pricing and incentive mechanisms should be promoted.*

These fundamental elements of ESD, which are at the core of the Water Act, may be summarised as the:

- principle of integration
- precautionary principle
- principle of inter-generational equity
- principle of conservation of biological diversity and ecological integrity
- promotion of improved valuation, pricing and incentive mechanisms.

They echo the principles that the earlier NSW WMA also requires to be applied in the sustainable and integrated management of the water sources of the state of NSW. Together, they form a package of principles that are legislatively required at Commonwealth- and state-level to inform the sustainable use of water, a natural resource held by the government in trust for the benefit of present and future generations. The notion of the public interest in relation to the management of natural resources includes ESD.[1]

The Water Act requires the Basin Plan to implement relevant international agreements and their core environmental objectives. The Water Act's objects also include "in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes".

While the term "optimises" indicates the importance of social and economic factors in the development of the Basin Plan, these factors cannot be given such weight as would prejudice the faithful implementation of the international environmental conventions upon which the validity of the Water Act depends.[2] As Richard Beasley SC noted in his closing submissions to the Murray-Darling Basin Royal Commission:

> *…there is no trade-off within* [the Water Act] *between the environment, on one hand, and social and economic considerations on the other. To the extent that it has one objective of using the water resources to optimise environmental, social and economic outcomes, which can't, except in odd cases, be simultaneously optimised, that is beyond doubt subordinate to giving effect to our international obligations and providing for special measures to restore damage to the environment and prevent further damage.*

The Commission respectfully agrees with that statement.

The principle of integration, which is the first of the ESD principles underpinning the development of the Basin Plan and which requires the effective integration of economic, environmental, social and equitable considerations, attracted extensive analysis in the *Murray- Darling Basin Royal Commission Report* ("the Walker report"), released on 29 January 2019, in the context of its resounding criticism of the so-called "triple bottom line" approach of the MDBA and the Commonwealth. This approach, evidenced primarily in the setting of the sustainable diversion limit (SDL) – effectively a cap on the volume of water that can be taken from the Basin for consumptive use so as not to compromise key environmental values – purports to give *equal* weight to economic, social and environmental considerations. The Walker report speculated that the source of what it labels the "very unhelpful slogan of a 'triple bottom line'" may have been the language of the ESD principle of integration, at first conceived innocently, but which later "morphed into a misleading and dangerous misunderstanding, not always so innocently".

[1] The Hon Brian J Preston SC, "The Judicial Development of Ecologically Sustainable Development", presented at the "Environment in Court", IUCN Academy of Environmental Law Colloquium, 22 Jun 2016, p. 4.

[2] P Kildea and G Williams G, "The Water Act and the Murray-Darling Basin Plan", *Public Law Review*, 2011, at 22 PLR 9.

As the Walker report states:

> *…there is no 'triple bottom line' legislated in the Water Act concerning the setting of the SDL that must reflect an ESLT* [environmentally sustainable level of take], *or in the scientific judgement to be made as to what are key environmental assets, ecosystem functions and environmental outcomes. That phrase is an inappropriate figure of speech or political slogan that the MDBA has unwisely adopted. Any optimisation of environmental, social and economic outcomes must come later. In any event, it is not possible to optimise all three simultaneously in determinations such as the setting of an ESLT or SDL.*

The Commission agrees with these statements.

The Commission has found that the MDBA's "triple bottom line" approach is echoed in the responsible NSW department's approach to the drafting and implementation of the Barwon-Darling Water Sharing Plan (BDWSP) and to the negotiation and implementation of the Basin Plan at the time of the matters it investigated. Submissions made on behalf of the NSW Department of Planning, Industry and Environment (DPIE) disputed any suggestion that the term "triple bottom line" implies or was understood by departmental officers to be an approach giving *equal* weight to social, economic and environmental considerations, or even permitting economic considerations to be primary. It was submitted that the Commission would place weight on a document published by the department in August 2018, titled "Guidelines for setting and evaluating plan objectives for water management", which states that the triple bottom line approach is guided by the objects in s 3 of the WMA.

The Commission considers that, however the department now explains and characterises the "triple bottom line" approach it adopts in the setting of water sharing plans or in the exercise of any other of its functions under the WMA, at the time of the matters investigated by the Commission, the evidence strongly indicates that socio-economic and environmental considerations were given at least equal weight and, at times, clear precedence was given to socio-economic considerations over environmental ones (as discussed in the chapters that follow).

While the Water Act recognises that the Basin States continue to manage water resources within their jurisdictions, the Basin Plan now sits over the top of what had until its development been primarily state-run governance of the Murray-Darling river system. Since the Basin Plan's inception, existing state government arrangements have had to be reconciled with the overarching environmental objectives set by the Commonwealth. Water resource plans, which are required to give effect to those objectives, were due to commence from July 2019. The Commission considers that a misdirected "triple bottom line" approach by the state to the setting of local SDLs, the recovery of water for the environment and other related matters has obvious implications for the validity and even lawfulness of those plans.

Water resource law reform in NSW

State-governed water resource management in NSW, which now must also give effect to the Basin Plan, is primarily the product of a national program of water resource law reform undertaken over the past 25 years by Australian parliaments. This reform program sought primarily to address the competing interests of consumptive water users and the environment. It reflected a shift in the objective of water management from the use of water solely for economic benefit to "finding the right balance between consumption and conservation, to meet both economic and environmental purposes".[3] The state and territory legislation that resulted, including the WMA, reflects the most significant reforms since water resource statutes were first enacted over a century ago.

The objects of the WMA, set out in s 3 of the Act, are, broadly, to provide for the sustainable and integrated management of the water sources of the state for the benefit of both present and future generations. Its objects, in particular, include to apply the principles of ESD, to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and to recognise and foster the significant social and economic benefits to the state *that result from* the sustainable and efficient use of water.

While social and economic benefits to the state are to be explicitly recognised and fostered, the WMA contemplates that these benefits are necessarily tied to the sustainable use of water. The WMA explicitly directs, and the effect of its objects ensures, that the ecological condition and requirements of rivers, wetlands, floodplains, and groundwater systems have the highest priority in the allocation of water as between any competing interests.

Geographically, all of NSW's inland water resources are located within the Basin. It is therefore the state most affected by the Basin Plan in terms of its own water resource management. As a matter of law, the shared objects of the WMA and the Water Act, including their shared underpinning by the principles of ecologically sustainable development, suggest that state

[3] C Guest, *Sharing the water: One hundred years of River Murray politics*, Murray-Darling Basin Authority, Canberra, 2017, p. xi.

and Commonwealth Basin water resource management regimes should fit together seamlessly. However, matters of NSW state politics and policy appear to have given rise to inconsistencies between the law and its application in departmental decision-making.

These matters include:

- the fact that the state agency that had responsibility for water resource management and for leading the intergovernmental negotiations for, and implementation of, the Basin Plan, was the NSW Department of Industry (DOI)
- the so-called "triple bottom line" strategic approach to water resource management of that agency.

That approach was one by which social and economic considerations were at times given greater weight than environmental considerations. This approach was designed as a way of rectifying the perceived "imbalance", and harm to consumptive water users and the communities dependent on them, caused by what are recognised as the explicitly environmental objectives of the overarching Basin Plan.

Ecologically sustainable development and water resource policy reform

At its meeting in December 1992, the Council of Australian Governments (COAG) endorsed a National Strategy for Ecologically Sustainable Development. In previous years, there had been a number of international developments in relation to environment and development issues, including the negotiation of a range of international treaties and conventions.

These developments culminated in the United Nations Conference on Environment and Development (UNCED), which was held in Rio, Brazil, in June 1992, and attended by most of the world's governments. There was a global recognition that the world's pattern of economic growth at that time was not sustainable on ecological grounds. There was a realisation that it is impossible to completely separate economic development issues from environmental issues:

> *…environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction.*

A radical new approach was needed to manage environmental resources in a way that ensured sustainable human progress and development. UNCED called on all nations to develop sustainable development strategies.

In relation to the management of water as a natural resource at this time, both state and federal governments recognised that past practices of over-allocation of water resources had taken a heavy toll on the health of rivers, species, ecosystems and wetlands. It was recognised that water needed to be specifically allocated for ecosystem needs, to address this environmental degradation. In addition, due to increased consumptive water use and competition, the irrigation industry was also concerned about the security of its water supply. As a result, in 1994, COAG agreed to adopt a strategic framework for the efficient and sustainable reform of the Australian water industry. In relation to water resource policy, COAG agreed:

> *…that action needs to be taken to arrest widespread natural resource degradation in all jurisdictions occasioned, in part, by water use and that a package of measures is required to address the economic, environmental and social implications of future water reform.*[4]

A key component of the 1994 COAG agreed strategic framework was that the concept that ESD should underpin all Australian water management.[5] The Commonwealth of Australia 1992 National Strategy for Ecologically Sustainable Development defines ESD as "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased".

ESD has also been described as:

> *…a peculiarly Australian term* [which] *arose in the early stages of a government initiated discussion of sustainable development in Australia in 1990. It seems that the environmental groups, concerned that the sustainable development discussion process would be hijacked by business and industry and interpreted as just economically sustainable development, successfully fought for the inclusion of the ecologically in the 'official' terminology. This is the term that has been used since then in Australia including in legislation and policy.*[6]

[4] S Smith, "Water Reforms in NSW", Briefing Paper No 4/98, NSW Parliamentary Library, March 1998, p. 7.

[5] R Lyster, et al, *Environmental and Planning Law in NSW*, the Federation Press, 2012, p. 306.

[6] R Harding, *Ecologically sustainable development: origins, implementation and challenges*. Desalination, 2016, vol 187, pp. 229–239.

Relevantly, the most important aspects of COAG's reform package for water resource management included:[7]

- the institution of consumption-based pricing for water
- the separation of water property rights from land title
- the implementation of a comprehensive system of water allocations or entitlements, including allocations for the environment as a legitimate user of water
- the determination of environmental water requirements on the best available scientific information
- where the construction of future irrigation infrastructure is proposed, the environmental requirements of river systems are to be met before any harvesting of river resources occurs
- the facilitation of trade in water, subject to the social, physical and ecological constraints of catchments and basin-wide sustainability considerations
- the institutional separation of the roles of water resource management, standard setting and regulatory enforcement and service provision.

Implementation of COAG's reform framework involved the need to address some important and contentious questions, including how existing entitlements to take and use water would be converted to new rights and how water would be allocated to the environment.

In 1996, the Agricultural and Resource Management Council of Australia and New Zealand in conjunction with the Australian and New Zealand Environment and Conservation Council developed National Principles for the Provision of Water for Ecosystems. These principles addressed the question of how water would be allocated to the environment. As noted by Dr Poh-Ling Tan, in his 2002 issues paper for the Murray-Darling Basin Commission:

> *…the report recommended that tensions between consumptive and non-consumptive use of water be resolved as far as possible, by providing water to sustain ecological values of aquatic ecosystems, whilst recognising the existing rights of other water users. However where systems were overcommitted, action including reallocation should be taken to meet environmental needs. Any future allocation should be on the basis that natural ecological processes and biodiversity are sustained. It could be argued that the* Ecosystem Principles *established that where ecological needs and private rights intersect, the former should have priority, because unless the primary needs of aquatic ecosystems are met, human use of resources cannot be maintained over the long term.*[8]

National Water Initiative

In August 2003, in order to "complement and extend the reform agenda to more fully realise the benefits intended by COAG in 1994",[9] COAG agreed to a National Water Initiative (NWI). This was designed to be an enduring national blueprint for water reform, intended to achieve a more cohesive national approach to the way Australia manages, plans for, measures, prices, and trades water.

In 2004, the Commonwealth, state and territory governments entered into two agreements as part of the NWI: the Intergovernmental Agreement on a National Water Initiative (IGANWI) and the Intergovernmental Agreement on Addressing Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin. The second paragraph of the IGANWI usefully summarises the balancing of competing interests and other considerations that underpin the task of water resource management for Australian governments, and the way in which ESD had by then become entrenched as a fundamentally important concept in natural resource management:

> *…in Australia, water is vested in governments that allow other parties to access and use water for a variety of purposes – whether irrigation, industrial use, mining, servicing rural and urban communities, or for amenity values. Decisions about water management involve balancing sets of economic, environmental and other interests. The framework within which water is allocated attaches both rights and responsibilities to water users – a right to a share of the water made available for extraction at any particular time, and a responsibility to use this water in accordance with usage conditions set by government. Likewise, governments have a responsibility* ***to ensure that water is allocated and used to achieve socially and economically beneficial outcomes in a manner that is environmentally sustainable***. (Emphasis added)

[7] Council of Australian Governments, Communique, Attachment A, Hobart, 25 February 1994.

[8] Dr PL Tan, *Legal Issues Relating to Water Use*, Murray-Darling Basin Commission Project, MP2004, Issues Paper No 1, Institute for Rural Futures, University of New England, April 2002, p.1 5.

[9] Intergovernmental Agreement on a National Water Initiative, paragraph 4.

The parties to the IGANWI agreed to implement the NWI:

> *…in recognition of the continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction.*

The parties agreed to substantially implement the NWI by 2010 and, where necessary, to modify existing legislative and administrative regimes to give effect to its objectives. The overarching objective of the IGANWI is:

> *a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes.*

That result was to be reached by the full implementation of the agreement and its objectives. While IGANWI recognised that states and territories retain the vested rights to the use, flow and control of water, it nevertheless required them, where necessary, to modify their existing legislative and administrative regimes to ensure that these objectives could be achieved. In summary, the most important of the agreement's objectives required:

- improved environmental management practices
- the return to environmentally sustainable levels of extraction of all overallocated systems
- security of water access entitlements
- removal of barriers to trade in water
- the recognition and management of connected systems (including surface and groundwater) as a single resource
- the facilitation through policy of efficient and innovative water use
- statutory-based water planning with provision for environmental and other public benefit outcomes.

"Environmental and other public benefit outcomes" were to be specifically identified within statutory water plans and the water management arrangements necessary to meet such outcomes were to be developed and implemented within those plans. Environmental outcomes included maintaining ecosystem function, biodiversity, water quality, and river health targets. Other public benefit outcomes were concomitant with environmental outcomes and included mitigating pollution, public health (for example, limiting noxious algal blooms), Indigenous and cultural values, recreation, fisheries, tourism, navigation and amenity values. The key concept of "environmentally sustainable levels of extraction" was defined as the level of water extraction from a particular system which, if exceeded, would compromise key environmental assets or ecosystem functions and the productive base of the resource.

The IGANWI states that the objective of the parties in implementing it is to provide greater certainty for both investment and the environment. At a broad level, statutory and commercial certainty of private water access entitlements would be provided for, as would statutory recognition and the same level of security for environmental water. On a practical level, these aims would be secured through statutory water management plans. The agreement recognised that there would be trade-offs between these competing outcomes but required that these "will involve judgements informed by best available science, socio-economic analysis and community input". Governments and the community would work together "to determine water management and allocation decisions to meet productive, environmental and social objectives".

These objectives are echoed in and inform the state and Commonwealth legislative schemes that governed water resource management in NSW at the time of the conduct investigated by the Commission. They are objectives that appear to encapsulate a fundamental tension in Australian water resource management between competing private economic rights and ecological needs. How these interests are balanced in a sustainable way – whether they should be given equal weight in that balancing exercise or whether the law requires the protection and restoration of the environment before the optimisation of socio-economic outcomes – is a critical question. It is relevant to an assessment of the propriety of a number of key water resource management decisions made by the department with responsibility for the state's water resource management that are the subject of the Commission's investigation.

The WMA

The history of the state government's restriction of access to, and use of, water in NSW has been neatly summarised in the 2009 High Court case of *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51 at [3], where the Court noted:

> *…successive governments of the State of New South Wales (the State) have long monitored, regulated and restricted access to and use of both groundwater and surface water. Policies have been formulated and pursued so as to achieve equitable access among water users, to mitigate*

> *adverse effects on the environment, and to ensure that water, as a finite and fluctuating natural resource, is able to be replenished for future use. The extraction and use of water has been regulated by statute since 1896, and, in particular, from 1912 principally by the* Water Act 1912 *(NSW) … The* Water Management Act 2000 *(NSW) … provided for the repeal of the 1912 Act.*

The WMA is now the key piece of legislation for the management of the state's water resources. Despite being enacted before the 2004 IGANWI, it embeds the key objectives of that agreement (discussed above) and has been significantly amended a number of times since its commencement on 1 January 2001, particularly in 2004, 2005, 2008 and 2010, to continue to give effect to those objectives. The WMA, as amended, is also part of a wider context of natural resource reforms occurring in NSW in 2003, represented by the *Native Vegetation Act 2003* (NSW), *Catchment Management Act 2003* (NSW) and the *Natural Resources Commission Act 2003* (NSW). This suite of legislation has "attempted to integrate natural resource management within the overall framework for managing natural resources and native vegetation on a catchment basis".[10]

The term "ecologically sustainable development" is included in over 60 pieces of NSW legislation. Section 3 of the WMA explicitly enshrines ESD as a key legislative concept, in that the first of the Act's objects requires that the principles of ESD be applied in the management of NSW's water sources. The WMA does not itself define ESD, however, its dictionary defines the "principles of ecologically sustainable development" as being those set out at s 6(2) of the *Protection of the Environment Administration Act 1991* ("the PEA Act").

The definition in s 6(2) of the PEA Act states at the outset that "ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes". It then goes on to nominate the precautionary principle, the principle of inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (each of which are explained in the statutory definition) as the principles and programs by which ESD can be achieved. As a matter of statutory construction, the implementation of these principles and programs must also be the means by which social, economic and environmental considerations can be effectively integrated in decision-making processes, which are required to apply the principles of ESD, such as those governed by the WMA.

[10] Op cit, Lyster, p. 328.

In June 2000, the Water Management Bill ("the WM Bill") was introduced to the NSW Parliament as a bill to "provide better ways of ensuring the equitable sharing and wise management of the State's water". It was described in the second reading speech delivered by the Hon Richard Amery, then minister for agriculture and minister for land and water conservation, as having arisen out of "the urgent need to prevent harm to the environment and to secure prosperity for future generations".

It was specifically introduced as "strong environmental legislation" but, at the same time, as a means of sharing water resources and maintaining natural ecosystems "so that our communities and industries benefit". In the speech, Mr Amery acknowledged that the *Water Act 1912* was no longer adequate to the task of managing the major irrigation industry in place by 2000 nor the many new water management challenges that could not have been envisaged nearly 100 years earlier. It was different from its predecessor legislation because of its "integrated water management nature", described as a:

> *…holistic approach* [that] *provides for truly sustainable management of water, not just as a valuable resource for industry but as a key element in the natural systems from the catchment to the ocean which sustain our culture, our communities and our economy.*

Mr Amery also emphasised that "water will continue to be managed as a public resource", as it had been since 1912, with control of it vested in the Crown and managed by the government of the day. The "vision" for water management to which the legislation sought to give effect was described as:

> *…a commitment by the community and the Government to managing our water resources in a way that is ecologically sustainable, protects biodiversity, respects Aboriginal interests, enhances water quality, promotes sustainable and beneficial use of the resource by the community and industries and achieves social equity in access to water for current and future generations.*

While it was introduced as a framework for sharing water between environmental and consumptive uses, the WM Bill was also described as providing "for the protection, conservation and ecologically sustainable development of the waters of NSW… [and] for explicit, strategic decisions for protection of water for the environment". The speech noted that this specific protection of water for the environment was not just the fulfilment of the Carr Government's election commitment, but a Murray-Darling Basin Ministerial Council (MDBMC) and COAG requirement.

Such frontline protection of water for the environment was envisaged as being achieved through a community/government partnership in which representative committees would undertake community-based planning, supported by the "expertise, resources and information of government agencies". The role of these committees under the WMA would be to produce draft water management plans for their area that would undergo an extensive exhibition and consultation process, before being signed-off by the government. The intention of this community-based planning process was said to be encouragement of community ownership, locally driven solutions, the "proper recognition of the economic, social and environmental implications of decisions," and more clearly defined and secure rights to access and use water.

As well as entrenching protection of water for the environment and providing for community-based and strategic water management planning, the WMA introduced a streamlined system of buying and selling water rights and the transition of existing water licensing arrangements under the *Water Act 1912* to a new system. The *Water Act 1912* continued to apply concurrently with the WMA until a new water management plan, called a water sharing plan (WSP), had been made for a particular water management area. Generally, when a WSP commenced, the licensing and approval provisions of the WMA were "switched on" in relation to the water sources covered by the plan and the applicable provisions of the *Water Act 1912* were "switched off". Under the WMA, WSPs did not start being made until 1 July 2004. Currently, there are now 58 WSPs in place under the WMA, covering every water management area in NSW.

Section 392 and s 393 of the WMA explicitly state that the "State's water rights" are the rights to the control, use and flow of all water in rivers, lakes and aquifers, all water occurring on or below the surface of the ground and all water conserved by any works that are under the control or management of the minister. The rights to all such water are now vested in the Crown and any right that the owner of riparian land would have at common law with respect to the flow of any river, estuary or lake through or past the land, or to the taking or using of water from any such river, estuary or lake, is abolished.

As a consequence of these provisions of the WMA, the right to extract water in NSW therefore arises, with a few limited exceptions, as a result of a licensing process, whereby water is allocated on the basis of a water access licence (WAL) or entitlement. Under the WMA, all water that flows into an identified water source is allocated to environmental and consumptive or extractive uses (generally understood to be irrigation, town water supply and stock and domestic use) through WSPs. These plans set out the rules for sharing the available water between its competing uses and the rules for the trading of water for a particular water resource area.

The water management principles and duties of the WMA

The WMA contains a number of provisions concerning water management principles and the duty of all persons exercising functions under the Act. There is a significant divergence in the submissions of Counsel Assisting the Commission and those made on behalf of the department on the nature and operation of those provisions, particularly as to the duty or obligation the provisions place on persons exercising "functions" under the Act.

The objects of the WMA are set out in s 3, which is in the following terms:

> *The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the bentefit of both present and future generations and, in particular—*
>
> *(a) to apply the principles of ecologically sustainable development, and*
>
> *(b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and*
>
> *(c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including—*
>
> *(i) benefits to the environment, and*
>
> *(ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and*
>
> *(iii) benefits to culture and heritage, and*
>
> *(iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,*
>
> *(d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,*
>
> *(e) to provide for the orderly, efficient and equitable sharing of water from water sources,*
>
> *(f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,*
>
> *(g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,*

(h) to encourage best practice in the management and use of water.

Section 5 of the WMA enacts the "water management principles". The section, so far as relevant, provides:

1) The principles set out in this section are the water management principles of this Act.

2) Generally—

(a) water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded, and

(b) habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored, and

(c) the water quality of all water sources should be protected and, wherever possible, enhanced, and

(d) the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised, and

(e) geographical and other features of Aboriginal significance should be protected, and

(f) geographical and other features of major cultural, heritage or spiritual significance should be protected, and

(g) the social and economic benefits to the community should be maximised, and

(h) the principles of adaptive management should be applied, which should be responsive to monitoring and improvements in understanding of ecological water requirements.

3) In relation to water sharing—

(a) sharing of water from a water source must protect the water source and its dependent ecosystems, and

(b) sharing of water from a water source must protect basic landholder rights, and

(c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).

Section 9 of the WMA, so far as relevant, provides:

1) It is the duty of all persons exercising functions under this Act—

(a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

(b) as between the principles for water sharing set out in section 5 (3), to give priority to those principles in the order in which they are set out in that subsection.

Plainly, the objects, principles and duties prescribed in the WMA are central to the management scheme established by it. The objects set out in s 3 of the Act prescribe and direct the attention of those who are made subject to the duty or statutory obligation under s 9 of the Act to its stated objects, which importantly include the sustainable and integrated management of the water resources of the state for the benefit of both present and future generations. Section 3 makes plain the fact that the WMA is legislation directed to matters of high public importance both to the present and the future water resources of the state. Where doubt exists as to the meaning to be given to legislative provisions, a legislative statement of the objects of a particular piece of legislation may, in accordance with accepted and well-known principles of statutory construction, assist in resolving uncertainty or ambiguity.

The WMA additionally sets out in s 5 a set of statutory principles, expressed to be "water management principles". These are of two kinds. First, s 5(2) prescribes a set of general principles in sub-paragraphs (a) to (h). Second, s 5(3) prescribes a set of principles concerning water sharing, which provide a clear priority for water sharing that places the needs of the ecosystem above consumptive use.

Section 9(1) of the WMA has two components. The first component picks up, by cross-reference, the principles stated in s 5 of the WMA, and gives operative effect to them. It additionally imposes a duty or obligation on "all persons exercising functions under the WMA" to:

1. "take all reasonable steps" when exercising such functions to act in accordance with the water management principles, set out in s 5; and

2. as between the principles for water sharing set out in s 5(3), to give effect to those principles in the order in which they are set out in that sub-section.

Section 9 of the WMA is framed in terms of "duty" and "functions" and creates the "duty" in the sense of a requirement for "all" those exercising functions under the Act so as to "promote" the water management principles

of the Act. The ordinary dictionary meaning of "promote" is to "support" or to "actively encourage" something. The term "function" is defined in the dictionary to the Act as "'function'" includes a power, authority and duty".

As used in s 9, the section creates a duty in respect of all persons exercising "functions"; that is, when exercising powers, authorities and/or duties. When so understood, "functions" carries a broad meaning and is not limited to "activities", a word employed in other sections of the WMA (for example, s 5(2)(d)). It is clear that the persons who exercise functions under the WMA include public officials and any other persons who are vested with a power, or an authority, or who are under a duty in respect of functions under the WMA.

Returning to s 9(1), it is plain that that provision by its terms imposes an affirmative duty, one which positively requires public officials and/or others exercising "functions" under the Act to take action as specified. The s 9(1) duty by its emphatic terms (as earlier noted) applies to "all persons exercising functions under this Act".

The rationale for the imposition of the s 9(1) duty is not hard to see. The complex and longstanding management of the state's water resources and the failures or inadequacies in effective management over very many years before 2000 led to the enactment of the WMA in that year. The objects of that Act (as noted above) include the provision of sustainable and integrated management of the water resources of the state for the benefit of present and future generations. The provisions of s 9(1) were clearly intended to ensure that all public officials and others exercising functions under the Act, including those involved in discretionary decision-making, were bound to act as s 9 requires, thereby maximising the prospect for fulfilment of the Act's stated objectives in creating the effective management of the water resources of the state – objectives of that kind not having been achieved before the WMA's enactment in 2000.

The written submissions to the Commission on behalf of the department contended for a construction of s 9 that favoured a less stringent or demanding operation of the "duty" specified in that section of the WMA. In paragraphs [29]–[35], it was argued:

> 29. The duty in s.9 is not a duty to achieve a particular outcome, but to take all reasonable steps to promote the water management principles and give priority to the water sharing principles in the order in which they are set out in section 5(3).
>
> 30. This is important to bear in mind when considering CA submissions–particularly the suggestion at [33] – [36] that environmental needs of the water source and its dependant ecosystem are the "dominant consideration". Section 5 sets out principles, not mandated outcomes. As observed by Leeming JA in *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)* [2020] NSWCA 14 at [67] and [132], the principles in s.5 are expressed in general terms, as distinct from mandated rules which will either be obeyed or disobeyed. The obligation in s.9(1)(b) to give priority to the principles in s.5(3) in the order set out is confirmatory of the fact that these principles point in different directions, and adhering to them is apt to turn upon taking them into account to inform the exercise of discretion rather than these principles directly imposing norms of conduct.
>
> 31. The duty in s.9 is a duty of imperfect obligation, to be exercised in the public interest, for purposes of serving a wide range of broadly expressed policy objectives of a character that overlap, conflict and are incommensurable with each other: Randren House at [135] – [136] per Leeming JA.
>
> 32. An element of compromise is necessarily involved, eg between environmental flows and agricultural users, and this can occur in accordance with and promoting the water management principles: see Randren House at [139] per Leeming JA.
>
> 33. Leeming JA observed in Randren House at [124] that like most decisions that apply to a large area, there are apt to be winners and losers. It is for the decision maker to balance the desired environmental outcome, and the chosen method of achieving it, with the beneficial and adverse social and economic consequences.
>
> 34. It must also be recognised that the process of producing a WSP [water sharing plan] involves polycentric decision making: Randren House at [12] per Basten JA referring to Tubbo at [66] – [79]. There is a real danger in focusing on specific parts only of the BDWSP. This has occurred in CA submissions and the submissions in support of CP (corruption prevention) recommendations – addressed in particular in relation to Topic 1 and Topic 2 below.
>
> 35. So too, the dangers of retrospective reasoning must be recognised. Relevantly, the duty in s.9 is the decision to **make** the

> WSP. Subsequent events should not be used to reason backwards that in making the plan, there was a failure to give effect to the principles in s.5 in accordance with s.9 of the WMA. Such analysis, in retrospect, has already been comprehensively undertaken in the NRC Report (the Natural Resource Commission 2019 report of its statutory review of the BDWSP).

It is well accepted that, in applying case law principles, it is essential to bring into account the context, the issues and the factual circumstances of the case. This principle equally applies to the Randren House case upon which submissions on behalf of the department placed some reliance.

The facts and circumstances of that case in which the NSW Court of Appeal examined the provisions of s 5 and s 9 of the WMA bear no relationship to the matters with which the Commission's investigation in Operation Avon is concerned.

Randren House was a case in which the appellants brought proceedings for judicial review challenging numerous decisions, including the making of a minister's plan pursuant to s 50 of the WMA. The appellants argued that the plan was invalid on a suite of administrative law grounds.

In dismissing the appeal, the Court, in summary, observed that:

1. The duty in s 9 was not justiciable in the sense urged by the applicants. Duties that have political but not legal force are not unknown. They are named "duties of imperfect obligation".
2. Section 9 does not give rise to a directly enforceable duty in the manner for which the appellants contended.
3. Those conclusions, however, did not entail that s 9 lacks all content. It was in the nature of a pre-condition to the exercise of a power.
4. Section 9 did not create a duty enforceable at the instance of persons such as the appellants.
5. There was nothing in s 9 or anywhere else in the WMA that suggested that even a serious contravention of the generally expressed "duty" in s 9 spells invalidity.

The decision in Randren House was a case concerning a landowner who challenged the relevant minister's plan, asserting invalidity but failing in the attempt on grounds, amongst other matters, that the claim for administrative law relief at the suit of the landowner was not justiciable.

The concept of "duty" enshrined in s 9, whether or not described as a political or legal duty, is indisputably one lawfully imposed by statute upon "all persons exercising functions under this Act"; that being the exercise by such persons vested with public power or authority or who are otherwise under a duty to exercise the relevant function as specified. The duty prescribed by s 9(1) has practical content.

Contrary to submissions on behalf of the department, it *is* a mandated duty to produce a particular outcome. When a legislature creates a mandatory provision in terms of a "duty" it means what it says. As discussed above, the duty is expressed to produce the outcome of promoting the water management principles (thereby giving effect as a practical matter to those principles) and, in the case of water sharing, to give priority to the principles in s 5(3) in the order in which they are set out in that subsection. In those respects, the persons exercising the specified functions are, by statute, bound to comply with the duty imposed upon them.

The principles referred to in s 5(2) and s (3), to which s 9(1)(a) and (b) make reference, are central to the scheme enacted by the WMA for the sustainable and integrated management of the water resources of the state. The duty prescribed by s 9 is central, not peripheral, to that scheme, in particular, to its integrity and effectiveness. Significant failure or inadequacy in terms of the sustainable and integrated management of the water resources may result from, or arise as, the product of a failure by persons exercising functions under the WMA to comply with the duty imposed by s 9.

The submissions of Counsel Assisting in relation to the duty in s 9 of the WMA are correct in principle and accordingly are preferred on that issue to the written submissions on behalf of the department.

The duty in s 9, to *give priority* to the water sharing principles in their legislated order, is not satisfied by taking all reasonable steps to do so; it is a requirement to do so. To give priority to something is to treat it as more important than anything else (Collins Dictionary). The water sharing principles in s 5(3) are *not* expressed in general terms, like those water management principles in s 5(2), but rather in mandatory terms. As the submissions on behalf of the department note, the obligation in s 9(1)(b) to give priority to the principles in s 5(3) in the order set out is confirmatory of the fact that these principles point in different directions. The Commission does not accept that this means, as contended, that adhering to them is apt to turn upon taking them into account to inform the exercise of discretion rather than these principles directly imposing norms of conduct.

The Commission also does not accept the submission that an element of compromise is necessarily involved – for example, between environmental flows and agricultural users – and that this can occur in accordance with and promoting the water management principles. The Commission considers, rather, that the obligation in s 9(1)(b) unambiguously removes any discretion in the order in which they are to be applied. No other right is to prejudice protection of the water source and its dependent ecosystems or basic landholder rights when it comes to sharing water in accordance with the WMA.

The provisions of s 5 and s 9 referred to above are to be applied as directed. That being the case, there was and is no scope for the "triple bottom line" approach embraced by the department. The failure of the department to concede that reality is a matter of significant concern. It tends to indicate that the department may still adhere to a construction of the duty in s 9 as one that is not directed to producing a "particular income". If it does still so contend, then there is a risk that the error in adopting that "triple bottom line" approach will continue, thereby undermining the statutory scheme established by the WMA. That would be a completely unacceptable outcome, being one that would be contrary to law (namely, the WMA).

Water management plans

The WMA empowers the minister to direct the drafting of water management plans – which are the means for implementing the Act's objects and water management principles set out in s 3 and s 5, including in relation to water sharing – for a water management area established by the minister. These plans are created either by a management committee appointed by the minister or by the minister himself or herself, for any water management area or part thereof for which a management plan is not in force. If it has been made by a committee, and once deemed suitable for public exhibition by the minister, the draft plan must be placed on public exhibition with any information appropriate or necessary to understand the plan and its implications.

Any person may make submissions to the minister concerning the draft plan; however, the WMA is silent as to the weight, if any, to be given to such submissions in the making of a management plan. If made by the minister, it is only optional under the WMA for the minister to place the draft plan on public exhibition. However, in all cases, before making a management plan, the minister must obtain the concurrence of the minister for the environment. These plans are valid for 10 years from their commencement, may be amended throughout their life to ensure continued compliance with legislation, and may be extended or replaced at the expiry of that time.

A significant milestone in the state's implementation of the Basin Plan was the requirement that by mid-2019, NSW submit for assessment by the MDBA, and accreditation by the Commonwealth, 20 water resource plans which are to play a key role in ensuring the implementation of the limits of the quantity of surface and groundwater that could be taken from the Basin for consumptive use. Each of these resource plans was to be developed on the basis of, and include, one or more of the water sharing plans currently in existence. At the time of writing, all of the state's water resource plans have been submitted to the MDBA for assessment prior to accreditation.

The content of a management plan is not mandated by the WMA and it may deal with any aspect of water management, including but not limited to water sharing, water source protection, and drainage and floodplain management. It may contain provisions with respect to the preservation and enhancement of water quality, the kinds of monitoring and reporting requirements that should be imposed as conditions of approvals and the conditions to which access licenses and approvals are to be subject. However, if a management plan *does* deal with water sharing, water use, drainage or floodplain management or controlled activities or aquifer interference activities, then the WMA *does* mandate what are called "core provisions" in relation to each of these aspects of water management, which are matters that must be dealt with by the management plan. The matters with which the water sharing provisions of a management plan must deal are set out at s 20(1) as follows:

> *(a) the establishment of environmental water rules for the area or water source,*
>
> *(b) the identification of requirements for water within the area, or from the water source, to satisfy basic landholder rights,*
>
> *(c) the identification of requirements for water for extraction under access licences,*
>
> *(d) the establishment of access licence dealing rules for the area or water source,*
>
> *(e) the establishment of a bulk access regime for the extraction of water under access licences, having regard to the rules referred to in paragraphs (a) and (d) and the requirements referred to in paragraphs (b) and (c).*

These core provisions once again set up a hierarchy that is reflected throughout the WMA, that posits the environment's water needs ahead of entitlements under WALs. While there is a requirement that, in the course of developing management plans either a committee or the minister is required to have "due regard to the socio-economic impacts of the proposals considered for inclusion in the draft plan", there is no statutory definition

of "socio-economic impacts" nor statutory indication of the meaning of "due regard". In keeping with the primary objects and the management and water sharing principles of the WMA, the Commission considers that whatever regard is had to the socio-economic impacts of the provisions of a water management plan, these impacts should be integrated with, but ultimately subject to, the environmental priorities of the protection and restoration of the water source and its dependent ecosystems.

As discussed further in this report, the Commission finds that the approach taken by the department in relation to aspects of the operation of the WMA was influenced or informed by an incorrect understanding of the Act's objects, principles and duty. In turn, that gave rise at times to an improper exercise of official power or functions by state public officials, which had the effect of operating to the advantage the irrigation sector to the disadvantage of the environment.

Chapter 3: Favouring irrigator interests in the drafting of the Barwon-Darling Water Sharing Plan

Chapters 3 and 4 examine the following issues:

- whether, between November 2011 and October 2012, the Hon Katrina Hodgkinson, former minister for water, acted corruptly in supporting changes to the 2012 Barwon-Darling Water Sharing Plan (the BDWSP), which had been lobbied for by irrigator Ian Cole and were allegedly to his betnefit
- whether the drafting of the BDWSP tended to favour irrigator interests more generally, contrary to the priorities for water sharing set out in the *Water Management Act 2000* ("the WMA"), which place these interests below ecological protection of the water source and basic landholder rights.

The Barwon-Darling water source itself, although only one of the many water resource areas in the vast Murray-Darling Basin, has become the focal point for concerns about water mismanagement in the state. Its location in the semi-arid far north-west of NSW makes the impact on the environment of water scarcity and the over-extraction of water at low flows particularly and starkly apparent.

This chapter also sets out in brief a number of key water management concepts, a rudimentary understanding of which is needed to appreciate the substance and import of many of the allegations raised by the ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped"), and investigated by the Commission.

The BDSWP

The BDWSP is a statutory instrument made under the WMA that sets out the water sharing rules for both the Barwon-Darling unregulated water source and the upper Darling alluvial groundwater source. It commenced in October 2012, just before the Murray-Darling Basin Plan ("the Basin Plan") and is due to expire on 1 July 2023. At the time of writing, the BDWSP has been updated and amended as part of the development of water resource plans required for the state to meet its commitments under the Basin Plan, and is pending assessment and approval by the Murray-Darling Basin Authority (MDBA).

The rules in the BDWSP were developed by the department, with input from the Barwon-Darling Interagency Regional Panel (IRP) and following a process of public consultation. The IRP – consisting of staff from agencies including the NSW Department of Environment Climate Change and Water, the Department of Primary Industries (DPI) and a number of catchment authorities – was first convened in August 2010 and met five times over the planning period. The department did not always adopt the IRP's recommendations. Targeted consultation with key stakeholders, including irrigators, environmental and Indigenous reference groups, commenced in November 2010.

The peak water user representative body for the Barwon-Darling was the Mungindi-Menindee Advisory Council (MMAC), headed by cotton farmer and horticulturalist Mr Cole. Mr Cole made regular submissions on behalf of MMAC throughout the plan's development, arguing that the Barwon-Darling irrigators had already endured a significant cut in their entitlements in 2006, when an agreement was reached with the state government in relation to a cap management strategy for the area, to bring water extraction in the Murray-Darling Basin back to 1993–94 levels. Mr Cole's lobbying was principally directed at ensuring that the proposed BDWSP rules took no more water away from consumptive users.

The draft plan was publicly exhibited between October and December 2011 and a number of written submissions were received from stakeholders. A number of key issues were raised following public exhibition and the IRP recommended some changes to the draft water sharing

rules. On 1 June 2012, the department submitted a final plan and briefing to Ms Hodgkinson for her approval and a final plan was gazetted and commenced on 4 October 2012.

There were significant changes between the version of the plan that was publicly exhibited and the final gazetted version. Contentiously, these changes enabled a significant increase in consumptive water users' capacity to access water at low flows, to the rate at which it could be extracted and to the amount of water of all licence classes that could be accrued, which has been to the detriment of the environment and downstream users. Mr Cole, on behalf of MMAC, specifically lobbied for the removal of the draft plan's proposed restriction on individual water take to 450% of annual allocation over a three-year period. The final plan removed that restriction and set annual extraction rates for A-, B- and C-class licences at 300% of their share component and allowed for unlimited carry-over and continuous accounting rules. This meant that there was no longer any restriction over a three-year period on the amount of water that could be extracted from the water source, which had intended to operate as a protection for the environment. In addition, any unused water allocation could be carried over from one year to the next, where previously it had been capped.

The rules in the gazetted plan provided for significantly more generous water take limits and account balance accrual than the rules in the draft plan. Mr Cole also lobbied for recognition in the plan of certain circumstances when irrigators should be able to access water below the cease-to-pump thresholds, which found their way into the final plan.

When the final BDWSP commenced, individual daily extraction limits (IDELs) contemplated by the plan were not implemented and pump-size limitations were removed for each class of licence. These were matters that had *not* been lobbied for by Mr Cole, but they had the effect that licence-holders could now extract water at low flows faster and more efficiently with bigger pumps and without the restriction of an enforceable daily extraction limit.

Why the Commission investigated

The *Four Corners* program, "Pumped", aired the allegation that certain rule changes in the final, gazetted BDWSP allowed irrigators more access to water than had been the case in the draft version, and were introduced following extensive lobbying from irrigators. The program alleged that these rules enabled increased access to low flow or A-class water and that a small number of large water users have benefitted from this increased access while downstream users, communities and the environment have suffered as a consequence.

One of the matters that the Environmental Defenders Office (EDO) requested the Commission to investigate following the *Four Corners* program was the circumstances surrounding the making of the BDWSP; specifically, the changes between the draft and gazetted versions of the plan, who lobbied for these changes and who benefitted from them. The EDO alleged that the changes allowed significantly larger volumes of water to be extracted than would have been the case under the draft version, thereby increasing the value of properties on the Barwon-Darling.

In September 2019, the Natural Resources Commission (NRC) published the report of its statutory review of the BDWSP. This review was brought forward at the request of the Hon Niall Blair, former minister for regional water, as a result of public concern over the mass fish deaths immediately downstream of the BDWSP area in late 2018 and early 2019.

The NRC examined the extent to which the 2012 BDWSP had contributed to the significant stresses placed on the Barwon-Darling ecosystem at a time of unprecedented drought. It examined changes to the water

sharing rules in the area covered by the water sharing plan (WSP) and concluded in its report that these changes had "resulted in an increased allowance for extractive use at lower flow classes that are critical to the environment" and "benefit the economic interests of a few upstream users over the ecological and social needs of the many".

The Commission's investigation obtained evidence consistent with this conclusion. It also found, however, that the situation identified by the NRC was significantly contributed to by implementation issues with the BDWSP, specifically the non-implementation of IDELs and the removal of pump-size restrictions, which were matters not lobbied for by the few upstream users who may have benefitted economically as a result of them.

Background

The Barwon-Darling has a long and complex water management history. The historical and policy context of the development of the BDWSP sheds light on some of its unique features and provisions, and is also necessary to understand the rationale and import of the more contentious rule changes between its draft and gazetted versions and the way in which some of these rules deviated significantly from rules applying in other unregulated river systems. This context is directly relevant to certain of the allegations of corrupt conduct investigated by the Commission.

Submissions made on behalf of the department urged the Commission to recognise that the process of planning and preparing what ultimately became the BDWSP extended over 14 years, from 1998 to 2012, and that that history must be given due weight in assessing the final two years of the process. It was submitted that the Commission must recognise the history before 2010 in order to fairly and accurately assess the planning process, including the extent to which, it was contended, "reasonable steps were taken in planning the BDWSP to promote the water management principles with the priority required by s 9".

The Commission has given significant consideration to the historical and policy context of the making of the BDWSP in investigating whether, in accordance with its jurisdiction, allegations of corrupt conduct concerning the minister in the making of that WSP could be established. It is important to note that the Commission's scrutiny of the process of the making of the BDWSP is for a different purpose from the assessment of that process reported on by the NRC.

The Commission's investigation has considered the extent to which those exercising functions under the WMA in relation to the BDWSP have adhered to the duty in s 9 of the WMA. As discussed in the previous chapter, the Commission does not accept the characterisation of that duty in the submissions on behalf of the department. On the proper construction of the provision of s 9, it is clear that the unambiguous and unqualified duty of all persons exercising functions under the WMA is to give priority to the water sharing principles in the order set out in s 5(3), namely:

> *(a) sharing of water from a water source must protect the water source and its dependent ecosystems, and*
>
> *(b) sharing of water from a water source must protect basic landholder rights, and*
>
> *(c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).*

Submissions on behalf of the department also contend that the duty in s 9 is the decision to *make* the WSP and that subsequent events should not be used to reason backwards that, in making the plan, there was a failure to give effect to the principles in s 5 in accordance with s 9 of the WMA. The Commission does not accept that the duty in s 9 is so confined. The language of the statute is clear that it is the duty of all persons exercising functions under the Act to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of the Act and to give priority to the water sharing principles in the order in which they are set out in s 5(3).

The Commission considers that the duty in s 9 clearly applies not just to the making of the BDWSP, but also to its implementation and to all decisions in relation to water sharing made under the WMA. The Commission has considered the department's compliance with that duty in its development and implementation of the BDWSP insofar as this is relevant to the allegations of corrupt conduct that are the subject of its investigation.

The Barwon-Darling unregulated and alluvial water sources

Rivers in NSW (surface water) are either regulated or unregulated. Regulated river systems are those with major dams or storages at their headwaters from which water is released in order to meet downstream system needs. Unregulated river systems, on the other hand, rely on rainfall and natural inflows rather than water released from storages such as dams. Licence-holders on unregulated systems access water opportunistically when river flows permit. Licensed pumping is permitted when the river reaches a certain specified height (commence-to-pump height) and is prohibited when the river falls to a certain specified height (cease-to-pump height) at certain river reference points. Water in the

river below the commence-to-pump height is reserved for the environment. Gauging that monitors flows, and metering that monitors extraction, is therefore essential for ensuring that water take in unregulated systems is legal. This is to be contrasted with regulated systems, where water releases can be readily quantified and water take readily identified.

The Barwon-Darling is an unregulated, semi-arid lowland river system running approximately 1,600 kilometres through the far-west of NSW. It is formed by the Barwon River, which extends from 25 kilometres upstream of Mungindi at the NSW border, becomes the Darling River north of Bourke, and reaches to just below Wilcannia and the artificial storage of Lake Wetherell, one of the Menindee Lakes.

The Barwon-Darling's catchment covers a large area of the northern portion of the Murray-Darling Basin and the river provides connectivity between the higher-rainfall catchments and rivers of the Northern Basin and the more arid Southern Basin. All of its major tributaries, many of which are regulated, flow into the river upstream of Bourke. Downstream of Bourke and further to the west, the Paroo and Warrego rivers contribute infrequent flows, other than during flood events. For this reason, as well as the low contributions of local groundwater and a concentration of irrigation water take around Bourke, flows in the Darling River generally decrease downstream of Bourke.

The whole river system experiences highly variable flows; from extended periods where the river stops flowing altogether, to periods of low flow, to small pulses or freshes, to large overbank flows, and to floods. The river's low gradient and its connected branches and wetlands make it prone to broad flooding in periods of high flows. The catchment also experiences significant climatic and rainfall variability, prolonged droughts, high summer temperatures and high evaporation rates.

The 2019 NRC report noted that the Barwon-Darling's varied and ecologically significant ecosystems:

> *…are adapted to the natural climatic variability and rely on the changing flow regime to maintain the presence of pool refuges and provide flooding events that connect the river and surrounding floodplain.*

The connectivity between the northern and southern Murray-Darling Basin and the varied habitats that the Barwon-Darling provides is critically important for regional communities of native fish and other aquatic species. Fifteen species of native fish, including vulnerable or endangered species, such as the Olive Perchlet, Murray Cod, Silver Perch and Freshwater Catfish, are known to inhabit the Barwon-Darling. Its aquatic community is part of an Endangered Ecological Community listed under the *Fisheries Management Act 1994* (NSW). In addition, the Barwon-Darling provides major bird foraging and breeding sites and habitat for a number of endangered and vulnerable bird, frog and vegetation species.

The Barwon-Darling River also supports many regional towns, including Broken Hill, Bourke, Brewarrina and Walgett, and is of importance to the Indigenous nations and communities who rely on and are connected to it. The majority of the land use in the catchment area is grazing and dryland cropping, with approximately only 3% (applicable to the period 2011–2016) used for irrigated agriculture, which is primarily concentrated between Mungindi and Brewarrina and around Bourke. The main irrigated crops in the catchment are cotton, fruit, nuts and grapes. Although only 3% of the land use is irrigated agriculture, this industry, and particularly cotton production, dominates water use in the catchment. While there are no major public irrigation water storages along the river, there are a number of large, private off-river storages that store water for irrigation that has been extracted primarily by pump during flows or harvested from floodplain run-off.

Water sharing plans

Water Sharing Plans (WSPs) have been progressively developed for the rivers and groundwater systems across NSW since the introduction of the WMA and are a requirement under that Act. The plans are statutory instruments setting out the rules governing how water is to be shared sustainably between the environment and water users over a 10-year period in the water source(s) covered by the plan. The first plan was developed in 2004 and there are currently 58 plans in force.

For some unregulated areas within the Murray-Darling Basin, including the Barwon-Darling, the NSW Government's development of WSPs coincided with the Commonwealth Government's development of the Basin Plan. Those plans that took effect before the Basin Plan commenced in November 2012, were considered an interim water resource plan under the *Water Act 2007* (Commonwealth) and, those made after the Basin Plan's commencement, were required to be accredited by the Commonwealth minister in accordance with Basin Plan requirements. The BDWSP, which commenced just before the Basin Plan was adopted and is not due to expire until 1 July 2023, is an interim water resource plan for the purposes of the Commonwealth legislation. A draft water resource plan and amendments to the exiting BDWSP have recently been submitted for assessment and approval by the MDBA prior to accreditation.

Water access licences under the WMA

As each WSP commenced under the WMA, the licensing provisions of the WMA came into effect in the plan area, and the provisions of the *Water Act 1912* accordingly ceased to have effect. Any pre-existing *Water Act 1912* licences were converted to WMA water access licences (WALs), water supply works (such as water pumps, bores, dams, weirs and irrigation channels) and use approvals (such as for irrigation or for all purposes other than basic landholder rights, which are described by the WMA as domestic and stock, harvestable or native title rights). On the date a WSP commenced, the old *Water Act 1912* licences and approvals were immediately replaced by the new licensing and approval arrangements under the WMA.

WALs consist of a share component and an extraction component. The *share component* of a WAL entitles the holder to a specified volume of, or specified shares in, the water annually available for extraction within a particular water management area. The water available for extraction in a water source is called the long-term average annual extraction limit (LTAAEL).

A WAL's *extraction component* entitles the holder to take water at specified times, rates or circumstances from specified areas or locations. It includes the commence-to-pump and cease-to-pump thresholds for certain classes of unregulated river licence. A separate approval is required to install and operate a work, such as a pump, dam or bore (works approval) and to use water for a particular purpose, such as irrigation (use approval). WAL holders can only take water if the water allocation account for that WAL is in credit and the water is taken through a water supply work nominated on that licence.

Under the WMA, WALs differ in a number of significant ways from licences under the *Water Act 1912*. They:

- are granted in perpetuity
- provide a clearly defined entitlement that is separate from land ownership
- separate the entitlement to access water from the approvals associated with water supply works and the use of water.

The separation of land and water rights allows licence-holders to trade water and move it to its highest value use. A water supply works approval or a water use approval authorises its holder to carry out an activity at a specific location on a property. While the works approval and water use approval cannot be traded to another property or location, nominated works can be amended under the WMA. This means that, on conversion of an old *Water Act 1912* licence to a licence under the WMA, a licence-holder could seek approval to nominate a different-sized pump to that of the pump "attached" to the old licence. The opportunity this automatic, new capacity suddenly presented for irrigators in the Barwon-Darling – to extract low flow or A-class water using much larger pumps than had previously been possible – had significant, deleterious consequences for the environment and downstream users. It is discussed further below.

Division 4 of the WMA provides for a range of water transactions or water "dealings", which include:

- the sale or transfer of the ownership of a WAL
- the sale of account water
- a change in the specified water supply work with which, or the location from which, a WAL holder can extract water from a water source
- the sale of the share component or extraction component of a WAL or the subdivision or consolidation of a WAL.

Water ordering, water accounting and trade of account water (known as temporary trades) could proceed immediately on conversion of the old *Water Act 1912* licences. Most other dealings could only be carried out after release of the water access licence certificate.

Under the WMA, water is credited to the accounts of WAL holders according to an available water determination (AWD), made at the start of each water year. This defines what proportion of the share component is available for extraction under each category of licence. Generally, unless management action is required to bring a water source back to the LTAAEL, the AWD is equivalent to 1 million litres per unit share. If action is required, an AWD of less than 1 million litres may be made for a period of time until the water source is back to its LTAAEL.

A water allocation account is established for each licence and is credited with water when the AWD is made and debited when water is extracted. A licence-holder's account is not permitted to be in debit. Water meters are the key tool for the measurement and monitoring of water usage and meter readings, along with all customer water orders are entered into the WaterNSW water accounting system. Water users must have compliant metering equipment installed to allow accurate reporting, either automatically or manually, of water take.

Generally, unregulated river access licences operate under three-year account management rules. These provide that AWDs, combined with carry-over (of the unused water allocation from the previous year), enable licence-holders to use up to twice their water allocation in a year, as long as, over a consecutive three-year period, they do not exceed the sum of their water allocations for those

three years. In unregulated rivers, the maximum amount of unused water allocation that can be carried over from one water year to the next is, generally, 100% of the share component; in other words, carry-over is not unlimited and a restriction on use of 300% of annual water allocation applies over a consecutive three-year period.

Legislative hierarchy of priorities

WSPs provide the legal basis for sharing water between the environmental needs of the river or aquifer and different types of consumptive water use, such as domestic supply, stock watering, industry and irrigation. As discussed in the previous chapter, under the WMA, priorities in the sharing of water are clearly legislated. The sharing of water must protect the water source and its dependent ecosystems and must protect basic landholder rights (defined as domestic and stock rights, harvestable rights or native title rights). The sharing or extraction of water under any other right, such as WALs, must not prejudice these protective principles.

The rights of licensed water users are therefore lower in priority than the protection of the environment and basic landholder rights. It is the legislated duty of all persons exercising functions under the Act to give priority to the water sharing principles in the order in which they are legislatively set out. As between the different categories of WALs, the priorities are also legislated. The WMA provides that local water utility access licences, major utility access licences, and domestic and stock access licences have priority over all other access licences, including those for commercial purposes, such as irrigation and industry, unless a management plan (WSP) provides for different rules of priority between these different categories of licence.

Environmental water

In accordance with the legislated priorities for water sharing, WSPs are required to reserve water for the overall health of the river and to protect specific ecosystems that depend on river flows, such as wetlands, lakes, estuaries and floodplains. WSPs for unregulated rivers do this by first establishing LTAAELs for licensed entitlement holders and other water users. The remainder of the water in the river is the environment's "share" and rules are required to protect it for environmental purposes. In addition, these plans set out access rules, or cease-to-pump rules, which apply to the majority of unregulated river access licences. Water users must cease-to-pump when the flow at a specified river reference point is equal to or less than the flow rate specified for each category of WAL in a particular plan management zone. Generally, the plans limit access to water below the cease-to-pump threshold to prevent extraction at the very low flows which are critical to the environment.

In the unregulated Barwon-Darling system, flows can only be protected for the environment through controls imposed on extraction. The health of ecosystems in unregulated rivers is most at risk during drier periods, when flows are naturally lower. This is when water quality can quickly deteriorate, oxygen levels decline, pools contract and algal blooms occur. Low flows, which are part of the natural flow regime, are essential for the maintenance of a river system. They contribute to ecological resilience by providing connectivity along channels, allowing movement and some small-scale breeding opportunities for aquatic animals and influencing water quality by flushing algal blooms and reducing salinity. They must be protected, not just for the health of the river system and its dependent ecosystems, but for the quality of town water supplies and the social wellbeing of communities, including Indigenous communities. Concerns about the Barwon-Darling's declining ecological health and the adverse impact of water extraction, particularly at low flows, are longstanding and increasing.

The Cap and events preceding the BDWSP

In the 1980s, expansion of large-scale irrigation in the Barwon-Darling, particularly to grow cotton, increased water use in the catchment. Concerns about declining river health led to an embargo in 1987 on the issue of any new entitlements.

In 1988, to protect low river flows, general access licences in the Barwon-Darling were converted into different classes of licence which entitled holders to extract water at specified river flow heights. A-class licences entitled holders to extract water when commence-to-pump flow levels were set at low flows. These licences had an authorised pumping capacity not exceeding 5 megalitres (ML) per day, which equated to a pump diameter size of 150 millimetres. B-class licences had an authorised pumping capacity not exceeding 80 ML per day, which equated to a pump diameter size of between 610 mm and 660 mm, and C-class licences were entitled to extract at rates greater than 80 ML per day. B- and C-class licences were set at flow levels (moderate and higher) designed to ensure that enough flow was protected to meet downstream requirements.

By the early 1990s, all licences supporting broad-scale irrigation had been converted to an annual quota, and all large irrigators had their extractions monitored in each river reach with "time and event" meters.

In 1991, chronically low flows in the Barwon-Darling caused a major blue-green algal bloom over almost the entire 1,600 kilometres length of the river. This heightened awareness of the river's environmental health and prompted

further efforts to improve flows. In 1994, this culminated in an audit of water extractions across the Basin by the Murray-Darling Basin Ministerial Council (MDBMC). The MDBMC found that the level of water being diverted or extracted was placing stress on the environmental health of the Basin's river systems and on the reliability of supply to water users. In 1995, the MDBMC introduced a limit on water extraction in the Basin known as "the Cap", which was formalised for each of the Basin States in Schedule E of the Murray-Darling Basin Agreement. For NSW, the Cap was defined as the average yearly volume of water that would have been diverted under 1993–94 levels of development and management rules.

The Cap was implemented in most Murray-Darling Basin valleys in 1997, but it was not until 2006 that it took effect in the Barwon-Darling. Unlike the regulated valleys, the Barwon-Darling had no mechanisms in place to limit growth in water use. Between the 1993–94 benchmark Cap year and 2000–01, there was significant investment in on-farm storages and cropped areas and modelling showed an *increase* of 10% in water diversions. In 2000–01, environmental flow rules that lifted commence-to-pump thresholds for licences were introduced but modelling indicated only a modest 4% overall reduction in extractions as a result. A Cap management strategy for the Barwon-Darling took six years to develop.

In March 2006, the then NSW minister for natural resources signed a non-legally binding heads of agreement for a Barwon-Darling Cap management strategy (CMS) with the NSW Water Administration Ministerial Corporation, MMAC (chaired by Mr Cole), Bourke Shire Council, Clyde Agriculture, Darling Farms and the NSW Irrigators' Council. The CMS was to be implemented from 1 July 2006. Agreement had been reached about the need to limit extraction levels along the Barwon-Darling river system and a fair and practical way in which this could be managed to allow irrigators to plan for the future. The media release that announced the agreed CMS quoted Mr Cole as saying: "[T]he agreement has been a long time coming, and we are pleased the Government has listened to our needs and worked with us to deliver a real and positive solution".

A key plank of the strategy to bring the valley's extractions back to Cap and keep them there was the imposition of an initial 173 GL (173 billion litres) LTAAEL. This represented a significant reduction from the total of 524 GL that had previously been licensed for annual extraction in the Barwon-Darling; although, not all of this had been used on a yearly basis due to the existence of a large number of inactive or sleeper licences. In fact, in 2003, prior to the Cap's implementation, average annual water use in the Barwon-Darling was only 209 GL. Each licence-holder in the Barwon-Darling was given a share of the reduced Cap.

For inactive licence-holders, this represented only a nominal reduction in water entitlements. However, as Mr Cole has submitted to the Commission, for some larger active irrigators, including the large family group of which Mr Cole was a shareholder, this cut of two-thirds of their entitlements forced them to purchase more water from the market to maintain their pre-existing level of annual activity. This was necessary to maintain equity with their banks, to maintain their number of employees and infrastructure and to prevent the sudden stranding of assets on their developed farms. Mr Cole submitted to the Commission that some Barwon-Darling irrigation businesses, including that of his own family group, did not survive the combined effects of the ongoing drought and the reduced Cap share.

The CMS also allowed special accounting rules to offset the reduction in entitlement caused by the reduction from a 524 GL annual volumetric limit (AVL) to a 173 GL Cap. The maximum amount that could be taken by a licence-holder in any one year was their original AVL and there was no limit on account volumes. This unlimited carry-over and continuous accounting enabled licence-holders to carry-over the unused portion of their water entitlement to the following year and permitted account water to accrue indefinitely. Water accrued in dry years, when crops were not planted, could be used in wet years.

To further mitigate the immediate socio-economic impacts on irrigators from the CMS, a number of more short-term strategies were implemented (including a 200% allocation for all licence-holders for the first year, and a share in an additional 150 GL over and above the annual 173 GL Cap) to allow irrigators two to three years of "normal" over-Cap water use in order to adjust their operations.

Although the NSW Government was confident that the CMS would ensure that the Cap was not exceeded over the long-term, the strategy was not sufficient to prevent a breach of the Cap in the short-term, according to Schedule E of the Murray-Darling Basin Agreement, to which NSW was a signatory. By late 2009, the MDBA had determined that, since the implementation of the CMS, the cumulative diversions in the Barwon-Darling river valley were continuing to breach Schedule E. It requested that NSW provide advice to the MDBMC on the additional measures the state proposed to implement to return diversions to within Cap in the valley within a shortened period of time.

Evidence obtained by the Commission indicates that, in response, in early 2010, the Hon Phillip Costa, then minister for water, proposed that commencing in the 2010–11 water year, the government would introduce additional measures to the CMS. It was proposed to further reduce the annual allocation for Barwon-Darling

licensed users from 173 GL to 143 GL for a period of 10 years, with a corresponding reduction to individual allocations of their Cap share. In addition, in lieu of unlimited carry-over and continuous accounting, it was proposed that licence-holders would be limited to a carry-over of 200% of their annual allocation and would be required to balance their account on a three-yearly basis. This meant that over a three-year sequence, the amount of water that could be extracted by a licence-holder would be capped at 300% of their annual allocation. The proposed arrangements, which were noted to be opposed by water users and industry groups, were to be included in the WSP for the Barwon-Darling river valley, then due to be completed in 2010.

In June 2010, the MDBMC agreed to a one-year delay sought by Mr Costa to the introduction of NSW's proposed Barwon-Darling Cap response. This was to enable diversions in the wet 2009–10 water year to be assessed. It was agreed that, should the Barwon-Darling 2009–10 diversions continue to be viewed by the Independent Audit Group (IAG) and the MDBA as in breach of the Cap, the proposed response would be implemented with effect from 1 July 2011.

Between Mr Costa's proposed Cap management response and the audit of 2009–10 diversions, the coalition won government in NSW. There had been considerable hostility expressed towards the proposed response on the part of water users and refinement of the modelling used to estimate Cap was ongoing.

In November 2011, the NSW Commissioner for Water announced that refinements to the model used to estimate the Barwon-Darling Cap had determined that the Cap could now be set at 198 GL. This meant 25 GL more water available on an annual basis for licence-holders than the existing allocation, and 55 GL more than the allocation previously proposed by Mr Costa.

The IAG had reported the valley to have an accumulated Cap debit of 346 GL by the end of the 2009–10 water year; under the revised model, it was claimed the valley had a small Cap credit of 2 GL. An interim Cap management plan was proposed for 2011–12 involving the distribution of shares in the 198 GL revised Cap to Barwon-Darling licence-holders, but allowing no access to accrued account water. The purpose of this interim strategy was to constrain water use to a maximum of 198 GL to allow time for the revised model to be peer reviewed and accredited by the IAG for Cap auditing purposes.

Some Barwon-Darling water users complained to the department that, because they were not allowed access to their accrued account water as a result of this strategy and were close to using up their individual share of the 198 GL, they would have insufficient water for the coming year if the dry conditions recurred in 2012-13.

In January 2012, the Commissioner for Water announced an additional "borrow forward" arrangement, which would allow water users in an expression of interest process to gain access to their 2012–13 Cap share in the 2011–12 water year. This arrangement was announced as providing an opportunity for water users to divert and/or store water from current flows, which would be an advantage, should 2012–13 be a dry year, while ensuring that no more than the long-term Cap was used by the valley over the 2011–12 and 2012–13 water years. While these interim measures would potentially result in further short-term over-extraction, it was noted that the interim arrangements would be superseded by the BDWSP, which would set in place long-term measures to ensure Cap management, and that was, by then, in an advanced stage of planning.

It was against this backdrop that the BDWSP was developed in the period between early 2010 and its gazettal on 4 October 2012; just a month before the adoption by the Commonwealth Government of the Basin Plan.

The BDWSP planning process

Evidence obtained by the Commission indicates that there was some pressure on the department to get all of the WSPs in the NSW Murray-Darling Basin in place prior to the commencement of the Basin Plan. A key plank of the Basin Plan was the setting of limits on the quantities of surface water and groundwater that could be taken from water sources within the Basin. These "sustainable diversion limits" would replace the Cap set by the MDBMC. If a WSP were in place before the Basin Plan commenced, it would set the benchmark against which any sustainable diversion limit imposed by the Basin Plan could be measured. Any reduction in access to water required by the Basin Plan would then be compensable by the Commonwealth. NSW Treasury asked the department to complete all WSPs prior to the commencement of the Basin Plan in order to ensure NSW industry was protected from reduced access.

In April 2010, the department began planning for the development of the BDWSP. The IRP was formed, comprising regional staff from agencies including the NSW Office of Water (NOW) itself, the Department of Environment Climate Change and Water, the Department of Industry and Investment, DPI, and a number of catchment management authorities. It first convened in August 2010, and met in person or by teleconference five times over the planning period. The IRP had responsibility for reviewing the existing water sharing rules in the

plan area for their continued applicability and making recommendations to the department about the water access and dealing rules that would apply in the plan, but their recommendations were not automatically adopted. The WSP rules were ultimately developed by the department and, in some instances, the evidence indicates that these clearly diverged from the IRP recommendations.

In November 2010, targeted consultation with key stakeholders commenced. The peak water user representative body for the Barwon-Darling was MMAC, later Barwon-Darling Water (BDW). The president of MMAC at the relevant time was Mr Cole. He was also managing director and a 20% shareholder with his wife of a large cotton and irrigation family company, Darling Farms, owned by the Buster Farming Group, which was established in the 1960s by Mr Cole's wife's family. MMAC's members included irrigators, local councils, graziers and other water users with basic stock and domestic access rights. Targeted consultation also took place at separate meetings with the environmental groups Darling River Action Group and the Inland Rivers Network, and with the Western and Border Rivers-Gwydir Catchment Management Authority Aboriginal Reference Groups.

The draft plan was formally exhibited from October to 18 December 2011, during which time public information sessions were held and feedback and submissions were received. On 1 June 2012, the department submitted a briefing and final plan for ministerial approval to Ms Hodgkinson. Ms Hodgkinson approved the plan for gazettal on 6 September 2012 and the Hon Robyn Parker, minister for the environment, gave formal concurrence prior to its gazettal and commencement on 4 October 2012. The changes made from the draft plan, which benefitted irrigators, are set out later in this chapter.

The Commission's investigation: changes between the draft and the final BDWSP

In accordance with the Commission's jurisdiction, the Commission's investigation focused on whether the changes between the draft version of the BDWSP, which was publicly exhibited in October 2011, and the final version of the BDWSP, which was gazetted in October 2012, were made corruptly to favour the economic interests of Mr Cole's family business specifically and Barwon-Darling irrigators, more generally. The Commission investigated whether Ms Hodgkinson acted partially towards Mr Cole's family business interests, particularly, or irrigators, more generally, in approving these changes.

The Commission broadly examined the approach taken by the department to the development of the BDWSP rules and whether this approach was consistent with the priorities for water sharing required by the WMA. The Commission further investigated whether the significant increase in Barwon-Darling water users' capacity to access water at low flows following the commencement of the BDWSP, which has been to the detriment of the environment and downstream users, was the result of any corrupt or improper conduct. In particular, the Commission investigated whether it was a result for which Mr Cole lobbied, in either his capacity as a water user representative or his private capacity as a representative of his family's company, and whether it was to the benefit of that family company's interests, as alleged.

The Commission examined documents obtained from the Department of Primary Industries – Water (formerly NOW) relating to the WSP development process, including ministerial briefings, minutes from IRP meetings, targeted consultation and public information sessions, internal departmental communications and correspondence with stakeholders, as well as written submissions.

The Commission interviewed a large number of individuals involved in the development of the BDWSP or affected by it as stakeholders. Those interviewed included:

- Daniel Connor, coordinator of the BDWSP planning process at the department
- Lyndal Betterridge, manager of water planning at the department
- Mitchell Isaacs, departmental liaison officer at Ms Hodgkinson's office
- Paul Simpson, director of surface water management at the department
- Amy Burgess, hydrologist within the WSP implementation team at the department
- Sam Davis, senior fisheries conservation manager at NSW Fisheries
- Peter Terrill, Office of Environment and Heritage (OEH) member of the IRP
- Ian Cole, chairperson of Barwon-Darling Water
- Geoff Wise, general manager of Bourke Shire Council.

The Commission conducted an analysis of changes between the planned and final provisions of the BDWSP between the first IRP meeting in August 2010 and gazettal of the BDWSP in October 2012. The Commission also analysed extensive financial material in relation to

Mr Cole's family's business interests during and following the development and gazettal of the BDWSP.

Mr Cole's lobbying on behalf of MMAC

The evidence obtained by the Commission indicates that Mr Cole took issue with a number of the access and accounting rules originally proposed in the draft BDWSP and that he lobbied hard and consistently against them on behalf of the members of both MMAC and Darling River Food and Fibre, the two peak water user groups whose interests he represented. Over the period between the public exhibition of the draft in October 2011 and August 2012, Mr Cole attended targeted consultation and public information meetings, communicated on numerous occasions by email with Mr Connor, enlisted the support of the Hon Kevin Humphries, local member and minister for western NSW, and drafted extensive written submissions following the public exhibition of the draft BDWSP. Following the public exhibition, he continued to communicate regularly with senior departmental officers, met with Ms Hodgkinson and then wrote to her on a number of occasions, and addressed an IRP meeting in person on behalf of MMAC to highlight aspects of the group's written submissions.

The Commission finds that Mr Cole's submissions were largely consistent throughout this period. Evidence indicates that Barwon-Darling irrigators believed that the department and other state government agencies wanted to further erode their water entitlements from the 67% reduction they had already agreed to under the CMS. They had little trust in the WSP process, asserting that their previous agreements had not been implemented by the state government as promised, other than those elements to the detriment of industry.

The Commission finds that Mr Cole's main lobbying efforts on behalf of Barwon-Darling irrigators were directed towards reminding the department of the commitments made to industry during the CMS process, seeking their full implementation and resisting any further reduction in irrigators' entitlements or access to water. MMAC's five main areas of concern with the publicly exhibited draft WSP, all of which concerned proposed limits to the availability of water, reflect these aims. These are discussed below.

Access to carry-over accounts – clause 37(3) and clause 44(4) of the draft plan

Mr Cole's submissions on behalf of his members noted that the 2006 heads of agreement in relation to the Barwon-Darling CMS had provided for the conversion of licensed entitlements into new "Cap-compliant" shares that could be carried over during a dry period and continuously accounted. He submitted that the use of carry-over water through continuous accounting, as agreed, "is absolutely critical to the integrity and survival of the irrigation industry on the Barwon-Darling River following the major cuts" made in 2006–07 under the CMS. He acknowledged that, in the drier-than-average sequence of years following the introduction of the CMS, pumping had increased the cumulative Cap debt of the Barwon-Darling under Schedule E of the Murray-Darling Basin Agreement. However, he asserted that this was only a "short-term spike" in Cap debits and a natural feature of the long-term Cap strategy on the Barwon-Darling when coming out of a drought. Irrigators have to, first, fill their storages, use the water and then refill storages, all in one year. A *long-term* Cap strategy means, precisely, that, over the long-term, average extractions can never exceed annual Cap share limits. He argued that the MDBMC's request for NSW to address this issue in the *short-term* was inconsistent with the CMS and had ever since caused problems in the relationship between MMAC and the department over Cap issues.

Given that the recent refinements to the model used to estimate the long-term annual diversions under Cap baseline conditions in the Barwon-Darling were showing a combined Cap credit in the valley, Mr Cole argued that any additional measures beyond the 2006 CMS were no longer required, including the interim strategy that prohibited access to accrued account water. He submitted that all sections of the draft WSP should be amended to reflect this.

The minister's ability to impose restrictions on Barwon-Darling irrigators outside the terms of a normal WSP – clause 37(3) and clause 44(4)

Mr Cole's submissions noted that the draft plan anticipated the minister being able to announce AWDs of less than 1 ML per unit share and replacement account management rules to further limit the volume of water taken by an individual in a series of water years. As discussed above, this was a feature of WSPs for unregulated rivers where management action was required to bring the water source back to the LTAAEL.

Mr Cole submitted that, for the same reasons as in relation to proposed limitations on access to accrued account water, this ministerial power was no longer required to address short-term Cap concerns raised by the MDBMC. Given that the LTAAEL is already set at Cap, and there is no way over a long-term climatic sequence for diversions to exceed Cap, the rule was unnecessary. He argued that all that the draft rule did was to take away the certainty the WSP was meant to provide licence-holders. He claimed that these "arbitrary restrictions are not applied in any other NSW water sharing plan".

The unnecessary restriction on water use of 450% over 3 years – clause 44(3)

The rules of the draft BDWSP set annual extraction limits for each class of licence at 300% of their share component. In effect, this would have the same impact on water extraction as the pre-existing annual volumetric limit (AVL), which had been reduced by two-thirds as part of the CMS (discussed above). Unsurprisingly, this rule was uncontentious to the irrigators that Mr Cole represented. As he noted in his submissions on behalf of MMAC, there were no concerns about the draft BDWSP's proposed replacement of the existing AVL with an annual restriction of 300% of Cap share on each existing licence. He noted that this would have no impact on individual licences or total extractions and that it made sense to use language that "modernises and simplifies the limitation concept".

Mr Cole submitted, however, that MMAC members were not happy with the proposed further restriction on water extraction to no more than 450% of Cap share over any three consecutive years, which a minister's note to the draft plan stated was:

> *…intended to prevent access licence holders changing their irrigation patterns to become more opportunistic, thus limiting the potential for short-term average annual extractions to be significantly larger than the long-term annual average extraction limit. Modelling has been used to select a limit expressed as a volume of share component (Cap share) that would have minimal impact on individual access licence holders and total extractions from the water source based on current irrigation behaviour using over 119 years of available climate data. This modelling indicates that a limit of 450% of access licence share component over three consecutive water years will reduce total irrigation long-term average annual extractions from the water source by 0.5% and will not impact long-term extractions of any individual licence holder by more than 4.6%.*

Mr Cole submitted that this proposal added an unnecessary additional layer of restriction and that short-term water use on the Barwon-Darling River was already controlled by the Cap and environmental flow rules (the cease-to-pump rules), which had been developed and agreed by a range of stakeholders, including relevant government agencies, irrigators, environmentalists and community representatives. He argued that the opportunistic pumping on the Barwon-Darling tended to occur during times of high flow and that low flows are protected by the pumping thresholds. He submitted that it made no sense to further restrict opportunistic pumping of high flows, which had been shown by the department's own modelling and research to have minimal environmental impact. The Barwon-Darling was a "boom and bust" river, with irregular flows and large variability in diversions. Water users must be able to utilise the "good years", knowing that the dry years will happen.

He submitted that the proposed rule was influenced by the department's experience in regulated valleys, which have more regular flows and less variability in diversions. He contended that, while it may appease the MDBMC by preventing significant debits from building under Schedule E, it is "wrong for government to change the rules and try to insert a short term outcome into a long term model".

Flexibility of the water trading rules

Under the 2006 heads of agreement, each Barwon-Darling water licence received a Cap share of the total 173 GL. One of the long-term mitigation strategies offered to irrigators to offset the impacts of the Cap was to allow active licence-holders to transfer Cap share from one of their licence classes to another (for example, from their B-class to their A-class licence).

The purpose of this concession was to allow active water users to reinstate their history of use to that which existed prior to the issuing of Cap shares to all users (even inactive ones). Each licence eligible for a concessional conversion was subject to a concessional conversion limit and the conversions occurred within the existing pool of Cap shares available, so that no new shares would be created and growth in usage above Cap levels could not occur. The conversions only changed the number of shares in each licence class, but not the number of shares overall. Under the heads of agreement, concessional conversions were to continue under the rules of the BDWSP for the first year of the plan only. This was reflected in the rules of the draft BDWSP.

Mr Cole's submissions noted that MMAC supported the recommendation of the IRP that dealing rules in the BDWSP should be set up to guard against potential third-party and/or localised environmental impacts. He argued that there should be greater flexibility in the proposed rules. Specifically, Mr Cole argued that the restriction of concessional conversion take up to the first year of the plan's operation should be removed in order to give irrigators time to recover from the recent drought. He also submitted that irrigators should be given time to ensure that the IDELs proposed in the draft plan correctly reflected individual irrigator behaviour and that trading between river sections (as well as within river sections) should be allowed.

The proposed dropping of the notwithstanding clause from Barwon-Darling licences

One of the most contentious issues for MMAC water users in the draft plan was the proposed removal of the so-called "notwithstanding" clause from licence

conditions. Almost all existing Barwon-Darling licences had a condition that, *notwithstanding* all other conditions, allowed the licence-holder to apply for access below their cease-to-pump level to very low flow class water. Historically, such access had been granted mainly to A-class licence-holders who had small pumps and no storage, in situations which included when a flow event was imminent; thereby, allowing a licence-holder to take water prior to the flow arriving and "pay it back" after the flow arrived, or when a small volume of water was required to finish a valuable crop.

In his submissions, Mr Cole suggested other possible "notwithstanding scenarios" might include certain circumstances where a flow may not deliver an environmental benefit, and so could be extracted without environmental or downstream impact, or in situations where there is a hiatus in policy announcements or there are decisions pending from departmental authorities at state and Commonwealth levels. He argued that the use of the notwithstanding licence provision was a form of "adaptive management", enabling "responsible balancing between environmental and economic outcomes".

Besides addressing these five key areas of concern in relation to the draft BDWSP, Mr Cole's submissions on behalf of MMAC expressed support for the imposition of IDELs. He suggested, however, that, as IDELs were a new concept in the Barwon-Darling and could take some time to be established, a stakeholders group could be established in 2012 to resolve issues around the necessity of any trade restrictions pending their imposition.

Evidence indicates that Mr Cole's repeated requests of local member Mr Humphries eventually led to a meeting on 15 February 2012 between a delegation of MMAC members and Ms Hodgkinson, principally to discuss Barwon-Darling Cap management issues. Mr Humphries, ministerial policy advisers and a number of DPI senior officers (including Richard Sheldrake, then director-general) were also in attendance. Although no minutes of that meeting are available to the Commission, the evidence indicates that Mr Cole sought the opportunity to personally put the matters outlined in his written submissions before the minister and to seek the incorporation of the original Cap agreement in the BDWSP, with no further measures required.

The evidence indicates that the IRP accepted Mr Cole's offer to present in person MMAC's submissions to the panel's fourth meeting on 13 March 2012. Minutes from the meeting indicate that the presentation given by MMAC members, Mr Cole and Mitchell Abbo, at the start of the meeting, was entirely consistent with the submissions lodged during the public exhibition period. Neither Mr Cole nor Mr Abbo participated further in the IRP meeting following their presentation.

Recommendation by the Department of Fisheries

The minutes of the fourth IRP meeting on 13 March 2012 indicate that Sam Davis, senior fisheries conservation manager at the NSW Department of Fisheries ("Fisheries"), also attended the meeting. Ms Davis told the Commission that Fisheries had made a submission on the draft WSP during the public exhibition period and again in a memorandum dated 8 March 2012. On the basis of the latter submission, she had been invited by the department to present some data and technical information to the IRP meeting. She told the Commission that she was not a member of the panel and had no role in the drafting of the BDWSP. Ms Davis said that Fisheries was concerned that the draft BDWSP did not provide adequate protection for environmental water and there was therefore likely to be further degradation of the aquatic system as a result.

Fisheries' submission on the draft BDWSP, dated 18 December 2011, noted its concern that the plan had become a nine-year plan (with a review set in 2019 rather than 2014 as previously advised). The nine-year plan did not include sufficient rules to secure environmental outcomes in low and medium flows to ensure the maintenance and recovery of the dependent aquatic ecological community of the Barwon-Darling. It noted that critical shepherding rules and clauses to allow flows to pass through the system were missing and required inclusion in the plan to protect the upstream environmental water contribution from other valleys. It noted that the draft BDWSP's "vision statement" appeared to indicate that areas that were degraded would not be provided for, which was inconsistent with the principles for water sharing planning under the WMA. Accordingly, it recommended the inclusion of a five-year review period for consistency with other WSPs and to allow any additional relevant information to inform the rules at that time.

Fisheries' submission also argued that the ongoing Cap debit in the Barwon-Darling valley should be "repaid" before any adjusted model was endorsed. It cited the CSIRO *Sustainable Yields Report*, which concluded that water resource development in the valley had nearly doubled the average and maximum periods between substantial flows in connected and dependant ecosystems on the Barwon-Darling. It argued that the rule allowing water users to take three times the share component of their access licence in a water year was formulated to "mitigate private risk for extractors without making any genuine adjustment or consideration for the environment".

Fisheries noted that while the department had indicated that its modelling showed that there would be no negative impacts on individual access licence-holders or total irrigation extractions from the water source as a result of

this rule, there had been no assessment of the potential impact on the environment.

Fisheries' submission also noted its concern with the inadequacy of the discretionary clause allowing the minister to impose embargos on B- and C-class licences to protect environmental values, including outcomes for fish passage and breeding, and water quality. It recommended that the clause require the development of guidelines about when, and under what conditions, it could be invoked to ensure that the environmental values were adequately considered and protected in the decision-making process. Fisheries also submitted that proposed pumping threshold rules had not been revisited since their formulation a decade earlier, had not been adjusted in response to any new or emerging supporting science or change in policy, and were inadequate to address the Barwon-Darling's declining river health.

The minutes of the 13 March 2012 IRP meeting indicate that Ms Davis gave a presentation to the IRP on matters concerning the ecological importance of the Barwon-Darling for native fish, including the existence of six vulnerable/threatened species within the water source's aquatic ecological community. The minutes show that she conveyed to the IRP Fisheries' concerns that the access rules in the draft BDWSP were based on the 2000–01 environmental flow rules, which had been created before many of the threatened species were determined and listed. As noted in the March 2012 memorandum, Fisheries was particularly concerned that no adjustment had been made to the flow classes adopted in 2000–01 and that there appeared to have been no consideration of available scientific information concerning the impact of extraction or changes to the environment over the previous decade.

The minutes record that the IRP discussed Fisheries' concerns with the draft plan. While the IRP specifically acknowledged the legislated priority of the environment over extractive use in the WMA, it determined that:

> *…given the consultation that has already occurred late changes as significant as changing access rules would not be possible, although the consideration of new science information could be considered by a specific amendment clause.*

The minutes indicate that the IRP endorsed, in principle, that the plan should allow for amendment to the existing flow classes/access rules or the establishment of new rules after year five. Such amendment would be contingent on demonstration to the minister's satisfaction that the existing access rules did not adequately protect an endangered aquatic ecological community or any threatened fish species within the Barwon-Darling water source.

The Background Document to the BDWSP states that:

> *…over the last decade, Fisheries NSW (and its predecessor organisations) has been undertaking research into the water requirements of native species of threatened fish within the water sharing plan area. Unfortunately, this research was not in a form that could be considered by the IRP during the development of this plan.*

The Commission finds, however, that there was, in fact, relevant scientific information available to the IRP during the development of the plan. The submissions made by Fisheries following public exhibition of the draft BDWSP from October to December 2011 had, themselves, noted that data from the Sustainable Rivers Audit and the CSIRO's *Sustainable Yields Report* was then available. This data suggested that the health of the Barwon-Darling was in decline at that point and that water resource development in the valley had "nearly doubled the average and maximum periods between substantial flows and connected and dependent ecosystems on the Barwon-Darling". The data also indicated that the Darling valley fish community was in poor condition and that "hydrological issues directly related to water management are having negative cumulative impacts on native fish populations, including fish passage opportunities and reduction in flood return intervals".

The gazetted BDWSP contained a limited and heavily qualified concession to the concerns expressed by Fisheries (discussed further below).

The IRP's recommended changes post-public exhibition

The evidence indicates that, in April 2012, the department provided those stakeholders, who had made submissions on the draft BDWSP during the public exhibition period, with an outline of the changes to the draft plan recommended by the IRP. The department noted that IRP recommendations may not always be adopted because the plan is made by the minister for primary industries with the concurrence of the minister for the environment. In summary, the IRP's principal recommended changes were:

- recognition of historical "notwithstanding" access in the Barwon-Darling for survival watering of permanent plantings and for access to imminent flows for A- and B-class licences
- in response to the concerns expressed by Fisheries, amendment to access rules in the Barwon-Darling after year five of the plan, if current access rules were shown to be having an adverse impact on endangered aquatic ecological communities or an individual listed threatened fish species, with the proviso that:

  - any such amendment did not substantially alter long-term diversions under A-, B- and C-class licences
  - socio-economic impacts were taken into account
  - the minister consulted with relevant government agencies and stakeholders
- IDELs were to be assigned to licences on commencement of the plan and calculated and established on the basis of the sum of average pump capacities for all authorised pumps attached to each *Water Act 1912* licence. This was to ensure that the rate and timing of water extraction could not increase above the limits imposed by the pump-sizes authorised under the old *Water Act 1912* licences. IDELs would be a way of carrying forward the existing licensing policy rules and rates of daily extraction, even though pump-sizes for A-class licences would be allowed to increase under the new WMA licences (as discussed further below). The IRP noted, however, that, while notional IDELs were to be included in the Background Document to the plan on its commencement, they would only be established when management systems were in place
- total daily extraction limits (TDELs) were to be established for each river section and licence class
- concessional conversions would be permitted within and between river sections for a defined period consistent with the period suggested in the 2006 heads of agreement.
- prior to the establishment of IDELs, trading in account water would be allowed without restriction within and between river sections and trading of rights and the nomination of works would only allowed between river sections to the limit of the licence's AVL at the commencement of the plan
- once IDELs were established, there would be no restrictions on nomination of works and trading of allocations and rights, but no trades in the extraction component between river sections would be permitted.

Peter Terrill, the OEH representative on the IRP, told the Commission that the most contentious issue for the IRP, and one that nearly every member of the panel was opposed to, was allowing access below the cease-to-pump levels for survival watering and imminent flows. This was because any water below this threshold is the environment's water, and therefore access to it, is always at the expense of the environment.

He told the Commission that "notwithstanding" access was a legacy from a time when the department was a lot more supportive of irrigators, recognised the Barwon-Darling as "a boom or bust" river system that was difficult to establish irrigation on, and thought that there ought to be a little leeway to the rules. The IRP, however, saw the WSP process as an opportunity to properly define the environmental share for the river and the rules for the irrigator and saw maintaining this "notwithstanding" allowance as a grey area that allowed the environmental share to be taken by the irrigators.

The minister's involvement

On 15 May 2012, following receipt of the outline of the IRP's recommendations, Mr Cole wrote to Ms Hodgkinson, on behalf of MMAC, now called Barwon-Darling Water (BDW), outlining a number of further suggested amendments to the draft BDWSP. Although the letter thanked the minister for the opportunity to comment on the IRP recommendations, there is no evidence available to the Commission to indicate that the minister in fact offered such an opportunity to Mr Cole after the public exhibition period.

Mr Cole's letter reiterated irrigators' concerns about any attempt to remove "notwithstanding" clauses from licences and it took issue in particular with the IRP proposal that the BDWSP include a provision to amend flow thresholds after year five of the plan, in accordance with Fisheries' submissions. Mr Cole submitted that, although the proposed amendment had attached conditions and safeguards, BDW feared that it would be used to further restrict access and damage the irrigation industry in the region. He repeated his previous submissions that the agreed Cap and current environmental flow rules adequately controlled water use and quoted from a note in the draft plan itself that stated:

> *…the Long-term average annual commitment of water to the environment in the Barwon Darling River Water Source has been estimated to be 2,607GL per year. This equates to approx. 94% of the long-term average annual flow in this water source.*

In these circumstances, he argued there was "no logic in further restrictions".

On 1 June 2012, the department submitted a briefing to the minister recommending that she seek the concurrence of the minister for the environment and approve the draft WSP for gazettal. The briefing noted a number of contentious issues arising from submissions received during the public exhibition of the draft, some of which were outside the scope of the WSP. These key issues were identified as:

- Cap management
- recognition of historical approvals to access water below the cease-to-pump
- incorporation of a new information on the requirements of threatened species of native fish within the Darling River Endangered Ecological Community
- administrative systems to manage IDELs.

Evidence available to the Commission indicates that, following the department's submission of the draft BDWSP for approval, the minister requested advice on the option of including an amendment provision that would allow the minister to amend the plan rules, if necessary, to allow consideration of different types of circumstances for "notwithstanding" access that may arise. Evidence indicates that this request followed her meeting with Bourke Shire Council, at which was discussed types of access below the cease-to-pump thresholds. On 19 June 2012, Mr Isaacs, water and fisheries departmental liaison officer at Ms Hodgkinson's office, emailed Ms Betterridge, manager of water planning at the department, noting that the IRP had not recommended such an amendment provision but that the minister specifically requested advice on including one.

On 20 June 2012, Ms Betterridge responded by email, saying that, from a legal perspective "such an amendment may be seen to threaten the commitment of planned environmental water". She advised that it was also likely to raise concern for concurrence, as OEH was not likely to support such an amendment because of its view "that it would open the door for the erosion of environmental water that is necessary to support fundamental ecosystem processes". Ms Betterridge suggested, however, that an extra amendment provision for accessing flows below cease-to-pump thresholds could be included in the plan and that the risk of not obtaining concurrence could be mitigated by the stipulation that the minister consult with relevant NSW Government agencies and stakeholders before amending the plan. This suggestion made its way into the gazetted BDWSP.

Evidence indicates that Mr Cole wrote two letters to Ms Hodgkinson on 31 July 2012, raising further issues of concern with the draft BDWSP and the recent reduction of the Cap from 198 GL to 189 GL, which had resulted from revision of the model, and seeking an opportunity to discuss this in person with the minister. There is no evidence available to the Commission that he was invited to make further comments by the minister, that she agreed to discuss these matters with him in person, or that she responded to Mr Cole's correspondence of 15 May 2012 or 31 July 2012, until after the BDWSP was gazetted on 4 October 2012.

Evidence obtained by the Commission indicates that some time between Ms Hodgkinson's approval of the draft BDWSP on 6 September 2012, and her signed order formally making the BDWSP pursuant to s 50 of the WMA on 19 September 2012, the minister for the environment provided formal concurrence. In doing so, Ms Parker wrote that she had been advised that the plan "reflects the recommendations of the Interagency Regional Panel as amended by feedback from public consultation".

Changes between the draft and gazetted versions of the BDWSP lobbied for by Mr Cole

The Commission's investigation examined whether the changes to the draft BDWSP that were lobbied for by Mr Cole on behalf of Barwon-Darling water users during the planning process were reflected in the final, gazetted version. The Commission finds that many of the significant changes that were made between the draft and final versions were favourable to irrigators and did align with Mr Cole's submissions, but that not everything he lobbied for was accepted and incorporated by the department in the finalised plan.

Significantly, by the time the BDWSP was gazetted, the Cap had been reduced from 198 GL to 189 GL due to revisions in the model, resulting in a corresponding reduction of 9 GL annually available for irrigation when the LTAEEL was set under the BDWSP. Although not a matter within the scope of the BDWSP, Mr Cole had written to the minister to express concern about the unfairness of the reduction and stated in relation to it that the "continual focus on finding new and innovative methods to take water from Barwon-Darling irrigators is disappointing".

Mr Cole had argued consistently throughout the planning process for a reinstatement of the long-term Cap management strategy agreed to under the 2006 heads of agreement, and that there was no need for any short-term intervention in the event of a Cap breach. However, the final BDWSP contained "step-in" powers for the minister to impose limits on the maximum volume of water able to be taken by licence-holders over a three-year consecutive period, in the event that the MDBMC considered the Barwon-Darling to be in breach of Schedule E of the Murray-Darling Basin Agreement.

Mr Cole had similarly lobbied for the removal of the minister's ability to announce reductions in available water determinations where, in the minister's opinion, it was considered necessary to return extraction in the water source to the LTAEEL. However, the final BDWSP contained provisions enabling the minister to do this from

the second year of the plan's effect in the case of A-, B- and C-class licences, and from the fourth year of the plan's effect for aquifer access licences.

Mr Cole had taken issue with the IRP proposal to address the concerns raised by Fisheries by including a provision in the BDWSP that enabled the amendment of flow classes/access rules after year five of the plan. Such a provision was included in the final BDWSP, albeit with significant inbuilt protection of irrigator interests; namely, that any proposed amendment must not, in the minister's opinion, substantially alter the long-term average annual extractions under unregulated A-, B- or C-class licences and must take into account the socio-economic impact of the proposed rules.

Mr Cole had argued for the removal of any time limit on concessional conversion rules in the draft plan. The final BDWSP permitted concessional conversions for the first five years of the plan, consistent with the period originally envisaged under the CMS and a substantial increase from the two months originally allowed for in the draft plan. Mr Cole had argued against the restriction of trade in year one of the draft plan to concessional conversions and trading within a river section. He argued that trading between river sections should be allowed from the plan's commencement. The finalised BDWSP allowed trade within river sections without restriction and trade *between* river sections up to the existing total AVL, from year one.

One of the most significant and contentious changes between the draft and the finalised plans, which reflected the outcome sought by Mr Cole on behalf of MMAC, was the removal of the restriction on individual take of 450% over three years. The finalised plan allows an annual take limit of 300% and no limit to the amount of unused water that can be carried over from one year to the next.

Mr Connor told the Commission that modelling conducted following the public exhibition of the draft plan had shown that there would be no difference in long-term outcomes between a 450% limit over three years (as provided for in the draft plan) and no limit on take over a three sequence (as under the CMS). In both cases, he advised that the long-term diversions were modelled at 9% below the Cap long-term average. Mr Connor told the Commission that "we didn't attempt through this process – at any stage – to put a limit on, for environmental purposes. It was … only ever about maintaining compliance with the Cap".

Evidence obtained by the Commission indicates that, on 6 June 2012, the department provided the minister's office with some additional information on contentious issues in the proposed BDWSP. In relation to Cap management, the department advised that several recent changes to the Barwon-Darling Cap model, then in the process of accreditation by the IAG, had resulted in a 23 GL increase in the Cap. That modelling was also said to demonstrate:

> *…that introducing an individual take limit of 450% of share component applying over three consecutive water years, as originally proposed in the draft WSP that went on public exhibition, would not improve schedule E compliance and hence would not achieve its intent. Not only would this rule not improve schedule E performance but it would impact upon the diversion patterns of current water users, consequently it has been removed from this version of the draft WSP.*

The briefing advised that the department considered that the proposed approach struck a "reasonable balance" between meeting the expectations of the MDBMC and "honouring previous commitments made by Government to Barwon-Darling water users".

The second significant change between the draft and finalised versions of the BDWSP, that aligned with a change lobbied for not just by Mr Cole on behalf of the water user groups he represented, but by most of the other irrigators and local councils that made submissions, was the recognition in the plan of certain circumstances in which irrigators may seek access to water below the cease-to-pump thresholds.

Not all of the historic "notwithstanding" access categories that had been in place prior to the commencement of the plan were formalised in the final plan, but those categories that were recognised – namely faulty gauges, domestic and stock watering – survival watering and imminent flows for A- and B-class licences, corresponded with the scenarios put forward in Mr Cole's submissions. As discussed above, the final plan also reflected the minister's intervention in relation to this issue by including an amendment provision allowing further scope to consider access categories not already covered.

The Commission finds that the two most significant changes to the final plan that aligned with Mr Cole's submissions were made by the department in accordance with the primary motivation driving its development of this plan; namely, that there would be no further reduction in licensed entitlement to that already imposed by the CMS in accordance with the 2006 heads of agreement. The unlimited carry-over and continuous accounting rules that replaced the initially proposed 450% over-three-years limit on take reflected the situation applying under the CMS and the recognition of access below cease-to-pump thresholds mostly reflected pre-existing or historic access. The Commission's investigation found considerable evidence that the department's approach to the development of the BDWSP was to maintain the status quo for water users.

The department's approach to the WSP development

While the IRP viewed the planning process as an opportunity to set rules that properly defined and protected water for the environment, in keeping with the legislated priorities for water sharing in the WMA, the evidence available to the Commission indicates that the department took a more conservative and irrigator-focused approach to the task.

Mr Connor told the Commission that, between 2010 and 2012, what the department effectively did in the final stages of the development of the BDWSP was look back at the considerable reforms that had been achieved in the Barwon-Darling over the previous approximately 20 years, including the Cap management strategy and other agreements, through a "triple bottom line lens".

In his view, the considerable inroads that had been made over the previous 20 years to protect the environmental values of the system had involved constant change for water users and had significant impacts on them. In his view, the entitlement reduction program agreed to by government and industry in 2006, while possibly not the best outcome for the environment, was something the Barwon-Darling was stuck with. As the water planning coordinator for the area, Mr Connor did not believe his charter was to impose further reform and further impacts on water users:

> *…it wasn't – do what you can do, we've got an open cheque book here, you just go in and protect the needs of the environment. It was – this is what you've inherited, there are a bunch of decisions made before you entered this playing field; do your best. And … we did and I think it served to consolidate all that stuff that went before it. And … it served to give that security going forward which set a playing field for, I guess the Basin Plan and other things to happen further down the track.*

Mr Connor told the Commission that there were a number of ways in which the department "took account of environmental values and sought to progress the protection of those" through the BDWSP. The first of these – albeit, as he conceded, not implemented – was to set up a process to implement IDELs, intended to provide a "market based mechanism for protecting those environmental flows on an event by event basis through the Barwon-Darling".

The second way was to allow no *new* extraction from lagoons and billabongs, and the third way was to replace the "carte blanche type access" that licence-holders were historically granted via their "notwithstanding" condition with something that was more narrow, proscriptive and reasonable in the department's view. He also cited the plan's amending provision to change access thresholds in order to better cater for the environmental requirements of native fish, as another example of meaningful improved outcomes for the environment achieved in the WSP planning process.

Mr Connor told the Commission that the take limits ultimately set by the BDWSP were never intended to protect environmental outcomes, but were "only ever about maintaining compliance with the Cap". For this reason, the BDWSP's take limits reflected the CMS, which allowed unlimited carry-over and no limit to annual take. The justification for not further limiting licence-holders' annual take, or even their take over a three-year sequence, was that licence-holders had been given a share of the long-term cap. No matter whether annual take limits were applied or not, he asserted that *long-term* average diversions would always be below Cap because of this fact.

Mr Connor told the Commission that, during the course of the BDWSP drafting process, the level of direct contact from Mr Cole was common to all such stakeholders, and there was nothing about it that he considered inappropriate. In relation to Mr Humphries' involvement, as both the local member for Barwon and the minister for western NSW, Mr Connor acknowledged that he took a "very keen interest" in making sure that the department answered everything that irrigators raised. Mr Connor said that, while he was very aware that Mr Humphries was "looking over [their] shoulder" and they were constantly being asked to justify how they had responded to the irrigators' issues, he did not believe he was ever directed to do anything differently from what he would have done anyway.

Mr Connor told the Commission that he was never exposed to an attempt by Mr Humphries to seek to make changes or influence the drafting of the BDWSP, although he considered Mr Humphries to have at times pushed the needs of irrigators in a way that saw him act beyond his portfolio. He told the Commission that there was definitely no such push from Ms Hodgkinson.

Ms Betterridge told the Commission that, in her view, Ms Hodgkinson was "quite a reasonable Minister" and "there wasn't any particular bias in her approach". She considered that the department had followed "due process" in getting the BDWSP approved and thought that they had achieved a good outcome. She told the Commission that the department had always known the BDWSP was going to be a difficult plan because of its:

> *…history of being difficult to manage and having strong user interests, so I guess it was the reputation that preceded it and hence why you'd put the better people on it because you knew it was going to be a tough negotiation and you wanted the right people in the room to have those conversations.*

In his interview with the Commission, Mr Isaacs, departmental liaison officer at Ms Hodgkinson's office when the BDWSP was being drafted, described the government's priority in relation to WSPs at that time as being the "triple bottom line approach or, or a really balanced outcome between environmental, social and economic concerns". He noted that the minister for primary industries had a clear interest in promoting primary industries and the government at that time had a very strong focus on regional economic development. Accordingly, the government did not want to be putting in place any laws that were counter-productive to that development. At the same time, the government was in the later stages of negotiation in relation to the Basin Plan and it feared that the Basin Plan was going to have a significant, unnecessary impact on NSW water users.

Mr Isaacs also told the Commission that at this time:

> *…there was a strong concern from a lot of regional MPs that the water sharing plans and the Basin Plan were unfairly favouring environmental concerns over water users. They wanted to make sure that water users weren't being unfairly impacted by rules thought up by bureaucrats.*

Mr Isaacs told the Commission that, while the focus of the government at the time, including Ms Hodgkinson, "was on economic development and not so much on environmental protection", there were nevertheless statutory obligations in relation to environmental protection, which the minister was mindful of despite that economic development focus. He told the Commission that the minister was:

> *…usually trying to find the best outcomes for water users in NSW, while meeting her obligations to other organisations or other statutory instruments. But she was definitely far more focused on socio-economic than environmental outcomes*

He believed that this approach was in line with government policy at the time.

Mr Simpson, who was involved in the processes leading up to the commencement of the BDWSP, but particularly in relation to consultation on Cap management issues, told the Commission that water users in the Barwon-Darling were "particularly unhappy" with some of the Cap provisions that were implemented in the BDWSP. He said that this feedback from stakeholders affected the "government's willingness to try and push for a reform versus a plan that was more like codifying the current arrangements".

In addition to not wanting to further antagonise water users, Mr Simpson told the Commission that the imminent commencement of the Basin Plan and the Commonwealth's assertion that it would come in over the top and take control of certain complex issues, meant that the state government's attitude was to leave some of the more contentious matters for the Commonwealth to address. He said:

> *I think there was a certain attitude at the State level – 'So, well, if you think you can fix it, be my guest. You can deliver the bad news to the water users if that's what it's going to take and we won't do that. You wanted to be in charge, well, now you're in charge'.*

The Commission's findings

The minister's involvement

Ms Hodgkinson submitted to the Commission that she does not know Mr Cole, either personally or socially, and has had no personal dealings with him. She has no specific recollection of the things for which Mr Cole may or may not have agitated within her ministry or the department, but she was not influenced by him, or anyone on his behalf, to act or not act in any particular manner or to provide any benefit to him.

The Commission is satisfied that the only involvement of the minister in making changes to the draft BDWSP that was put forward for her approval by the department was to request the inclusion of a provision enabling the consideration of additional circumstances when access to water might be granted to irrigators below cease-to-pump thresholds. The evidence indicates that this request was made by the minister following her meeting with Bourke Shire Council and not directly as a consequence of lobbying by Mr Cole.

The Commission is satisfied that Mr Cole lobbied consistently on behalf of the water users he represented, with the aim of keeping the department to the commitments made to industry during the CMS process, and resisting any further reduction in irrigators' entitlements or access to water. Many of the issues about which he made submissions were favourably reflected in the final gazetted BDWSP, but the Commission does not find that there was anything improper about the nature or timing of his lobbying.

The department's approach to the BDWSP

The department's approach to its task in the development of the BDWSP is explicit in the plan itself. The overarching "vision statement" at clause 9 of the plan, which is "to provide for healthy and enhanced water sources and water dependent ecosystems and for equitable water sharing among water users in these water sources", may be considered broadly consistent with the requirements

of the WMA and its water management principles. However, elements of the plan's stated objectives, at clause 10, indicate a deviation from those principles for water sharing set out in s 5(3) of the WMA, which it is the duty of all persons exercising functions under the Act to give priority to in the order in which they are set out. This entails prioritising the protection of the water source and its dependent ecosystems and basic landholder rights over any other right to share or extract water.

While the first two objectives of the BDWSP appear to reflect the mandatory protective principles set out in the WMA in relation to water sharing, there is a significant qualifier in the first objective. The first objective of the plan is to "protect, preserve, maintain and enhance the *important* river flow dependent and *high priority* groundwater dependent ecosystems of these water sources" (emphasis added), where neither "important" nor "high priority" are defined. The Commission notes that the mandatory protective principles in the governing Act apply to the whole water source and its dependent ecosystems without qualification or limitation.

The BDWSP's next objective is to "manage the water sources to ensure equitable sharing between users". This objective reflects an object of the governing Act, although it is not one of the water management principles, either generally or specifically, that the WMA requires to be applied in relation to water sharing. Significantly, a head note to clause 10 of the BDWSP, which sets out the plan's objectives, states:

> *…water sharing plans must include a vision statement, objectives consistent with the vision statement, strategies for reaching those objectives and performance indicators to measure the success of those strategies.* ***Socio-economic impacts were a major consideration*** *in the development of the rules in the plan and are reflected in the objective to 'manage the water sources to ensure equitable sharing between users'.* (Emphasis added)

The evidence indicates that this note was not in the draft plan that was publicly exhibited. There is no evidence available to the Commission to indicate when or why this note was added. Section 18 of the WMA requires that, in formulating a draft management plan, the management committee (or the minister in the case of a minister's plan made under s 50) must have "due regard to the socio-economic impacts of the proposals considered for inclusion in the draft plan". The Commission finds that the note to clause 10 of the BDWSP indicates that significantly more than "due regard" was had to such impacts in the drafting of the plan.

The Commission finds that this note, which uses the language of the "triple bottom line" and reflects evidence given to the Commission by Mr Connor, Mr Isaacs and others, was a clear message to water users. The evidence obtained by the Commission in its investigation indicates that in the language of the "triple bottom line" approach adopted by the department, socio-economic considerations are those that relate to irrigation and industry and they are "balanced" with environmental considerations by being given equal weighting.

Notwithstanding the WMA's hierarchy of water sharing priorities that clearly requires water users' interests to be subordinate to the protection of the environment and basic landholder rights, the Commission finds that the department was in effect signalling to its key stakeholders that it had given "major consideration" and not just "due regard" to their interests in the development of the plan's rules.

Submissions on behalf of the department and Mr Connor contend that the Commission should not place undue emphasis on those aspects of the WSP's objectives outlined above, arguing that a fair reading of these objectives indicates no inconsistency with the principles in the WMA. It was submitted that the fact that "socio-economic impacts were a major consideration in the development of the rules" accords with the requirement in s 18 of the WMA to have "due regard" to the socio-economic impacts of proposed rules.

The Commission rejects this submission and is of the opinion that there is a quantum difference between "due regard" and "major consideration". Due regard is not defined in the WMA but, as between the water sharing principles in the Act, the Act leaves it in no doubt that protection of the water source and its dependent ecosystems is to take priority over any other extraction right, or in other words, is to be the "major consideration".

A clear example of a misapplication of the WMA's water sharing principles that, in the Commission's opinion, reflects the approach contained in the statutory note to the plan's objectives, can be found in the Background Document to the plan, which was among material published by the department in September 2012 to explain the development of the BDWSP rules. The Background Document noted the circumstances in which approval to access flows below the cease-to-pump thresholds may be considered under the plan. It recorded that the IRP had reluctantly agreed to the inclusion of certain circumstances in which such access may be granted, based on historic access and following feedback from public consultation.

It also noted that the IRP was of the view that:

> *…in principle, reliance on access to flows below the CtP* [cease-to-pump] *should be discouraged through the rules in the plan because of the risk it poses to environmental values and other high priority users.*

It acknowledged that environmental water needs "are most critical during periods of low and no flows" and it noted "a significant amount of literature on the environmental risks that extraction during periods of low and no flow poses".

Despite this acknowledgement, however, the Background Document justified the inclusion of these access rules in the finalised plan in the following terms:

> *…whilst it could be argued that allowing access to water below the CtP has environmental implications, historically water users have had the ability to apply for access below the CtP so any tightening of this position should be seen as an overall gain for the environment.*

This rationale is directly contrary to the mandatory water sharing principles at s 5(3) of the WMA, which require that the sharing or extraction of water by water users must not prejudice the protection of the water source and its dependent ecosystems. By including in the plan circumstances in which water users can access the very low flows below cease-to-pump thresholds, which were set to protect environmental values, the department prejudiced protection of the environment in order to effectively maintain the access to flows below the cease-to-pump thresholds that had previously been enjoyed by water users, and in response to their demands.

Submissions on behalf of the department contend that the example discussed above "is a demonstration of the inherent difficulty with competing principles, even when the order of priority is clear". The Commission is of the view that it is precisely because of the inherent difficulty in balancing competing interests in the management of water as a scarce and valuable resource that the WMA sets out the prioritisation of these interests and imposes a duty to apply it in order to give effect to the Act's ecologically sustainable objects, as hard or politically unpalatable as that may be.

The Commission finds ample other evidence that the consistent approach of the department to the development of the BDWSP was not to push for reforms that met the requirements of the WMA's water sharing priorities, but to codify existing arrangements and avoid as much as possible delivering any "bad news" to irrigators. This was the department's approach in the knowledge that the Basin Plan, which was about to become law, would necessarily adversely impact water users and the Commonwealth would be responsible for compensating any loss of entitlement.

The Commission finds that compliance with the Cap became the benchmark for many of the rules developed in the BDWSP. There was an explicit reluctance to move beyond the restrictions imposed under the CMS in 2006 and a belief that these restrictions were adequate to meet the environmental needs of the Barwon-Darling. The available evidence indicates that the IRP had concerns that corresponded with the WMA's priorities for water sharing but that the department's concerns to maintain water users' entitlements as far as possible, overrode these.

The Commission finds that the finalised BDWSP represented not just a missed opportunity to reset the rules for water sharing as between the environment and irrigation in the Barwon-Darling. In its codification of current arrangements, it allowed extraction by water users to prejudice protection of the environment and basic landholder rights in a number of aspects, in an inversion of the WMA's legislated water sharing priorities.

Submissions made on behalf of the department and Mr Connor contend that:

> *…the goal was to put plans in place that protect the environment, and in a way that was neutral on water users, striving for that difficult win-win circumstance where the environment is no worse off and the irrigators are no worse off.*

The attempt to achieve such a balanced or "neutral" outcome is the antithesis of the "priority" concept in s 9(1) of the WMA. The Commission considers that this submission illustrates a failure to acknowledge or accept what is required to give effect to the mandatory, affirmative scheme established by the WMA.

The WMA was the culmination of a widely accepted approach to ecologically sustainable development, which is reflected in the Act's objects, principles and duties. The Commission considers that a proper construction of these provisions leads to the conclusion that the duty in s 9 is an affirmative duty requiring the proactive application and promotion of the water management principles, so as to accomplish what the Act intends.

The first two objects of the Act (discussed in chapter 2) are to apply the principles of ecologically sustainable development and to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity, and their water quality. The third of the Act's objects is to recognise and foster significant social and economic benefits to the state, including benefits to urban communities, agriculture, fisheries, industry and recreation, *that result from* the sustainable and efficient use of water. What the Act intends is not an outcome where the environment is no worse off and irrigators are no worse off, but one where water sources and their dependent ecosystems are protected, enhanced and restored, water is sustainably managed, and significant socio-economic benefits are fostered as a consequence. The social and economic benefits are necessarily subject to the environmental objectives.

The submissions made to the Commission on behalf of the department contended that the "triple bottom line" approach has not been used in decision-making under the WMA in a manner inconsistent with the principles and duties in s 5 and s 9. It was further submitted that it is important to look beyond the phrase and consider whether *in fact* the principles in s 5 have been appropriately taken into account. The department contended that measures informed by environmental considerations, such as environmental flow rules and the reduction of the entitlements of licence-holders under the Cap management strategy, were carried into the BDWSP by way of the access rules and the long-term average annual extraction limit. It was submitted that the LTAAEL set by the BDWSP meant that, over the long term, approximately 96% of inflows into the Barwon-Darling were committed to the environment.

As recognised by the department's own submissions, the NRC stated in its September 2019 report that the LTAAEL is not an appropriate measure for assessing whether the BDWSP has met its environmental and social objectives, particularly for such a variable system. The use of the statistic that approximately 94% (the department's submissions asserted 96%) of water is allocated to the environment is "highly misleading" as an indicator of environmental outcomes because it is based on an average taken over more than 100 years and includes major floods that significantly skew that average. Submissions on behalf of the department recognised the limitations of this measure, but asserted that it is one measure in a set of measures to protect the environment and it is the set of measures in the BDWSP that work together.

Submissions on behalf of the department contended that the measures in the BDWSP which indicated that environmental principles were given appropriate priority included:

> *a. a process to implement IDELs and TDELs;*
>
> *b. rules protecting extraction from lagoons and billabongs;*
>
> *c. limitations on "notwithstanding conditions";*
>
> *d. cease to pump rules, which were intended to give the environment and its dependent ecosystem access to water first, and to maintain water in the system to meet ecological need;*
>
> *e. new, more restricted C-class conditions;*
>
> *f. aspects of the account rules: for instance even if the flow was over the cease to pump level, water users could only take water if they have allocations and carryover provisions and limits on how water can be used (the 300% rule).*

The Commission agrees that it is necessary to look behind the "triple bottom line" phrase to the department's actual application of the water management and water sharing principles in relation to the BDWSP. However, in relation to those measures proposed in the department's submissions as illustrative of compliance with the WMA's principles and duties, the Commission is of the opinion that, contrary to the submission, careful analysis does not bear out the claim that appropriate prioritisation was given to protection of the water source and its dependent ecosystems.

The failure to implement IDELs and TDELs is addressed in the next chapter. The Commission notes that rules protecting extraction from lagoons and billabongs in the BDWSP merely prohibited any *new* extraction from occurring, as noted in the explanatory Background Document to the plan:

> *Off-stream pools, including those on ox-bows, warrambools and billabongs, are considered to be of high environmental value. Currently, there are a number of licences that nominate authorised works which are located on off-stream pools and* ***not allowing this practice to continue would cause unacceptable impacts on these individual users*** *as it would in most cases trigger the redesign and construction of new irrigation infrastructure. In contrast, the rule in the plan which protects these pools through the prohibition of new works can be achieved with minimal impacts. This rule does not preclude a replacement work with the same specifications being installed in one of these off-stream pools.* (Emphasis added)

The Commission considers this measure to fall significantly short of according the required priority to environmental values and that it in fact constitutes another example of the department's approach of avoiding where possible "unacceptable impacts" to licence-holders, even where this might prejudice the protection of the water source.

The BDWSP's limitations on "notwithstanding" conditions are discussed above. The Commission similarly considers this measure to fall significantly short of according the required priority to environmental values. The Background Document to the plan notes that, while it could be argued that allowing access to water below the cease-to-pump thresholds (as occurs with "notwithstanding" conditions) has environmental implications, historically water users have had the ability to apply for such access, so any "tightening" of these conditions "should be seen as an overall gain for the environment".

The Commission considers this to be another misapplication of the water sharing principles. Under the

BDWSP, licence-holders are still able to access water below the cease-to-pump threshold in most of the circumstances that had been historically approved, despite this being known to be to the prejudice of the protection of the water source.

Cease-to-pump rules are designed to protect low and very low flows in unregulated river systems for the benefit of the environment. As discussed above, Fisheries was concerned that there had been no adjustment to the environmental flow classes developed in 2000–01 that were carried into the BDWSP, and no consideration of any scientific information on the impact of extraction or changes to the environment in the decade following their development. Even the Background Document to the BDWSP acknowledged that these thresholds had been developed before many of the river's threatened and endangered native fish species were recognised by legislation and that they were only "adequate" for protecting in-stream values within the Barwon-Darling Unregulated River water source. In the Commission's opinion, these rules are merely a continuation of the status quo rather than a proactive application of the appropriate priority to environmental protection.

While the BDWSP contains a provision to enable the amendment of these access rules should further studies indicate they are having an adverse effect on the endangered aquatic ecological community, such an amendment is subject to conditions including that long-term diversions under A-, B-, and C-class licences are not substantially altered and the socio-economic impacts of the proposed rules have been taken into account. The Commission considers this amendment provision to illustrate clearly that any identified needs of the ecosystem will not be allowed to prejudice the rights of licence-holders, rather than the other way around, as required by the legislated priorities for water sharing.

In relation to the claim that new, more restricted C-class access conditions in the BDWSP are a measure which indicates that environmental principles were given appropriate priority, the Commission notes that the Background Document to the plan states that the existing access rules for C-class licences continue to apply. New uniform flow classes were established by the plan that would sit above all existing conditions for any *new* C-class licences coming into existence as a result of trade. This was not done for environmental reasons. The Background Document states that the purpose of these new uniform flow classes "was to protect existing C Class users" from competition by these new licences for the same physical water. Extraction pressure from new licences would be moved into the higher flows where extraction has less environmental significance.

Again, the Commission is of the opinion that this measure falls far short of according appropriate priority to ecosystem protection. This measure is avowedly concerned with the protection of existing licence-holders from competition by new licences for the same physical water. The burden on the environment from this extraction pressure may well be lessened because it will be pushed into higher flows, which are less important to ecosystem health, but ecosystem protection is not the first priority here.

Finally, the claim that aspects of the accounting rules in the BDWSP indicate that environmental principles were given appropriate priority is specious. The "rule" that, even if the flow was over the cease-to-pump level, water users could only take water if they had allocations, is simply the law. Under s 60C of the WMA, it is (and was at the relevant time) an offence to take water other than in accordance with the water allocation for the access licence by which the taking of water from that water source is authorised.

As discussed above, the finalised BDWSP allows an annual take limit of 300% and no limit to the amount of unused water that can be carried over from one year to the next. This is not the case for access licences in other unregulated rivers, where carry-over is not unlimited and a restriction on use of 300% of annual water allocation applies over a consecutive three-year period. These accounting rules in the BDWSP were what the irrigation industry lobbied for and, as submissions on behalf of the department acknowledge, they were considered by the OEH at the time to be too generous because they would allow excessive amounts of water to be taken in a single year; particularly following a sequence of dry years, when the environment is already stressed. The fact that the OEH ultimately agreed to these settings following negotiation does not mean that these are measures which illustrate that environmental principles were appropriately prioritised in the BDWSP. The Commission rejects the submission in relation to each of the examples put forward.

Submissions on behalf of the department and Mr Connor urged the Commission to recognise that:

> *…significant progress had been achieved over the long history of work which lead* [sic] *up to the BDWSP, including unprecedented reforms (including environmental protections, such as environmental flow rules and Cap management strategy which reduced entitlement volumes) and the 2006 Heads of Agreement*.

It was submitted that the planning of the BDWSP from 2010 to 2012 cannot be examined in a vacuum and that the long and complex history of the planning and

preparation of the BDWSP must be given due weight in any assessment of the final two years of the process.

The Commission considers the complex and lengthy historical and policy context of the planning of the BDWSP to be relevant to the matters it investigated and has given it due consideration. However, the Commission is of the opinion that that context reveals that, despite all the hard work to bring the Barwon-Darling back within Cap, the environmental flow rules and the CMS strategies previously implemented were evidently not working. The BDWSP presented an opportunity to make difficult decisions, potentially unpalatable to industry and politically risky, but necessary to protect and restore an increasingly degraded river and its dependent ecosystems. The Commission maintains that this was a missed opportunity to reset the rules for water sharing as between the environment and irrigation in the Barwon-Darling in accordance with the WMA's priorities.

Not corrupt conduct

The Commission is of the opinion that the general approach of the department to the development of the BDWSP rules was to attempt to maintain the status quo for water users wherever possible, even where this had adverse implications for the environment and downstream users. This was contrary to the duty to give priority to the water sharing principles in the order in which they are set out in the WMA. However, the available evidence does not allow the Commission to impute to the minister, or any other individual public official involved in the process, an appreciation that what was being done was for a dishonest or otherwise improper reason.

The Commission finds no evidence of dishonesty on the part of those departmental officers involved in drafting the BDWSP and no evidence of a personal interest in the outcome. The Commission finds that those departmental officers who were tasked with developing the BDWSP gave what amounted to "major consideration" to the socio-economic impacts on water users of proposed rules in the plan because of a belief that the best outcomes for water users could be achieved at the same time as meeting environmental obligations, or that a workable balance or compromise could be struck between these competing interests in the plan's rules. As discussed earlier in this chapter, s 9(1) of the WMA does not provide for or permit compromise in relation to water sources and their associated ecosystems. Where there existed tension between such matters and socio-economic impacts, the WMA made provision that ensured the latter impact would not trump the former.

The evidence is clear that the government's and the minister's avowed policy focus on regional economic development informed the department's focus on maintaining as much certainty as possible for industry and avoiding any further adverse impacts beyond those agreed between government and industry in 2006. However, as observed above, there is no evidence available to the Commission that those public officials responsible for the development of the BDWSP, including the minister, exercised their powers dishonestly to favour the interests of water users over other interests or otherwise improperly such as to amount to corrupt conduct under the *Independent Commission Against Corruption Act 1988* ("the ICAC Act". Rather, the evidence indicates that it was a belief held by those public officials that it was within their power to appropriately and successfully balance those competing interests by adopting the so-called "triple bottom line" approach, which they considered was in line with government policy.

The NRC noted in its September 2019 report that the WMA:

> *…makes it clear that water sharing is not about balancing uses and values, it is about firstly providing for the environment and secondly recognising basic landholder rights above other uses. Plan provisions are exacerbating the negative impacts of water shortages on both environmental and social outcomes. As a result, the Plan does not provide adequate protection for the river and its dependent ecosystems or basic landholder rights.*

Accordingly, the Commission supports the recommendation of the NRC, that DPIE-Water should ensure that the amended and re-made plan rules, objectives and outcomes fully recognise, and are consistent with, the prioritisation specified in the WMA.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of s 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

a) obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence

b) the taking of action against the person for a specified disciplinary offence

c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An "affected person" is defined in s 74A(3) of the the ICAC Act as a person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, the investigation.

The Commission is satisfied that, on the basis of the allegations that were investigated, Ms Hodgkinson and Mr Cole are affected persons for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of either affected person.

As Ms Hodgkinson is no longer a NSW public official, having retired from state politics in September 2017, it is not necessary to consider any recommendation in relation to dismissal action.

Chapter 4: Benefits to irrigators from the Barwon-Darling Water Sharing Plan

This chapter continues the examination, commenced in the previous chapter, of the allegation that changes were made between the draft and gazetted versions of the Barwon-Darling Water Sharing Plan (BDWSP) in order to corruptly favour the economic interests of Ian Cole's family business, specifically, and to corruptly benefit Barwon-Darling irrigators, generally. It examines whether two specific changes, allegedly lobbied for by Mr Cole on behalf of the members of the Mungindi-Menindee Advisory Council (MMAC) – namely, the removal of limits on pump-sizes and the non-implementation of limits on daily extraction on commencement of the plan – were made for corrupt reasons.

Changes for which Mr Cole did not specifically lobby

The Commission finds that there were two significant consequences of the BDWSP, once it commenced, that provided water users on the Barwon-Darling with the opportunity to access significantly more water at low flows than had previously been possible. Neither of these consequences was a matter for which Mr Cole or other Barwon-Darling water users had specifically lobbied.

The first of these was the removal of a mandated pump-size from each class of licence, which was a direct consequence of the automatic conversion from licences under the *Water Act 1912* to licences under the *Water Management Act 2000* ("the WMA") on commencement of all water sharing plans (WSPs). The second of these was that individual daily extraction limits (IDELs) and total daily extraction limits (TDELs) were not implemented at the commencement of the BDWSP and, despite the intention for their introduction during the life of the plan, they remain unimplemented eight years later.

Removal of pump-size restrictions from each class of licence

Historically, an A-class licence in the Barwon-Darling meant that the licence-holder could only use an A-class pump, which had the smallest maximum allowable pump diameter of up to 6 inches or 150 mm. A B-class licence pump had a maximum allowable diameter of up to 24 inches or 610 mm and the difference in extraction rates between the two pump sizes is 16-fold. Where an A-class pump can extract an average of only 5 ML a day, a B-class pump can extract an average of 80 ML, or take as much in an hour-and-a-half as an A-class pump can take in a day.

Historically, A-class licences were held in the Barwon-Darling by riparian properties for "drought-proofing", as well as by a small number of small, permanent planting owners and one large, permanent planting irrigator. These licences were generally used to pump water directly to the crop and were not usually attached to storages.

On commencement of the BDWSP, and not because of any provision in the plan per se, but because of an administrative arrangement that applied to all NSW WSPs, old *Water Act 1912* licences were automatically converted to WMA licences. There was no longer any connection between the access licence and its works approval (pump) based on the capacity of the works (pump-size) or any connection between water access and land use. Licence-holders could now seek approval to nominate what had formerly been a B-class pump for their A-class licence and extract water at low flows more efficiently and faster, using the much larger pump. They could thereby extract more of their A-class account water during A-class flows than would have been possible under their antecedent licences.

Following the commencement of the BDWSP, in certain circumstances, B-class pumps could even extract water at

below A-class cease-to-pump thresholds; for example, in the event of an imminent flow, although this would have to be pumped direct to crop. This permissible, increased access to A-class flows, in the absence of daily extraction limits, undermines the capacity of pumping thresholds to protect the low flows that are critical for the environment.

The evidence available to the Commission indicates that it was the intention of the BDWSP planners that IDELs would be introduced to ensure that, despite the new capacity to employ a bigger pump, A-class licences could not have a greater pumping capacity or extract water any faster than they had before the plan's commencement. IDELs were contemplated as part of the extraction component of individual licences that limit the rate and/or timing of extractions and they were intended to be established as a way to share water between licence holders and the environment within a flow class on a daily basis.

During the development of the BDWSP, IDELs were intended to provide a mechanism to limit extraction rates to those then permitted through authorised pumps. Because extraction rates would be limited to those already permitted through authorised pumps, it was envisaged that any third-party impacts through trade would be mitigated and there would be no further impacts on the environment. It was intended that, with IDELs in place, even though volume could now be *moved* via trade, it could not be taken out at an increased rate to existing extraction rates and there would be no additional localised impact.

Initially, in October 2010, it was proposed that IDELs would be established on the basis of the average-pump capacities for authorised pumps at the commencement of the plan. Average-pump capacities were recorded for various sizes and types of pumps in the department's licensing database to enable this to happen. Following feedback received in relation to the publicly exhibited draft plan, the department investigated a number of additional methods for establishing IDELs, but the intention remained to match existing extraction rates and thereby prevent additional adverse environmental or third-party impacts while facilitating trade.

Non-implementation of IDELs and TDELs

The draft BDWSP that was publicly exhibited included proposed separate TDELs for each licence class for each river section and a table listing the proposed IDELs. The proposed IDELs were calculated according to a formula based on the existing pumping capacity of the authorised works on each *Water Act 1912* licence at the commencement of the BDWSP. When the BDWSP was finalised, however, clauses 51 and 52, which provide for the establishment of TDELs and IDELs, were not implemented and that remains the case to date.

Evidence obtained by the Commission indicates that the implementation of IDELs required an upgrade to the licensing administration systems at a cost of approximately $370,000. The department's briefing to the Hon Katrina Hodgkinson, then minister for primary industries, on contentious issues connected with the plan and its implementation included advice that the cost of this upgrade was unable to be absorbed within current operational budgets. The Background Document to the BDWSP announced that, "the administrative and management systems required to successfully implement IDELs are not currently in place, however it is expected that they will be in place within the first few years of this plan's term". A note to clause 52 in the plan itself stated that it was intended that IDELs would be issued to water access licences (WALs) that arose from *Water Act 1912* entitlements "during the life of the plan".

Evidence obtained by the Commission indicates, however, that from the commencement of the BDWSP in 2012 until after the ABC's *Four Corners* program "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped") aired in July 2017, there were inadequate administrative and management systems

in place, no one drove the implementation of IDELs and it was not a priority for the department. The evidence also indicates that IDELs are a feature of a suite of unregulated water source WSPs across the state and that they have not been implemented to date in most of these.

In October 2016, Geoff Wise, chair of the Western Lands Advisory Council, wrote to the Hon Niall Blair, then minister for land and water, concerning the effect of certain provisions of the BDWSP on basic landholder rights and on water users downstream of Bourke. One of the key issues raised was the anticipated introduction of IDELs provided for by clause 52 of the BDWSP, which had still not been implemented some four years into the plan's operation. The evidence indicates that Mr Wise was advised that many of his concerns would be considered in the Water Resource Planning Process for the Barwon-Darling, about which public consultation commenced in early 2017.

Public exhibition of the draft water resource plan for the Barwon-Darling closed on 29 October 2019. The draft resource plan proposes to limit total daily extraction across all unregulated river access licences in the Barwon-Darling to the maximum of the sum of pump capacities for authorised pumps or the sum of agreed pumping rates for any installed pumps on commencement of the 2012 WSP, with IDELs expected to commence from 1 July 2020. That draft resource plan is currently awaiting accreditation by the Murray Darling Basin Authority (MDBA) and has not yet commenced.

When the BDWSP commenced in October 2012, the reliability and security of access to the lowest flows significantly increased for Barwon-Darling broad acre irrigators. This was because of the opportunity that arose to increase pump size following the automatic conversion of licences under the *Water Act 1912* to licences under the WMA, the new rules that set annual extraction limits at 300% of the share component and allowed unlimited carry-over, and non-implementation of IDELs and TDELs. The absence of IDELs and TDELs meant that there were no checks on the demand on water resources in low-flow periods. The WMA's trading mechanisms, which "switched on" when the BDWSP commenced, also resulted in the ability to consolidate or aggregate these valuable A-class licences.

The removal of pump-size restrictions on A-class licences and the absence of IDELs allowed for the opportunistic extraction of A-class water in unprecedented volumes by a small number of large irrigators. Analysis of data obtained by the Commission from WaterNSW indicates that, between 1990 and 2013 (23 years), an estimated total of 28.8 GL of A-class water was extracted, while between 2014 and 2017 (just three years), a total of 53.4 GL of A-class water was extracted upstream of Bourke. Between water years 2014–15 and 2016–17, 95.6% of all A-class water extracted in that period was extracted by just three broadacre irrigators.

Paul Simpson, director of surface water management at the department, told the Commission that the risk of a concentration in opportunistic extraction of low-flow water and an unprecedented rate of extraction of that water as a result of the plan rules and the failure to implement IDELs, was certainly recognised in the planning and implementation of the BDWSP, but what was not appreciated was just how quickly that risk would be realised. He also noted that the unbundling of land and water rights was part of broader water reforms agreed to by Australian governments and that NSW had a statewide approach to works approvals and WALs that needed to be implemented uniformly. The department's view was that having specific rules for a particular valley such as the Barwon-Darling would increase the complexity of administration and management.

Mr Simpson told the Commission that the decision was explicitly taken that the risks were manageable, that statewide policy should be implemented, and that the impending Basin Plan may supersede some of the potential problems, but he conceded that "the risk has been borne out quicker than was expected at the time, which is always a possibility".

Submissions made to the Commission on behalf of the NSW Department of Planning, Industry and Environment (DPIE) contended that the suggestion that no one in the department drove the implementation of IDELs, that it was not a priority for the department, and that non-implementation was ultimately due to operational failures and a lack of will within the department, neither fairly reflects the evidence, nor accurately characterises the situation.

It was submitted that, when the BDWSP was first put in place, there were a number of competing priorities for the small implementation team. In January 2017, it was identified that there were likely to be perverse outcomes using rules contained in the BDWSP (addressed by the *Water Management Amendment Act 2018*) and thereafter, "the implementation of IDELs remained an identified objective but it was considered against other competing priorities".

Submissions on behalf of the department contended that there is no proper basis for the Commission to conclude there was a lack of implementation of specific policies, including IDELs, to favour irrigators. For the period between 2012 and 2017, the department was not set up for implementation *generally*. It was submitted that, in response to the Ken Matthews report, implementation (including of IDELs) has become a focus.

Taking into account this submission, the Commission remains of the opinion that the implementation of IDELs was not the department's priority from the time the BDWSP gazetted until after the release of the Matthews report in November 2017.

Was there a benefit to Mr Cole's family business from the BDWSP rules?

The ABC's *Four Corners* program, "Pumped", asserted that a "new set of water pumping rules" introduced by the NSW Government "came in after extensive lobbying by irrigators [and] allowed them more access to water than prior to 2012 when the Murray-Darling Basin Plan was signed". The program alleged that Mr Cole had lobbied for the new rules and benefitted from them, putting his water licence on the market when the new rules increased the value of some water licences. The program asserted that Mr Cole had been unable to find a buyer for his family property, Darling Farms at Bourke, for a decade, but that "when the new rules came in", he was able to "offload" the property to Webster Limited as part of a $30 million deal, which included $4.5 million for the "water component" alone.

The rules in the BDWSP (not the Murray-Darling Basin Plan) that Mr Cole lobbied for, those he did not, the changes to the finalised plan that aligned with his lobbying and those that did not, have been set out in some detail in this and the previous chapter. The evidence clearly indicates that, following the commencement of the BDWSP, A-class licences became significantly more valuable. The evidence examined by the Commission does not, however, indicate that Mr Cole lobbied for this consequence. The Commission finds that Mr Cole's lobbying was consistently directed towards preserving the entitlements that water users had negotiated with the NSW Government under the 2006 heads of agreement and did not concern either the removal of pump-size limitations (an automatic consequence of the "switching on" of the WMA) or the non-implementation of IDELs and TDELs.

The Commission's interview with Mr Cole touched on both of these matters. Mr Cole told the Commission that he had first become aware that it was possible to pump A-class water using B-Class pumps after the commencement of the BDWSP. He noted that:

> *…a lot of people are running around saying it happened as a result of the Barwon Darling Water Sharing Plan of 2012, and in a sense, that's correct, but in a sense, it's not correct … It had nothing to do with the negotiations under the plan. I don't even remember it being discussed. In fact, it was my understanding that A-class water would always be taken with a small pump … not a big pump. Now, whether that's a good thing or a bad thing, it's a completely different matter.*

Mr Cole told the Commission that, his understanding that following the gazettal of the BDWSP the change to WMA regulation would result in the removal of pump size restrictions, came from later discussions with people at the department. Mr Cole conceded that it could be seen that the ability to extract A-class water with larger pumps increased the commercial viability of Darling Farms and therefore increased its value to any prospective purchaser. However, he maintained that it was not something he had known was even possible during the making of the plan and it was not something that he considered he or his family had benefitted from, either directly or indirectly.

Mr Cole also told the Commission that, in his view, IDELs should have been implemented, noting:

> *…there wouldn't have been this controversy over the A-class if the IDELs had been in place, because with the IDELs, you were only allowed to take on a daily basis what you could take through the pump you're using at the time.*

Mr Cole told the Commission that his and his organisation's view has always been that the government needs to implement the plans it puts in place, noting:

> *…we know that the Cap plan wasn't fully implemented, and still hasn't been fully implemented, right. And the Cap plan actually forms part of a water sharing plan. Additional to that, we know that IDELs were allowed for in the plan but were never implemented … They should have been implemented, you know. We wouldn't have had the controversy – well, we may not have had the controversy that we have now, and that really pisses me off, that, that the government doesn't follow through on things.*

Benefit to the bank

The Buster family started farming at Bourke in the mid-1960s. Darling Farms' operations included irrigated cotton and permanent horticulture and an adjacent cotton gin and fruit-packing enterprise. Mr Cole and Steve Buster, his brother-in-law, managed the properties from 1996. The evidence available to the Commission indicates that, during the planning of the BDWSP and after its commencement, Mr Cole and his in-laws, the Buster family, were no longer the actual or legal owners of the properties or had WALs in their names.

Following significant equity losses as a consequence of a number of severe droughts between 2003 and 2007, Mr Cole and members of his extended family and

their associated entities ("the Cole parties") entered a complicated, long-term and confidential arrangement with the bank in order to manage their financial issues. Under this arrangement, the bank took over legal ownership of the Cole parties' assets and agreed to release them from their remaining debt at the end of the five-year period, or earlier, if all assets were sold. As an alternative to appointing costly receivers and in recognition of the management skills and insight provided by the Cole parties, the bank negotiated that they would continue farming their properties as well as two other sizeable distressed assets in the Bourke area at the time, whose owners had either left the property, or for which receivers had been appointed, until such time as all of these assets were sold. These assets included the largest A-class licence (WAL 33751) in the Barwon-Darling.

In recognition of the Cole parties' extended custodianship of the properties, the bank's strategy also involved certain financial incentives tied to the size of the proceeds achieved from the sale of the assets. The bank took an active role in marketing all of the Bourke properties for sale. In November 2011, the bank and the Cole parties entered into a deed of cooperation to formalise these arrangements, which is during the time the draft BDWSP was on public exhibition.

The evidence indicates that, by September 2014, nearly all the core assets had been sold or were under negotiation for sale to Bengerang Ltd, a wholly owned subsidiary of Webster, with all payments finalised by May 2016. WAL 33751 was sub-divided into three licences; the largest of which was sold with two other WALs for just over $4.5 million, and is presumed to be the "water component" of the sale referred to in the *Four Corners* program. This WAL's subdivision is the subject of further discussion in chapter 5.

Not corrupt conduct

The Commission finds that Mr Cole and his family did sell assets to Webster, following the gazettal of the BDWSP, including a number of A-class licences for $4.5 million; however, this was at least two years after the commencement of the plan. While the evidence indicates that it was in the business interests of the Cole and Buster families to obtain maximum prices for the sale of all of the distressed assets that Mr Cole and his relatives managed at Bourke, it was the bank that ultimately controlled and benefitted from their sale, having taken over the legal ownership of these assets several years before their sale.

The Commission finds no evidence that Mr Cole lobbied for changes to the BDWSP in order to increase the value of the Bourke properties and their WALs. The Commission finds that Mr Cole did not lobby at all for two of the most significant changes that followed the commencement of the BDWSP, which allowed increased access for irrigators to water at low flows, thereby increasing the value of A-class licences. These were changes that were not matters of negotiation during the planning and development of the BDWSP, but were consequent on the transition from the *Water Act 1912* to the WMA and on the department's inaction in implementing an aspect of the BDWSP that Mr Cole and MMAC had supported in principle.

It is important to note that, even if Mr Cole did lobby for changes that would benefit his family's business interests, that of itself would not amount to corrupt conduct. Such lobbying could only amount to corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") if it could adversely affect the "probity" of the exercise of public official functions. There is no evidence available to the Commission that Mr Cole lobbied for changes to the draft BDWSP rules in a way that adversely affected, or could adversely affect, either directly or indirectly, the exercise of official functions by any public official or public authority.

Accordingly, the Commission makes no finding of corrupt conduct in relation to the particular subject of this chapter.

Section 74A(2) statement

The Commission is satisfied that Mr Cole is an "affected" person for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Cole.

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Chapter 5: Authorisation of licences and pumps contrary to the *Water Management Act 2000*

Following the airing of the ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" in July 2017, the Environmental Defenders Office (EDO) complained to the Commission about alleged legal anomalies in the conversion of licences and associated works approvals currently held by the two largest licence-holders in the Barwon-Darling. The EDO complained that, some time prior to 2015, when licences currently held by Bengerang Ltd (owned by Webster Limited) were still held by Ian Cole and his family, pumps attached to those licences had been approved by the department in contravention of the *Water Management Act 2000* ("the WMA") and to the benefit of Mr Cole's family business interests.

The EDO also complained that, some time after June 2014, certain pumps attached to licences currently held by the Harris family, previously held by Clyde Agriculture Ltd, were approved by the department in contravention of the WMA and/or the Barwon-Darling Water Sharing Plan (BDWSP). The EDO claimed that some of the impugned approvals took place when Clyde Agriculture was the licence-holder and some when the Harris family became the licence-holder.

Licences and works approvals held by Mr Cole and his family

As discussed in chapter 4, the evidence indicates that, when the BDWSP commenced in October 2012, the largest A-class licence in the Barwon-Darling, Water Access License (WAL) 33751 (with a share component of 4,256 ML), was held by Mr Cole and his family, following its transfer by the mortgagor bank as part of its long-term strategy to profitably manage a number of distressed assets in the region. The day that the BDWSP commenced, and *Water Act 1912* entitlements automatically converted to entitlements under the WMA, WAL 33751 was issued with an associated works approval consistent with the pumps authorised under the previous *Water Act 1912* licence.

The evidence indicates that, on 14 January 2015, WAL 33751 was cancelled following the approval of a subdivision dealing application under s 71P of the WMA lodged by Mr Cole. WAL 33751 was subdivided into three A-class licences, each with a works approval attached to it upon creation. The three new licences had the same combined share component of 4,256 ML as the original, and they and their nominated works were all located within the same Culgoa River to Bourke management zone. However, the authorised works approvals attached to the three new licences consisted of additional and bigger pumps than the pumps that had been originally attached to WAL 33751.

The EDO complained that this was contrary to s 71P(2)(a) of the WMA, which stipulates that access licences arising from subdivision may only be approved by the minister where the combined share components and combined extraction components are no greater than the corresponding components of the cancelled licence. The EDO complained that the additional and bigger pumps now attached to the three new licences, by influencing the rate at which water could be taken from a water source, effectively permitted a higher extraction component than that of the original licence, particularly in the absence of any other mechanisms within the licence that would otherwise limit the extraction component.

The evidence available to the Commission indicates that, on 8 January 2015, Mr Cole submitted an application for WAL 33751 to be subdivided into three unequal WALs, with a combined unit share equivalent to the original share component, as required by s 71P(2). The purpose of the subdivision was to sell these new WALs to three different prospective purchasers, one of which was Bengerang. Evidence indicates that on subdivision, the works approval nominated on one of the three new WALs was the works approval from the original WAL.

The evidence also indicates that, on 12 January 2015, in accordance with advice received from the department,

Mr Cole lodged a separate s 71W dealing application. This enabled him to move two other WALs held by Darling Farms (WAL 33719 and WAL 33750) from works approvals that were then nominated for the two remaining subdivided WALs.

The Commission finds no evidence that the approval of Mr Cole's applications to first subdivide WAL 33751, under s 71P and then to nominate additional and bigger works for the other two of the three newly created licences under s 71W, contravened either or any provision of the WMA. The additional and bigger pumps attached to two of the three new licences do effectively permit an increase in the rate at which water could be taken from a water source from that of the original licence, but not because of the subdivision dealing.

The Commission notes that, had individual daily extraction limits (IDELs) been established and implemented under the BDWSP, as intended, they would have been specified as part of the extraction component on the new access licences and provided the necessary limitation on the adverse impacts that the larger pumping capacities necessarily have on the environment and downstream users.

Harris family licences and works approvals

The EDO complained that additional pumps appear to have been added to four B- and C-class licences currently held by the Harris family, beyond those that should have been added when the licences were converted from *Water Act 1912* licences to WMA licences, and they have therefore been authorised in contravention of the WMA (clause 3(1)(b) of Schedule 10 of the WMA requires a like-for-like replacement of the nominated work).

The Commission finds that the evidence does not substantiate this allegation. The pumps identified by the EDO, as those that should have been attached to the licences in question on conversion, were listed in appendix 7 to the "Background Document to the Barwon-Darling Water Sharing Plan" published by the department to accompany and explain the BDWSP in September 2012. Appendix 7 purports to list all of the works authorised to extract Barwon-Darling unregulated water at the commencement of the plan for each *Water Act 1912* licence.

Documents obtained by the Commission from WaterNSW, however, indicate that the "additional pumps" on the Harris family licences identified by the EDO had all been recorded as approved works long before the commencement of the BDWSP; with some noted as early as 1991 and 2001. The investigation found a significant discrepancy between the authorised works listed in appendix 7 of the Background Document to the BDWSP and WaterNSW's records.

The Commission finds that the "missing" additional pumps not listed in appendix 7 were nevertheless listed in the licensing data used by the department as the basis for all of the figures in the BDWSP. Daniel Connor, coordinator of the BDWSP planning process at the department, confirmed to the Commission that the explanation for their non-inclusion in appendix 7 is that the department intended to exclude those additional pumps when calculating an IDEL for each licence because they were second lift pump sites not located on the main river.

The Commission finds no evidence that any of the WALs and associated works approvals held by the Harris family identified by the EDO were improperly converted from entitlements previously existing under the *Water Act 1912* into licences and associated works approvals under the WMA.

Chapter 6: The minister and the embargo

This chapter examines whether, on 25 March 2015, the Hon Kevin Humphries, then minister for natural resources, lands and water, and local member for Barwon, gave tacit approval to Barwon-Darling irrigators to pump water during a gazetted embargo, by announcing that there was no embargo in place. The embargo was not legally lifted until 29 May 2015 and at least one Barwon-Darling irrigator, namely Anthony Barlow of Burren Downs, extracted water in contravention of the embargo.

Background

Among the allegations of illegal water extraction in the Barwon-Darling, which were aired in the ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped"), was the claim that certain irrigators had pumped during an embargo put in place in early 2015 to ensure that water got down the river to give Broken Hill its water supply. Jamie Morgan, manager of the Strategic Investigations Unit (SIU), interviewed irrigator Mr Barlow of Burren Downs about this and other allegations of non-compliance. Mr Barlow told him that he believed he had permission to pump because Mr Humphries had given a room full of irrigators at a community meeting permission to pump by asserting that he was aware that the ban was going to be lifted. Mr Morgan told *Four Corners* that the gazetted ban was still in place when Mr Barlow admitted pumping.

The Environmental Defenders Office (EDO) asked the Commission to investigate allegations that Mr Humphries informed irrigators in the Northern Basin that they could pump water during a gazetted embargo restricting water extractions on the Barwon-Darling and in certain tributaries in 2014–15. The allegation that Mr Humphries incorrectly stated to a meeting of irrigators at Bourke on 25 March 2015 that "there is no embargo" (or words to that effect) about the taking of water in that locality was also the subject of a public interest disclosure reported to the Commission on 23 August 2017 by Simon Smith, the secretary of the Department of Industry (DOI).

The Commission's investigation

In accordance with the Commission's jurisdiction, the Commission's investigation focused on whether Mr Humphries acted partially towards Barwon-Darling irrigators by giving them permission to pump water during a gazetted embargo and whether this constituted corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

The Commission interviewed senior departmental officers, Andrew Scott and Paul Simpson, departmental officer Amy Burgess, Ken Harrison, local engagement officer with the Commonwealth Environmental Water Office, Ian Cole, irrigator and chairperson of Barwon-Darling Water (BDW), and Mr Humphries. Mr Humphries also provided a statement to the Commission. The Commission obtained Mr Scott's contemporaneous handwritten notes of the BDW meeting at which Mr Humphries spoke to irrigators in March 2015 and other departmental documents relating to the embargo and to investigations of non-compliance in the Barwon-Darling.

Temporary water restrictions ordered on the Barwon-Darling

The Menindee Lakes are situated approximately 110 kilometres south-east of Broken Hill and are the principal water supply storage for Broken Hill. They also meet the irrigation, stock and domestic needs of landholders between Menindee and Wentworth, and supplement the Murray River system. They were originally a series of shallow natural ephemeral lakes along the Darling River that filled during floods and then drained

back into the Darling River when the flows receded. In the 1950s and 1960s, the lakes were engineered to store and release water for supply to local towns and for agriculture and the mining industries.

Flows into the Menindee Lakes can occur in large pulses following flooding rain in the upper catchments, but between floods, the Darling River can dry out with practically no inflow at all. In late 2014 and early 2015, Broken Hill experienced serious water shortages in the context of an unprecedented drought.

On 27 January 2015, Mr Simpson endorsed a briefing to Gavin Hanlon, the new deputy director general of the department, which proposed that the only feasible option to improve Broken Hill's water supply was to restrict access to upstream unregulated flows to improve the chance of inflow to the Menindee Lakes.

Mr Simpson told the Commission that, for the six months prior to the briefing, the department had been increasingly concerned that Menindee would run out of water, that Broken Hill's water supply would be threatened if they did not act soon, and there were also salinity issues in play. Eventually, the minister's office agreed to impose an embargo on water use but only after what Mr Simpson described as a lot of opposition. He told the Commission that water users were unhappy with the numerous submissions put up by the department and they made their opposition known to the minister's office. In his view, the minister's office was reluctant to impose an embargo, not because it did not agree that the situation at Menindee was serious, but because it did not consider that the sort of restrictions proposed for the Northern Valley water users were warranted.

Ultimately, the department's advice to the minister's office was to the effect that town water supply had a higher priority than water for irrigation under the *Water Management Act 2000* ("the WMA") and that in terms of the water management framework, it was the appropriate way forward. Mr Simpson told the Commission that to have to "try to ship water in or evacuate Broken Hill – there's 20,000 people – compared to a bit of opportunity access for cotton growers" meant that an embargo was obviously the better course of action and was in the best interests of NSW as a whole.

Under s 324 of the WMA, the minister may, if satisfied that it is necessary in the public interest to do so, direct that the taking of water from a specified water source is prohibited or subject to specified restrictions, for a specified period. Public interest considerations include the need to cope with a water shortage, a threat to public health or safety, or to manage water for environmental purposes. The order must be made in writing and published in the *Government Gazette* and, at the time relevant to the Commission's investigation, notice of the order was required to be published in an appropriate newspaper. If circumstances required publication of the order earlier than could be achieved by gazettal, the minister could cause notice of the order to be broadcast by a television or radio station to the part or parts of the state within which the water source is situated. An order under s 324 takes effect when it is first published or broadcast. It ceases to have effect when the period specified in the order expires unless it is repealed sooner.

The briefing endorsed by Mr Simpson on 27 January 2015 noted that senior departmental staff had met to consult with key members of community and industry groups on 26 November 2014 at Narrabri. While the community accepted that the Broken Hill situation required extraordinary measures, they had also requested that "consideration be given to allowing access in specific circumstances when small flows may significantly benefit existing crops but would not benefit Broken Hill".

The briefing attached a draft temporary water restrictions order for the Upper Darling Basin, pursuant to s 324 of the WMA, which required Mr Hanlon's signature under the delegated authority of the minister. The briefing stated

that the draft order "provides flexibility to still provide access to small flows (by announcement) if required". That flexibility was apparently provided by Schedule 2 of the draft order, which prohibited the taking of water from specified water sources, except where the water was announced by media release from the department as available to be taken.

On 28 January 2015, the department issued a media release to announce that temporary water restrictions on supplementary flows in the regulated north-western NSW rivers and on access to water for Barwon-Darling water users with B- and C-class licences were in force to help ensure future large flows reached the Menindee Lakes as the water supply for Broken Hill remained critical. Mr Hanlon was quoted as saying that "the NSW Office of Water will continue to closely monitor the situation so that these restrictions can be removed once the security of water supply to Broken Hill is assured".

On the same day, Mr Humphries' office also issued a ministerial media release, which mirrored that put out by Mr Hanlon's department. The minister's media release stated that he had requested the department to put in place temporary restrictions on access to supplementary water for licensed water users in the regulated sections of the Border, Gwydir, and Lower Namoi rivers and for large water users along the Barwon-Darling with B- and C-class licences. The minister announced that these restrictions "will help to ensure that any future flows in the northern rivers will reach a number of communities along the Darling and secure water supply for critical human needs" and that the restrictions would be lifted "when there is sufficient assured inflow along the Darling River".

An order was gazetted on 6 February 2015. In compliance with s 324 of the WMA, it was noted to commence from that date and to remain in force until 29 February 2016, unless repealed or modified by a further s 324 order before that date. Schedule 2 to the order provided that the taking of water under unregulated river B- and C- class access licences in the Barwon-Darling Unregulated River Water Source, and under supplementary access licences in the regulated river sources, was prohibited, "except where the water is announced as available to take by media release from NSW Office of Water, subject to any conditions prescribed in that announcement". In effect, the order allowed its own variation or lifting by media release, as well as by repeal or a further s 324 order. It was submitted to the Commission on behalf of the NSW Department of Planning, Industry and Environment (DPIE) that a variation or lifting of a s 324 order, as announced by media release, can occur if this is set out as a condition in the order.

On 13 February 2015, the department issued a media release, titled "Easing of temporary restrictions to Supplementary Access and flows in Barwon-Darling River to assist Broken Hill". Mr Hanlon announced that temporary restrictions had been eased for the regulated rivers in northern inland NSW because of a flow event that had passed through the NSW Border and Gwydir rivers.

The media release quoted Mr Hanlon as saying, "…as the flow event has passed through the NSW Border Rivers and the Gwydir River we can now lift the embargo". However, the media release went on to announce that, because access to water for critical human needs remained at low levels, the flows in the unregulated Barwon-Darling river system would remain restricted. Relevantly, Mr Hanlon announced that:

> *…as the flows pass down the Barwon Darling River we will look to ease restrictions for water users with B and C and supplementary class licences. We will continue to monitor each event on a case by case basis.*

Mr Scott, senior departmental officer, told the Commission that he had been involved in receiving instructions and drafting the s 324 order in question, as well as the departmental and ministerial media releases. He said that that particular order provided that it could be "turned off" if there was a media release from the department. He told the Commission that he came back from leave to the media release of 13 February 2015, in which Mr Hanlon announced that the embargo could be lifted in the Border and Gwydir rivers. He told the Commission:

> *…lifting the embargo when the water is gone is just a pointless exercise other than trying to – trying to dress it up as good news. So by saying that the embargo is lifted, ordinarily that sounds great, but if there's no water to be taken or the water's actually just flowed past just to sort of like well thanks for nothing and this is where it got really quite strange and – yeah I –I'm pretty sure I was on leave at that time but I think that there was specific instructions been given to the Department at this time from the Minister. That's my understanding.*

The meeting at Bourke

On 24 March 2015, Mr Cole, in his capacity as chairperson of BDW, sent an email to a large number of recipients, including irrigators, departmental officers (both state and Commonwealth), local councils and Mr Humphries, inviting them to attend the organisation's annual general meeting (AGM) the following day. The AGM was to be followed by an Ordinary Meeting and both were to take place at Diggers On The Darling at Bourke.

The minutes of the Ordinary Meeting for BDW held on 25 March 2015 indicate that 36 people attended, including Barwon-Darling irrigators – Anthony Barlow, Peter Harris and Jack Harris and Joe Robinson – a number of other farmers, irrigators and water user representatives, departmental officers and Mr Humphries (in his capacity as minister for water and member for Barwon).

The minutes indicate that, before Mr Humphries arrived at the meeting, Ms Burgess, hydrologist with the department, provided an update on the embargo. She advised the meeting that the department forecast that, without the embargo in place, only 12 GL would have reached the Menindee Lakes from two recent flow events but, as a result of the embargo, 18 GL would now reach the lakes. The minutes also record that Mr Robinson told the meeting that Mr Humphries had advised him "that there is no embargo at present and it is a flow by flow basis".

After noting the arrival of Mr Humphries, the minutes record the following:

- *The Minister told the meeting that there is no embargo at present on the Barwon Darling*
- *If the next flow is assessed as having no benefit for BH* [Broken Hill] *water supply it will not be embargoed*
- *The embargoed* [sic] *will be assessed on a case by case basis*
- *Q: Why has their* [sic] *not been a media release? A: There is no embargo and a media release would be issued on the next flow of whether it will need to be embargoed …*
- *Q: Will embargoes exist in the future once a solution is found? A: The Minister replied that he is 90% confident embargos will not have to be used as often.*
- *Q: The embargo restricted some water users from finishing off the crop? A: Town water supplies is the first priority for government and the NSW office of water.*

Mr Scott took handwritten notes at the Ordinary Meeting at Bourke on 25 March 2015. These notes record that Mr Humphries told the meeting it was a case-by-case, event-based embargo and that, if there was no benefit to the Menindee Lakes (from the flow or event), people can "have a crack at it". When it was suggested that a media release should be issued to indicate that the embargo had been lifted, Mr Scott's notes record Mr Humphries responding "you're not listening – there is no embargo".

Mr Scott told the Commission that he believes that what the minister was trying to get at with his comments was the fact that embargos could be called on or off depending on an assessment of flows, as evidenced by the media release issued by the department on 13 February 2015 (noted above). That media release announced the easing of restrictions for the regulated rivers in northern inland NSW and that each event would continue to be monitored on a "case by case basis", even though the embargo remained formally and legally in place.

Mr Scott told the Commission that media releases provided a quick and flexible means of effectively switching embargos on and off; whereas, the formal gazettal process was more complicated and lengthy and he thought Mr Humphries' comments reflected the "ridiculous confusion" created by this practice.

This interpretation of Mr Humphries' comments as reflective of confusion was supported by Ms Burgess, who attended the Bourke meeting with Mr Scott, her manager. Both Mr Scott and Ms Burgess told the Commission that no one from the department knew beforehand that Mr Humphries would be coming to the meeting and therefore no departmental briefings had been provided to him.

In her interview with the Commission, Ms Burgess said that she remembered thinking that Mr Humphries' comments to the meeting about the embargo suggested that he did not fully understand the legislative mechanisms and processes by which such restrictions were imposed and lifted. She told the Commission she believed that the confusion lay in Mr Humphries' suggestion that there was no embargo in place and that the department was considering imposing one on a flow-by-flow basis. As she told the Commission, "in fact, it was the opposite way around. So there was an embargo in place, unless we raised it by media release, which we were assessing on a flow-by-flow basis".

Ms Burgess told the Commission that Mr Humphries' comments indicated to her that he was confused about whether the embargo was applied on a case-by-case basis or exempted on a case-by-case basis, but that, as a matter of course, the departmental officers who were there and witness to this confusion would not have corrected a minister in public. Ms Burgess believed that she and her manager would have come out of the meeting and discussed whether there was a risk of any misunderstanding caused by Mr Humphries' comments that needed correction. She told the Commission that she and Mr Scott would have taken into account the flows at that point and the fact that as there was no water there to take from the Barwon-Darling; whether there was technically an embargo in place at that time became somewhat irrelevant.

Mr Simpson told the Commission that:

> *Kevin Humphries consulted widely without any input from the department. And there was a lot of concern that he was telling people things that were either not based in fact, or, you know, outlandish.*

He told the Commission that Mr Humphries liked to go out and speak to people himself and he would do that on a regular basis without any departmental advisers.

The Commission interviewed Mr Harrison, who attended the meeting at Bourke in his then capacity as an officer of the Commonwealth Environmental Water Office. He told the Commission that he had a clear recollection that Mr Humphries reiterated a number of times to the meeting words to the effect that, "the embargo is off, it's over, the event's passed through, the embargo's dependent on the event, the event's now done".

He told the Commission that there was "a bit of a stunned silence in the room" and there were a couple of departmental officers looking distinctly uncomfortable and surprised. Mr Harrison remembered thinking to himself that it was a "slightly outlandish comment" to make to the meeting because, "given it had to be gazetted to be put on, surely it had to be gazetted that it was actually cancelled … I'm not really sure you can just do it like that".

Mr Cole told the Commission that he had been "very unsettled" by Mr Humphries' repeated assertion at the meeting that there was no embargo. He said that he and Tony Thompson, the newly-elected chairperson of BDW, cautioned their members after Mr Humphries left the meeting that what Mr Humphries had said was "bullshit" and that they knew there had been no gazettal of the end of the embargo and no media release. He said he advised the irrigators at the meeting not to go home and turn on their pumps until they got notice that the embargo had been lifted. Mr Cole told the Commission that, in his opinion, Mr Humphries was "in election mode, there was an election coming up … he was trying to look good in front of his constituents".

Mr Cole told the Ken Matthews investigation that, in his view, when Mr Humphries said there was no embargo, he was "splitting hairs". He explained that:

> *…in a sense, what he was saying was right, you know, on that day, he said the embargo is off. He said it's a – and the way he explained it, he said, look, it's an event by event thing, okay. So, you think about it, no one's got their thresholds in, right, to put a B class pump in … so the embargo is not on, is it? I mean, it is legally, it's been consented but it's not affecting anyone because the thing stopping you from pumping is your threshold, you haven't got it, okay. As soon as an event happens and the river flows above the threshold, that's when the embargo kicks in and it says, no, even though you've got your threshold, you can't pump.*

In Mr Cole's view, Mr Humphries' assertion, that the embargo was off, was a matter "of a minister who was hanging onto his ministry, grandstanding in front of an audience".

Mr Humphries

The NSW state election occurred three days after the BDW meeting at Bourke. Although the coalition government was re-elected, Mr Humphries did not retain his ministry and the Hon Niall Blair became minister for primary industries and lands and water from 2 April 2015.

On 1 August 2017, following the airing of the *Four Corners* program, Mr Humphries' electorate office released a media statement taking issue with an allegation levelled against him by the opposition that he had informed a group of Barwon-Darling irrigators that they could access water during an embargo. Mr Humphries categorically denied articulating any such claim and stated that, "as all irrigators know … access to surface water can only be undertaken on advice and communication from the appropriate authorities, in this case WaterNSW".

Mr Humphries was interviewed by the Commission and later provided a statement. He told the Commission that, during his time as minister for natural resources, lands and water, the Government's number one issue was not the irrigation industry, but rather, fixing communities' water security and securing town and country water supplies. Ensuring the security of water supply to Broken Hill was also the "front and centre issue" for him as the local member for Barwon and then as the minister for Western NSW.

Mr Humphries told the Commission that he attended the Barwon-Darling Water meeting on 25 March 2015 in his capacity as minister. He said he was there to listen to the group's views and "that obviously coming into an election, they might have had a few views". He agreed that the minutes of the meeting were "pretty much" an accurate record of what he had said, including that there was no embargo on the Barwon-Darling at the time and that the embargo would be assessed on a case-by-case basis. Mr Humphries' initial position was that he could not remember, but did not think there was an embargo in place at the time. He readily accepted he was wrong on this point when advised by Commission investigators that the order gazetted on 6 February 2015 was still in force at the time of the meeting. Mr Humphries told the Commission that what he had been telling the meeting "was that each of those embargos needs to be assessed on a case by case basis. Now if there was an embargo

on, obviously they wouldn't have been able to, to pump … And if I'd said something contrary, it should have been pulled up. But that wasn't a licence to go and pump".

Mr Humphries explained to the Commission that he might have made a mistake in terms of the way he presented the point he was making, but what he was trying to say was that there was no "blanket" embargo in place, but rather that each event or flow would be assessed on a case-by-case basis. If there were a flow coming down the river that was too small to give any benefit to the drinking water supply, irrigators should be given the opportunity to access it and "every incident in terms of rainfall event and river flow, needed to be treated in, in that light". He told the Commission that his view on embargos was very clear, namely that:

> *…embargos should be treated on a case by case basis. And that it was pointless having this over-arching embargo on the whole system when it didn't – doesn't work that way … because you can have absolutely flash flooding going on in some areas that are going to give a benefit downstream – as opposed to having minute flows – or a small flow–that might help an irrigator finish off a crop in another part of the system. So the discussion was around, how do you manage the system more efficiently and effectively?*

He told the Commission "if there was an embargo on at that time, and I've said there wasn't an embargo on … I was wrong … But that wasn't the intention".

Mr Humphries was adamant that nobody could have interpreted what he was saying as a licence to pump, because all irrigators know they cannot pump until they are told they can and that is usually by way of a clear notification, or in other words, "the irrigators have been in the industry for a long time. And they know the rules". Mr Humphries reiterated to the Commission what he had told the meeting that, although the embargo may have restricted some water users from finishing off their crop, town water supply is the first priority and that will not change.

Mr Barlow pumps in contravention of the embargo

On 18 May 2015, Richard Wheatley, senior water regulation officer at the department, received a report that pumps had been operating on the cotton-growing property, Burren Downs, downstream of Mungindi, when an embargo on unregulated B- and C-class licences was in force. Mr Wheatley contacted Mr Barlow, who managed the property and the unregulated river (B-class) licence held by his parents, to question him about the reported activity.

In his file note of this contact, Mr Wheatley recorded that Mr Barlow told him that he believed that the embargo preventing pumping was not in place and that Mr Humphries had explained at a meeting that the embargo would be implemented only for that flow event and that subsequent flows would require further embargos.

On being told that the embargo had been set by order and remained in place until the order was lifted, Mr Barlow advised that someone who worked for Troy Grant told him that the embargo was to be lifted on 15 May 2015. He advised that he had got sick of waiting for the media release. On being told that the embargo had not been lifted on 15 May 2015, Mr Barlow volunteered to immediately shut down his pumps.

An update on 18 May 2015 on the department's website indicated that temporary restrictions remained in place for the Barwon-Darling River as at that date, with no access to flows allowed for entitlement holders with B- and C-class licences. It was noted that flows currently passing through the northern river systems, together with earlier flows that reached the Menindee Lakes, were expected to extend water supplies for Broken Hill until spring 2016.

On 29 May 2015, the department issued a media release to announce that temporary restrictions were eased for all areas above Louth in the Barwon-Darling and in the regulated Namoi, Gwydir and Border rivers, and that those in place below Louth were expected to be eased in the coming weeks after current flows in the area entered the Menindee Lakes. The Barlow property, Burren Downs, is located above Louth on the Barwon-Darling. The order of 6 February 2015 was repealed on 22 June 2015, the repeal taking effect on publication in the *Government Gazette* on 26 June 2015.

On 2 June 2015, SIU investigators, Mr Morgan and Andrew Mannall, interviewed Mr Barlow at Burren Downs about the allegation that, on 18 May 2015 and for a number of days prior, he had pumped water into storage on the property when there was an embargo in place. Mr Barlow told the investigators that at a Barwon-Darling water users' meeting in Bourke, just days before the election, Mr Humphries had confirmed on three separate occasions that the embargo was on an "event by event basis" and that each flow would be assessed on its merits and had to be announced if it was going to be embargoed. Mr Barlow told investigators that he had expected the flow on around 15 May 2015 to be embargoed, but when he received no information about this, he elected to pump the following day and pumped for two days before he received the call from Mr Wheatley.

In February 2019, WaterNSW eventually brought proceedings against Mr Barlow in the Land and

Environment Court for taking water from the Barwon River in the period from 16 to18 May 2015, in breach of the order of 6 February 2015 prohibiting the taking of water, which constituted an offence against s 336C(1) of the *Water Management Act 2000* ("the WMA").

Proceedings were also brought against Mr Barlow for taking water during this time, and on a subsequent occasion, when metering equipment was not operating properly, being offences against s 911(2) of the WMA. Mr Barlow pleaded guilty to all three offences and was convicted and fined $86,625 on 22 March 2019. Preston CJ found that Mr Barlow was recklessly indifferent to whether the embargo was still in place when he pumped between 16 and 18 May 2015. He had heard the minister say at the meeting on 25 March 2015 that the embargo had been lifted, but he took no steps to ascertain whether the formal process required to lift the embargo had taken place.

Not corrupt conduct

In his capacity as minister for natural resources, lands and water, Mr Humphries attended a BDW meeting at Bourke on 25 March 2015, just days before a state election. The Commission is satisfied that Mr Humphries told those present that there was no embargo in place on the Barwon-Darling, even though the temporary water restrictions order made under s 324 of the WMA, and gazetted on 6 February 2015, was still in force. Mr Humphries does not deny that he said this to the meeting.

The Commission finds that Mr Humphries was wrong to make the assertion that there was no embargo in place but does not find that he intended, by that assertion, to give permission to those irrigators present to pump during an embargo, in contravention of the WMA.

The Commission finds that Mr Humphries intended by his comments to convey that there was no "blanket" embargo in place. Mr Humphries did not agree with the imposition of what he termed "blanket" embargos over the whole system and was in favour of assessing flows on a case-by-case basis. The evidence clearly indicates that Mr Humphries considered it desirable and possible to both impose the water restrictions necessary to deal with the critical water shortage at Broken Hill *and* to facilitate access for irrigators to small flows that may significantly benefit existing crops but that might be assessed as not benefitting Broken Hill. The terms of the s 324 order, gazetted on 6 February 2015, had been drafted by senior departmental staff explicitly to enable this flexibility of approach.

However, where the department assessed each flow event on a case-by-case basis to determine whether to ease or lift the embargo that was in place, Mr Humphries either wrongly understood, or was proposing in the alternative, that flows should be assessed to determine whether an embargo *should* be imposed. The evidence indicates that he believed that the starting point of such considerations should be access for irrigators, with flows embargoed only if they were large and significant enough to make it down the system to the Menindee Lakes and, thereby, assist Broken Hill's water supply.

Notwithstanding the fact that s 324(7) of the WMA provides that an order under s 324 prevails in the event of any inconsistency between it and any other provision of the Act relating to the distribution, sharing or taking of water, to the extent of that inconsistency, an order under s 324 still needs to satisfy a public interest test. The Commission finds that allowing opportunistic water take for crops without consideration of the needs of the environment or downstream users at a time of unprecedented drought, would be contrary to the objects of the WMA, which provide for the sustainable and integrated management of the state's water sources and would therefore not satisfy such a test.

The Commission finds that the department's practice of effectively varying or lifting the Upper Darling Basin embargo by media release, as permitted by its drafting, contributed to confusion about the legal status of the embargo and whether future flows or events could become available, or would be restricted, on the part of some of those who attended the Bourke meeting, and potentially the minister himself.

The Commission notes that the legislation is clear that an order under s 324 only ceases to have effect when it is repealed, or on the expiry of the period specified in the order. This was something that the chairperson of BDW thought it necessary to remind his members, once Mr Humphries had left the Bourke meeting, so that they did not inadvertently break the law. While Mr Barlow tried to assert that he had believed, based on Mr Humphries' comments to the Bourke meeting, that the embargo had been lifted and water was available to be taken, he accepted that he may have acted recklessly in not checking whether the embargo had actually been lifted by revocation of the order or announcement by media release from the department.

The Commission finds that, as well as being somewhat confused about how embargos were managed by the department, an inference can be drawn that Mr Humphries was in campaign-mode days out from a state election and was seeking to placate his constituents and stakeholders about the contentious embargo on the Barwon-Darling. Mr Humphries had resisted the imposition of an embargo for some time and had been sympathetic to the concerns of the Northern Valley irrigators. Mr Humphries' comments to the irrigators at the Bourke meeting suggested that, even though town

water supply had to be the government's first priority, the government would look after their needs too, even during an embargo. At least one of the irrigators present, Mr Cole, thought the minister was "grandstanding" prior to the election.

While Mr Humphries correctly maintained that town water supply had to be the government's first priority, given the imminent water shortage for Broken Hill was the public interest consideration for the imposition of the embargo, his comments and conduct clearly evidenced his belief that the government's next order of priority in the management of the state's water sources was the needs of irrigators.

The Commission finds no evidence that any consideration was given by Mr Humphries to the protection of the water source and its dependent ecosystems when he announced to the meeting at Bourke that there was no embargo and that, if there was no benefit to Broken Hill's water supply from a flow, irrigators should be able to access it.

Contrary to the submissions on behalf of the department, the Commission considers that the duty in s 9 of the WMA to give priority as between the water sharing principles in the order in which they are set out in s 5(3), *would* apply to decisions not to impose embargos or to lift them in order to enable opportunistic water take for irrigators. Any such decision would be inconsistent with the s 9 duty if it did not first ensure that there was no prejudice to the protection of the water source and its dependent ecosystems in doing so. Given that s 324 orders are ordinarily imposed at times of low and very low flows, which are critically important to the environment, it is difficult to conceive of a situation where prioritising the rights of irrigators to those low flows would not prejudice the water source and be contrary to the public interest in any event.

Mr Humphries' comments and conduct evidenced one more example in this investigation of an attempt to implement the law in the "least worst" way for productive water users and thereby lessen their criticism of the department and/or the minister.

Section 74A(2) statement

The Commission is satisfied that Mr Humphries is an affected person for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Humphries.

As Mr Humphries is no longer a public official, having retired from politics at the State election in March 2019, it is not necessary to consider any recommendation in relation to dismissal action.

Chapter 7: Was there an attempt to amend the BDWSP to benefit Peter Harris?

This chapter examines whether, in 2016, Mark Campbell, officer of the Department of Primary Industries – Water (DPI-W), approved an application by the Harris family to pump water from a different section of the Barwon-Darling, in contravention of clause 66(1) of the 2012 Barwon-Darling Water Sharing Plan (BDWSP). It further examines whether, between 2016 and August 2017, the Hon Niall Blair, then minister for lands and water and minister for primary industries, attempted to amend the BDWSP to retrospectively justify the alleged unlawful decision by the department to approve the Harris family's application to pump water from a different section of the Barwon-Darling than the relevant water access licence (WAL) allowed.

Background

The Environmental Defenders Office (EDO) complained to the Commission about another matter relating to the Harris family, which it had examined on behalf of its client, the Australian Conservation Foundation. The EDO's analysis identified, in part, that on 4 February 2016, the department approved an application to amend the extraction component of WAL 33664 held by Budvalt Pty Ltd, whose directors are Peter Harris and Jane Harris, despite the fact that this appeared to breach clause 66(1) of the BDWSP. As discussed in chapter 3 of this report, the BDWSP was made under s 50 of the *Water Management Act 2000* ("the WMA") and commenced in October 2012.

On 2 August 2017, the *Daily Telegraph* published an article in which it was reported that Mr Blair was attempting to amend the BDWSP to retrospectively justify a decision that had been taken by his department to enable Peter Harris, NSW irrigator, cotton farmer and so called "major political donor", to access more water in the Barwon-Darling. The article reported that the department had prepared a briefing in relation to what it described as an "obvious drafting error" in the BDWSP that needed amendment as it was impacting on some water users wishing to trade between river sections covered by the plan. The briefing was reportedly drafted some months after Peter Harris had been granted "extra irrigation rights", notwithstanding that this had required the department to "overrule" the law to do so. The article reported that the Hon Gabrielle Upton, then environment minister, was refusing to concur with the amendment sought by Mr Blair's department.

WALs under the WMA

As discussed in chapter 3, the WMA governs the issue of WALs and the trade of water licences and allocations for those water sources (rivers, lakes and groundwater) in NSW where water sharing plans are in place. WALs may be granted to access the available water governed by a water sharing plan (WSP) under the WMA. WALs entitle licence-holders:

> *(i) to specified shares in the available water within a particular water management area or water source (the share component), and*
>
> *(ii) to take water at specified times, rates or circumstances from specified areas or locations (the extraction component).*

Water access entitlements are rights to an ongoing share of the total amount of water available in a system. Water allocations are the actual amount of water available under water access entitlements in a given season. Each WAL has a water allocation account. On 1 July each year, an available water determination is made that stipulates the amount of water available to be credited to a WAL's water allocation account, based on the WAL's share in the available water. As water is extracted from the water source, the WAL holder's account is debited by the amount that is extracted. It is an offence to take more water than the water allocation credited to the water allocation account of a WAL. Accordingly, if a WAL

holder needs to take more water than their allocation, they need to purchase another WAL's water allocation on the water market.

It is also an offence to take water under a WAL in contravention of the extraction component of the licence. The extraction component specifies the times, rates and circumstances when water can be taken, the types of water source from which the water can be taken and whether water can be taken from the whole water source or only from within a specified management zone. These extraction components are a tradable right under s 71Q of the WMA. WALs also specify the nominated water supply work (such as pumps, bores or wells) or extraction point from which water can be taken under the licence. It is an offence to take water from a water source other than by a water supply work or from an extraction point which is nominated on a WAL.

WSPs are the main tool under the WMA for managing the state's water resources. These statutory instruments define the rules for sharing the water in a particular water source between the environment and consumptive water users, as well as, in large part, the rules for the trading of water in a particular water source (although these access licence dealing rules can be trumped by access licence dealing principles made under the WMA, which may prohibit or regulate dealings). They stipulate the categories of WAL available in the water source, which, in turn, help define the priorities for sharing water, how water may be used – that is, for general purposes or defined purposes such as stock and domestic or native title holders' traditional purposes – and the conditions that apply to those licences.

Barwon-Darling WSP

The BDWSP commenced on 4 October 2012 for a 10-year term. The BDWSP covers two discrete water resources: the Barwon-Darling unregulated river and the Upper Darling Groundwater Source. The plan specifies four "river sections" within the Barwon-Darling unregulated river water source for trading purposes. It also specifies 14 "management zones", each representing a portion of a river section, to allow the refined implementation of access rules. There are 200 WALs in the Barwon-Darling, most of which are used for irrigation, with the remainder used for town water supply and stock, and domestic purposes.

As an unregulated river system, the Barwon-Darling's supply of water is dependent solely on rainfall and natural river flows. In recognition of the need to protect the various flow events – from floods (very high flows), to freshes (high flows) to dry spells (very low flows) – for the benefit of the environment, the BDWSP establishes five flow classes for each management zone, namely: no flow, low flow, A-, B- and C-flow classes, in ascending order of water availability.

WALs in the Barwon-Darling are categorised according to these flow classes and allow licence-holders to access flows at or above their relevant flow class only; for example, A-class licences are entitled to access A-, B- and C-class flows, whereas B-class licences can only access B- and C-class flows. These access rules aim to reserve the low flow and no flow classes for the environment. Each class of licence is also subject to a relevant cease-to-pump rule, which requires that users must cease to pump when the flow at designated reference points in the respective management zones is equal to, or falls below, the flow rate specified for each category of WAL (expressed in ML per day).

The dealing rule in clause 66 of the BDWSP

As well as setting out environmental water rules to determine the share of the water reserved for the environment, long-term average annual extraction limits for the water sources covered by the plan, and access rules to determine when extraction is allowed, the

BDWSP also sets out what are known as dealing rules. These control both the trade of water, including the transfer of the share component of a WAL and the assignment of water allocation between WALs, and changes to the location for water extraction.

Under s 71S of the WMA, the minister may consent to an application by a WAL holder to amend the extraction component of the licence, so as:

(a) to vary the times, rates or circumstances specified in the licence with respect to the taking of water under the licence; or

(b) to vary the areas or locations specified in the licence as the areas or locations from which water may be taken under the licence.

Clause 66(1) of the BDWSP, however, provides:

> *Dealings under section 71S of the Act are prohibited if the dealing involves the extraction component of an access licence being varied to specify a different river section.*

Despite the unambiguous wording of the prohibition in clause 66(1), however, clause 66(2) appears to contemplate that the variation of the extraction component of an access licence to specify a different river section *can* happen. This sub-clause sets the totals that must not be exceeded, for each of the Barwon-Darling's four river sections, of the sum of share components for each category of access licence, in the event of the extraction component of a WAL being varied to specify a different river section. In effect, as long as specified limits are not exceeded, it allows a s 71S dealing to specify a different river section.

Peter Harris' application to amend WAL 33664

On 4 February 2016, Peter Harris submitted an application as director of Budvalt, to amend the extraction component of Budvalt's unregulated river A-class WAL 33664 to specify a new management zone, within a different river section, from which water was proposed to be pumped under the amended WAL. Specifically, the application was to remove four nominated works (pumps) located in the Boorooma to Brewarrina Management Zone (River Section 2) and to add one pump located in the Brewarrina to Culgoa Management Zone (River Section 3) to the WAL.

Mr Campbell, water regulation officer at the department, processed the application and recommended its approval to Russell Harrison, director of water regulatory operations at the department, who granted the application by delegation of the minister on 5 February 2016.

The Commission's investigation

In accordance with the Commission's jurisdiction, the Commission's investigation focused on whether the approval by departmental officers of the application by Peter Harris to amend the extraction component of WAL 3364, despite the fact that it appears to have breached clause 66(1) of the BDWSP, constituted corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). The Commission also investigated whether the subsequent attempts to remove clause 66(1) of the BDWSP were made to retrospectively justify an unlawful decision that conferred a benefit on Peter Harris and may have constituted corrupt conduct.

In the course of its investigation of this allegation, the Commission interviewed, among others, Mr Campbell, Richard Wheatley (departmental officer), Kylee Wilton (BDWSP planner), Daniel Connor (BDWSP planner) and Dr Julie-Anne Harty (senior environmental water planner at the Office of Environment and Heritage (OEH)). The Commission reviewed the BDWSP, the Background Document to the plan, which was among material published by the department in September 2012 to explain the development of the BDWSP rules, relevant sections of the WMA, and extensive departmental, WaterNSW and OEH records and communications.

Section 71S applications

Evidence obtained by the Commission indicates that, as at January 2016, certain departmental officers involved in assessing applications under s 71S of the WMA considered clause 66(1) of the BDWSP to have been drafted in error. They were of the view that clause 66(2) captured the true intent of the dealing rule, which was to permit dealings within and between river sections, up to a limit. Clause 66(2) of the BDWSP provides that:

> *Dealings under section 71S of the Act are prohibited if the dealing involves:*
>
> *(a) the extraction component of an unregulated river (A Class) access licence being varied to specify River Section 1, if it would cause the sum of the share components of all unregulated river (A Class) access licences that nominate water supply works located in River Section 1 to exceed 3,434,*
>
> *(b) the extraction component of an unregulated river (B Class) access licence being varied to specify River Section 1, if it would cause the sum of the share components of all unregulated river (B Class) access licences that nominate water supply works located in River Section 1 to exceed 82,940,*

(c) *the extraction component of an unregulated river (C Class) access licence being varied to specify River Section 1, if it would cause the sum of the share components of all unregulated river (C Class) access licences that nominate water supply works located in River Section 1 to exceed 26,040…*

The clause continues in the same vein, to set out the limits for each licence class for River Sections 2 to 4.

On 19 January 2016, Mr Connor (acting team leader, surface water policy at the department), who had been involved in drafting the BDWSP, requested Ms Wilton (senior water policy officer at the department) to prepare an amendment to the BDWSP to remove clause 66(1).

The same day, Mr Campbell, on the strength of his understanding that clause 66(1) was drafted in error and would soon be removed by amendment, recommended the approval of a s 71S application to amend the extraction component of a Barwon-Darling WAL notwithstanding the fact that it offended clause 66(1). This was not an application from, or associated with, the Harris family. On 28 January 2016, Mr Harrison, as the delegated officer, granted the application on the basis of Mr Campbell's recommendation and advice concerning the imminent removal of clause 66(1). Peter Harris' s 71S application in relation to WAL 33664, as detailed above, was approved for the same reasons on 5 February 2016.

The evidence available to the Commission indicates that there were 15 applications made pursuant to s 71S of the WMA between 1 January 2016 and September 2017. Of these, three required re-submission because of missing information and two were subsequently withdrawn. Of the 10 remaining, nine were in breach of clause 66(1) in that they sought variations of the extraction component of a WAL to specify a different river section. Nevertheless, seven of these offending applications were approved. Of the approved applications, two related to WALs held by Peter Harris and Budvalt. All approvals were granted by the department prior to 1 July 2016, when this function was transferred to WaterNSW following an organisational restructure. The evidence indicates that no legal advice was ever obtained by departmental officers in relation to this issue.

The evidence indicates that, once the function was transferred to WaterNSW, the delegated officer at that agency was not comfortable to approve dealings in contravention of the BDWSP, whether the BDWSP was correct or not. His view was that the plan should be amended rather than its intent second-guessed and that such applications would not be approved as long as the BDWSP prohibited them.

Evidence obtained by the Commission indicates that, following the restructure and the refusal of WaterNSW to approve applications that contravened clause 66(1) of the BDWSP, such applications were dealt with via a more lengthy, costly and complicated workaround. This involved getting applicants to resubmit their dealing applications to use a combination of other sections of the WMA, such as 71Q and 71W, which permit trade between river sections and could achieve the same result as a s 71S dealing but without the restriction imposed by clause 66(1).

Not corrupt conduct

The Commission finds no evidence to indicate that the Harris family was treated partially when delegated departmental officers processed and approved the s 71S application for WAL 33664 in contravention of clause 66(1) of the BDWSP. The available evidence indicates that, between January and July 2016, at least seven s 71S dealings that offended clause 66(1) were approved for Barwon-Darling WAL holders; only two of these were connected to the Harris family.

The Commission found no evidence that any departmental officer acted deliberately and dishonestly to circumvent the law and confer a benefit on one or more irrigators or concealed any of the processes followed in doing so. An alternative explanation exists, supported by objective evidence, for the decision to approve applications in apparent contravention of the law. The evidence indicates that departmental officers involved in approving such dealings operated under a belief held in good faith that there was a fundamental inconsistency between clauses 66(1) and 66(2) of the BDWSP and that it was the latter that gave effect to the true intent of the dealing. In light of this inconsistency and the fact that the same result, although by a more lengthy and costly process, could be achieved using other sections of the WMA, these officers considered clause 66(1) to have been drafted in error and to require removal by amendment as a simple administrative tidy up.

The Commission finds that, while there is some evidence to support an interpretation of clause 66(1) of the BDWSP as anomalous and drafted in error, the decision to approve applications contrary to the law without first obtaining legal advice and/or securing the necessary amendment was not appropriate. There is no evidence, however, that this conduct was corruptly or otherwise improperly motivated.

The involvement of Mr Blair

On 14 September 2016, Mr Connor drafted a briefing for Mr Blair, seeking approval to amend the BDWSP to remove clause 66(1), which he asserted was originally drafted in error. The briefing advised that the intent of the access licence trading rules in the BDWSP is to permit licences to be traded between river sections along the

Barwon-Darling up to specified limits but that clause 66(1) mistakenly prohibits a licence trade if the extraction component of an access licence is varied to specify a different river section. This was said to conflict with clause 66(2), which covers the intent of the trading rules, by specifying the limits for these trades.

The briefing also advised that the department had been in touch with affected water users and had advised that the "minor" error would be rectified as soon as practicable. The affected water users were noted to be "fully supportive of this amendment". The briefing was endorsed on 14 November 2016 by the manager of rural water policy and the director of policy and planning, and, on 25 November 2016, by deputy director general, Gavin Hanlon.

The department was responsible for developing and implementing WSPs made under the WMA. The making or amendment of a WSP requires the concurrence of the minister for the environment under s 41(2) and s 45(3) of the WMA respectively. On 9 January 2017, Mr Blair signed a letter addressed to the Hon Mark Speakman, minister for the environment, seeking his formal concurrence to amend the plan by deleting the "erroneous" clause 66(1).

On 11 January 2017, Dr Harty drafted a memo to Lisa Thurtell, a senior OEH officer, in response to the concurrence request. She noted that, although the removal of clause 66(1) was presented as a simple exercise to free up trade opportunities for consumptive water users in the water source, in fact there were a number of related issues with the BDWSP "which mean the proposed deletion of clause 66(1) could cause several third party impacts, for both the environment and other consumptive users in the water source".

One of the key issues noted by Dr Harty in her memo, which was reiterated in her interview with the Commission, was that, despite the fact that clause 66(1) and clause 66(2) clearly contradict each other, clause 66(1) should not be removed because of the consequences this would have for the environment. The problem lies in the fact that, individual daily extraction limits (IDELs) and total daily extraction limits (TDELs) on licences, which are provided for in the BDWSP as a sort of "check and balance" for the environment, while still allowing access and trade, have never been implemented.

If they had been implemented as intended under the plan, there would be an effective daily Cap on how much water could be pumped out of the river and a safeguard enabling certain flows to continue through the system without being extracted. It would not matter what sized pump was used, or where the water was extracted, or how long the pumping continued, the limitation on water take would come from the IDEL. Without IDELs in place, however, trade enables consolidation of entitlement in a couple of places on the river and the effective extraction of large volumes of water up to the cease-to-pump thresholds. Removing the restriction on trade between river sections provided by clause 66(1) would further compound the problems for the environment.

In her memo, Dr Harty noted that, since the BDWSP commenced operation:

> *…there have* [sic] *been significant concentration of ownership of entitlement in the water source, and equivalent changes in extraction patterns. Where previously there were approximately 100 people holding A class licences, now two large annual cropping irrigators own 47% of the A class entitlement, 67% of the B class entitlement, and 99% of the C class entitlement. Where previously A class pumping was restricted to 5 ML/day, now A class flows can be extracted using much larger pumps (up to 80 ML/day). The historic level of take for A class licences was 4 GL/year, whereas now observed A class take can be as much as 4 GL over two weeks, repeated throughout the year.*

Dr Harty noted in her memo that if clause 66(1) were removed from the BDWSP, consumptive users could trade water from one licence to another in order to have access at several points along the river to potentially very large volumes of water. This consolidation of entitlement, combined with the lack of IDELs and TDELs, would enable just a few irrigators to have potentially unlimited access to the lower A- and B-class flows, to the detriment of others downstream and the environment. She noted that no supporting evidence had been provided by the department to establish that the proposed rule change would not result in unacceptable risks to the environment and she recommended that the matter should be dealt with in the BDWSP development process scheduled to commence in early 2017.

On 1 March 2017, Mr Blair sought concurrence from the Hon Gabrielle Upton, the new minister for the environment, to amend the BDWSP by removing clause 66(1). The grounds for the proposal were, again, that the clause was drafted in error and this was having an impact on some water users wishing to trade between river sections and needed to be corrected as soon as possible.

The evidence indicates that the concurrence request remained under active review by OEH for a number of months and that, in August 2017, after the *Four Corners* program had aired, OEH recommended to the minister that concurrence be withheld until at least the findings of Ken Matthews' interim report had been released.

In February 2018, following consideration of Mr Matthews' final report, OEH prepared a further briefing in which it recommended that Ms Upton not concur to the proposed amendment. OEH noted that the proposed removal of clause 66(1), along with the failure to implement IDELs, would consolidate entitlement and increase daily extraction within certain river reaches, representing significant risks to downstream water users and the environment. The briefing noted the loss of public confidence in water management in the Barwon-Darling River following the *Four Corners* program, and highlighted in Mr Matthews' final report, and that this would require systematic attention in the preparation of a water resource plan for the area for accreditation under the Murray-Darling Basin Plan ("the Basin Plan").

Evidence available to the Commission indicates that Ms Upton wrote to Mr Blair on March 2018 to advise that she considered providing her concurrence to the proposed amendment would be premature and that she anticipated that, as the issues would be fully considered and addressed through the development of the BDWSP, for accreditation under the Basin Plan, she looked forward to offering her concurrence to a revised WSP at the appropriate time.

Not corrupt conduct

The Commission finds no evidence that Mr Blair's requests for concurrence from his environment ministerial counterparts for the proposed removal by amendment of clause 66(1) from the BDWSP were corruptly or otherwise improperly motivated. The Commission finds no evidence that the minister's actions in proposing the amendment of the BDWSP were motivated by the need to retrospectively justify an unlawful decision made in favour of Peter Harris and nor were they the result of any representations made to the minister by particular irrigators.

The Commission finds that there is an obvious inconsistency between clause 66(1), which prohibits the trading of the extraction component of a water licence between river sections and clause 66(2), which provides for the trading of the extraction component up to specified limits for each river section, and clearly implies that trading between river sections is anticipated to occur. There is a lack of clarity in the BDWSP about the reasons for this apparent inconsistency and the interpretations of it differ as between the department and OEH.

The Commission finds evidence supportive of both the view that clause 66(1) had been drafted in error and that it was an intended protection in the absence of the establishment of daily extraction limits. The Commission finds that the failure to establish IDELs and TDELs, as contemplated by the BDWSP, has in large part contributed to the confusion about the intention and status of clause 66(1) given its apparent inconsistency with clause 66(2). The circumstances surrounding the failure to establish IDELs and TDELs, as contemplated by the BWDSP, are addressed in chapter 4 of this report.

Section 74A(2) statements

The Commission is satisfied that Mr Campbell and Mr Blair are affected persons for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecution with respect to the prosecution of either Mr Campbell or Mr Blair, or any recommendation in relation to disciplinary or dismissal action against Mr Campbell.

As Mr Blair is no longer a public official, having retired from politics in October 2019, it is not necessary to consider any recommendation in relation to dismissal action.

Chapter 8: The department's investigations

This chapter relates to allegations investigated by the Commission that:

- between 20 August 2015 and February 2017, the Department of Primary Industries – Water (DPI-W) failed to properly investigate or take prosecution action in relation to breaches of the *Water Management Act 2000* ("the WMA") by Peter Harris, and by those managing properties owned by him, including Miralwyn and Rumleigh
- a proper investigation was not undertaken when Peter Harris built a 2-kilometre in-ground irrigation channel in 2015 through Crown lands adjoining his property at Miralwyn without approval.

This chapter also examines an allegation that, in 2016, senior officers from the department were involved in "shutting down" proposed investigations into systemic breaches of the WMA by irrigators in north-west NSW by Jamie Morgan, manager of the department's Strategic Investigations Unit (SIU), and eventually disbanded the SIU.

Background

The ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped") aired allegations that the department took no action on reported water compliance breaches involving properties on the Barwon-Darling owned by irrigator and cotton grower, Peter Harris, and his family. It was specifically alleged that the department did not take action in relation to the reported illegal pumping of water at the Harris property, Miralwyn, on 20 August 2015, nor in relation to the reported illegal pumping of water from the Harris property, Rumleigh, on 13 February 2016. It was alleged that the department was aware of but took no action in relation to the alleged illegal access of up to 1 billion litres of water; more than was allowed for the benefit of properties owned by Peter Harris. In addition, it was alleged on the program that the department failed to properly investigate the allegedly unauthorised construction in 2015 by Peter Harris of a 2-kilometre in-ground irrigation channel through Crown lands adjoining Miralwyn.

The program also aired allegations that when Mr Morgan, as manager of the SIU, sought approval to conduct a major proactive investigation in the Barwon-Darling following evidence of significant non-compliance in that river system, it was never given. Mr Morgan claimed on the program that, around the time he sought approval for this investigation, there was suddenly no appetite for compliance on the part of senior management, his unit was moved out of the department, and his staff numbers began to fall. He claimed that the SIU was very quickly disbanded after it began to uncover significant compliance problems in the Barwon-Darling.

Mr Morgan was the manager of the SIU from approximately mid-2014 until mid-2016, when a restructure of the state's water governance resulted in the discontinuation of the SIU and the transfer of a large part of the responsibility for compliance and enforcement to the state-owned corporation WaterNSW, which operates the state's rivers and water supply systems and is an avowedly customer service-oriented organisation.

The Ombudsman's investigation

In June 2016, several departmental staff raised concerns with the NSW Ombudsman about the department's performance of its statutory compliance and enforcement functions. The reported concerns closely mirrored many of those aired in the *Four Corners* program a year later. These included the allegations that:

- there were systemic failures by senior management to take action on water compliance matters

- the SIU had been scaled down and rendered ineffectual through a loss of staff before being ultimately disbanded
- the department's ability to take timely and appropriate enforcement action was being impeded
- the restructure and realignment of functions referred to as the Water Transformation Project, which was initiated in mid-2015 and came into effect on 1 July 2016, was having a debilitating effect on the conduct of enforcement activities across the state.

In June 2016, the Ombudsman also received a complaint from a member of the public that the department was not taking adequate action on allegations of potentially large-scale water theft by a local cotton farmer.

The Ombudsman commenced an investigation. Following the transfer of a large part of the department's compliance and enforcement functions to WaterNSW, the Ombudsman received similar complaints against WaterNSW, which also became the subject of its investigation. This was the Ombudsman's fourth formal investigation since 2007 into the state's administration of water compliance and enforcement. After an extensive investigation, in August 2018, the Ombudsman published *Water: compliance and enforcement*. Relevant findings from the report are set out below.

Resourcing the SIU

The SIU was a specialised investigation team created by the department in 2012–13 in response to the Ombudsman's recommendations from previous investigations. It was created to focus on investigating and taking enforcement action in relation to serious breaches of water laws. The unit became part of DPI-W's Monitoring and Investigations Branch, when the NSW Office of Water (NOW) was replaced by DPI-W in mid-2015.

As such, the SIU's functions incorporated a proactive monitoring role, which was funded by the Commonwealth under the National Framework for Compliance and Enforcement Systems for Water Resource Management (NEF) for a limited period until January 2016. Up to five SIU investigator positions were temporarily funded through the NEF. A full complement of staff for the unit consisted of 12 investigators, including the manager, Mr Morgan. The SIU was fully staffed as at mid-2015.

The Ombudsman's investigation found that concerns about the ongoing funding of the unit, potential staff shortages from the non-renewal of temporary staff contracts, and the impact of this on effective compliance were raised with Gavin Hanlon, deputy director general, from mid-2015. Senior management considered that there was little point seeking an extension of NEF funding because of the planned organisational restructure and the potential that, with it, the department's compliance function would be transferred out of government in any event.

The Ombudsman found that the resourcing uncertainty resulted in a number of skilled investigators seeking employment elsewhere, a decrease in staff morale among those who remained and work that had been the responsibility of the SIU falling to the department's Water Regulation Group, which was staffed with officers who did not feel equipped to take on high-level strategic investigations. In the months before the planned organisational restructure took effect on 1 July 2016, the SIU had reduced to just six employees. Following the restructure, only two former SIU investigators remained within the department and four, including the manager, were transferred to WaterNSW.

The Ombudsman concluded that, while there was no evidence of a deliberate or conscious decision in the department to reduce the number of SIU investigators to a point where the unit was rendered ineffectual, attempts to secure alternate sources of funding could and

should have been made in order to retain appropriately trained and specialised staff, even on a temporary basis. The Ombudsman found that the failure to ensure that funding was prioritised caused a loss of expertise, skills and corporate knowledge and was avoidable. This loss also contributed to the inability of WaterNSW to deal appropriately with the significant backlog of cases it inherited from the department following the transfer of compliance functions.

Transfer of compliance functions to WaterNSW

From 1 July 2016, as a result of the organisational restructure, WaterNSW became responsible for licensing functions for the majority of private water users in the state and for compliance and enforcement in relation to the entities it licensed. The department retained responsibility for servicing and regulating water utilities, mining companies and state significant developments. Approximately 70% of the compliance workload shifted to WaterNSW, as did departmental regulatory staff, including four SIU officers.

The Ombudsman's investigation found that, once the government had decided to split the compliance function between the department and WaterNSW based on the types of customers each was responsible for licensing, "the contemporaneous evidence suggests that the decision to divide the expertise of the SIU between the two agencies was logical in the context in which it was made". Under the model that was adopted, each agency became responsible for the end-to-end regulation of its particular "customers", from licensing and billing to enforcement.

The Ombudsman also concluded that the decision about where to place the SIU investigators who were transferred – that is, whether to keep them in a standalone unit or embed them in the regions and discontinue the unit, as ultimately happened – was within the legitimate management discretion of both affected agencies. There was no evidence that it was improperly motivated.

Compliance post-restructure

The Ombudsman's investigation identified that, in the 12 months following the transfer of compliance functions, there were impediments to the ability of some of the staff transferred from the department to undertake compliance activities and a slower than anticipated return to productivity. It discovered a 72% drop in total enforcement actions taken by both agencies in this period compared to the 12 months immediately prior. The Ombudsman found that the integration of transferred departmental staff within WaterNSW was less than ideal and there was a further loss of experienced investigators.

It concluded that there was:

> *…insufficient infrastructure to support the delivery of the compliance function, inadequate communication and leadership, and no clear statement on the importance of the compliance function in the broader context of the WaterNSW business.*

The Ombudsman noted that a number of transferred water regulation staff struggled with what they perceived as a "cultural malalignment" and conflict between WaterNSW's avowedly customer-focused values and objectives and the legal obligation to hold some of its offending customers to account. The Ombudsman found that, in the face of these concerns, WaterNSW failed to make it clear to both staff and customers that it took seriously its regulatory obligations.

The Ombudsman found that WaterNSW failed to demonstrate sufficient regard for its enforcement responsibilities until after the *Four Corners* program aired in mid-July 2017. It was not until after this time that WaterNSW sought to address the backlog of compliance cases it had inherited from the department and properly resource its compliance functions. The Ombudsman found that, between the end of 2016 (when Mr Morgan took a redundancy) and August 2017 (when WaterNSW engaged a private company to provide investigative and analytic services to assist with the compliance backlog), "there were only three investigators left to perform a role that should have been done by at least three times as many investigators".

The Commission's investigation

In accordance with the Commission's jurisdiction, the Commission's investigation focused on whether the alleged failures on the part of the department to take appropriate investigative and enforcement action in relation to allegations of non-compliance by Peter Harris constituted corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). Likewise, the Commission's investigation focused on whether the alleged refusal in 2016 by senior management within the department to approve a major proactive investigation proposed by Mr Morgan into systemic breaches of the WMA in the Barwon-Darling, and the SIU's ultimate disbandment, constituted corrupt conduct within the meaning of the ICAC Act.

The Commission conducted interviews with a number of departmental and WaterNSW executives and SIU officers, including Mr Morgan. The Commission had made available to it large quantities of relevant material, including interview transcripts, by both the Ombudsman and Ken Matthews' investigation team, and obtained and

reviewed extensive agency records from the department and WaterNSW, as well as other documentary evidence.

The Harris matters

The Commission's investigation confirmed that the department had, prior to 1 July 2016, commenced investigations into allegations of illegal water take by the Harris family at properties in the Barwon-Darling unregulated system while that agency still held responsibility for investigating breaches of the WMA. Allegations being investigated included the potential offences of:

- taking water in excess of allocation and contrary to water access licence (WAL) conditions at Rumleigh in February 2016
- taking water when metering equipment was not working properly at Miralwyn in August 2015
- constructing an unauthorised irrigation supply channel across Crown land adjoining Miralwyn.

Evidence obtained by the Commission indicates that the department was also investigating allegations of illegal water take against a number of other WAL holders in the Barwon-Darling, including that Anthony Barlow pumped water at the property Burren Downs while there was a gazetted embargo in place (the allegation concerning Burren Downs is dealt with in chapter 6). These investigations were transferred in varying stages of incompleteness to WaterNSW.

Investigation concerning the unauthorised channel on Miralwyn

On 12 August 2015, a neighbouring property owner called the department's Dubbo office to enquire whether the works currently being undertaken along the boundary of his property and Miralwyn were authorised or exempt. He alleged that a channel was being constructed to take Macquarie River water through the Miralwyn tail water system. This enquiry was forwarded to Richard Wheatley, senior water regulation officer at the Dubbo office.

On 18 August 2015, Mr Wheatley referred the matter to the SIU for investigation. SIU investigators conducted a site visit on 19 and 20 August 2015, inspected the channel and conducted a directed interview with Jack Harris (Miralwyn and Geera property manager, and son of Peter Harris) about this allegation and the other allegations involving illegal water take and meter tampering that the unit was already investigating.

On 9 September 2015, on behalf of the Harris company, Budvalt Pty Ltd, Jack Harris submitted an application for an amended water supply works and use approval in relation to the channel, the declared purpose being to utilise tail water and storage water from one part of the property on another. On 22 September 2015, Mr Wheatley advised SIU officers that an application for an amended approval "to legitimise the supply channel" constructed by the Harris family had been received and that he would advise further as his assessment of the application continued.

On 30 September 2015, DPI-W advertised in relevant media that an application had been received from Budvalt in relation to the channel and called for objections in writing within 28 days. An adjoining property owner raised concerns directly with the Department of Primary Industries – Lands (DPI-L) that the channel had been built above ground, not below ground as advertised, and that it had been constructed well before the advertisement was issued calling for objections. DPI-L advised Mr Wheatley that, in addition, it appeared from the information received, that the channel had been constructed across a Crown road without authorisation and that compliance action may be required.

The evidence available to the Commission indicates that Budvalt's application to legitimise the channel was the subject of multiple objections and remained unapproved by DPI-W pending consent or concurrence from DPI-L in relation to the encroachment on Crown land. On 11 March 2016, Mr Wheatley advised DPI-L that, although investigators had been on site, because an application had been lodged, and the works are permissible on application, it was unlikely that any compliance action would be taken. The matter was referred to DPI-L's compliance unit for investigation. Evidence available to the Commission indicates that, over the next approximately 18 months, DPI-L pursued a negotiated solution with the Harris family to reinstate public access to the Crown road, which the channel construction had impeded. By August 2017, DPI-L proposed to authorise the irrigation channel across the Crown road on the basis that the required ongoing access along the Crown road was being appropriately addressed.

Over the course of the period that DPI-L pursued voluntary compliance action in relation to the Crown road issue, compliance action by DPI-W appears to have been suspended or re-prioritised. The Commission's investigation identified insufficient evidence to explain why there was no progress in the SIU's investigation of the construction of the alleged illegal channel after 9 September 2015.

The Commission does note, however, that the evidence indicates that one of the original SIU investigators with carriage of the matter resigned on 11 September 2015 and, the other, on 25 April 2016. The matter was re-allocated to another SIU investigator on 9 May 2016, but was then one of the investigations transferred to WaterNSW on

1 July 2016. The matter was re-allocated to a further SIU investigator in WaterNSW on 25 January 2017 and then back to Mr Wheatley on 11 July 2017, shortly before the *Four Corners* program aired.

Finalisation of DPI-W's outstanding investigations

Evidence obtained by the Commission indicates that, in April 2017, the Environmental Defenders Office (EDO) advised WaterNSW of its concerns about substantial over extraction of water by Peter Harris and Jane Harris at their "Beemery Farm" property in the 2015–16 water year, contrary to the conditions of their licences. Concerns from the EDO were based on its analysis of water allocation and usage accounts for WALs held by the Harris family, which were released to it by WaterNSW under the *Government Information (Public Access) Act 2009*. In May 2017, WaterNSW commenced an investigation of the matters raised by the EDO.

The evidence indicates that investigations in relation to six properties in the Barwon-Darling unregulated system, owned by the Harris family and others, were yet to be finalised by the time the *Four Corners* program aired in July 2017. The evidence available to the Commission indicates that, as at 26 September 2017, WaterNSW still had not approved Budvalt's application for authorisation of the irrigation channel, primarily because concurrence from DPI-L was still outstanding and objections had been received.

In November 2017, WaterNSW engaged an external agency to work with its investigators to finalise these matters and assist the board of WaterNSW to decide whether prosecution action should be commenced in relation to any potential offences.

The interim report of Mr Matthews' independent investigation into NSW water management and compliance, published in September 2017, contained a principal finding that water-related compliance and enforcement arrangements in NSW had been ineffectual and required significant and urgent improvement. Mr Matthews found that several individual cases of alleged non-compliant extraction of water for irrigation from the Barwon-Darling river system, as reported in the *Four Corners* program, had remained "unresolved for far too long". He recommended that WaterNSW, as the appropriate authority in the first instance, immediately proceed to assemble appropriate briefs of evidence to enable the determination of whether or not to take prosecution action.

Mr Matthews investigated the circumstances surrounding the allegations concerning construction of an irrigation channel affecting Crown land adjacent to the Harris family's Miralwyn property, including the handling of the issue by the two relevant areas of the DPI. Mr Matthews concluded in his interim report that overall, the two areas of the department "handled an awkward issue satisfactorily".

When Mr Matthews submitted the final report of his independent investigation in late November 2017, he expressed his disappointment that decisions about whether or not to prosecute had still not been taken, but acknowledged that he was satisfied that WaterNSW was progressing the cases as fast as good legal process permitted.

In early March 2018, WaterNSW commenced proceedings against Peter Harris and Jane Harris in the NSW Land and Environment Court. They were charged with extracting water at their property, Beemery Farm, between 22 and 30 June 2016, below the flow conditions permitted by their WAL and taking approximately 1.8 GL more than that to which they were entitled. Peter Harris and Jane Harris were found guilty as charged in March 2020. The decision on penalty is reserved.

In July 2018, the Natural Resources Access Regulator (NRAR) laid charges against Jack Harris and Budvalt alleging breaches of the WMA involving the unauthorised construction and use of the channel at the Harris family property, Miralwyn, in July and August 2015. Budvalt pleaded guilty on 27 July 2020 and the charge against Jack Harris was withdrawn. On 29 September 2020, the Land and Environment Court convicted Budvalt of a breach of s 91B(1) of the WMA for the unlawful construction and use of the water supply work at Miralwyn and fined the company $252,000.

In May 2019, charges were laid against Peter Harris and his farm manager, alleging that, between 6 and 8 August 2015, at the property, Mercadool, near Walgett, water was extracted when metering equipment was not working, in contravention of the WMA. On 31 July 2020, the Land and Environment Court dismissed these charges against Peter Harris and his farm manager because elements of the offences were not proven beyond reasonable doubt.

In late 2017, the EDO commenced civil enforcement proceedings against Peter Harris and Jane Harris in the Land and Environment Court on behalf of its client, the Inland Rivers Network (IRN). The IRN sought, among other things, a declaration that Peter Harris and Jane Harris took water unlawfully from the Barwon-Darling unregulated water source in the 2014–15 and 2015–16 water years, and orders that Peter Harris and Jane Harris remedy the alleged unlawful take by returning to the river system an equivalent volume of water. These proceedings were set down for a final hearing in March 2020. The matter is still before the Court.

Not corrupt conduct

The Commission's investigation confirmed that certain investigations commenced by the department into allegations of unlawful water take against the Harris family were still incomplete on transfer to WaterNSW as part of the department's transfer of compliance functions effective from 1 July 2016. These investigations remained incomplete by the time the *Four Corners* program aired in July 2017, along with the investigation of additional allegations of illegal water take by the Harris family notified to WaterNSW by the EDO in April 2017. The Commission notes that no decision to take prosecution action against Peter Harris and Jane Harris was made by WaterNSW until after Mr Matthews submitted the final report of his independent investigation into NSW water management and compliance in late November 2017.

The Commission finds that, although there were long delays and a lack of progress by the department, and then WaterNSW, in relation to the investigation and/or prosecution of alleged cases of non-compliant irrigation activities on the part of the Harris family, there is no evidence to conclude that this was as a consequence of any corrupt conduct on the part of any person. The Commission finds no evidence that allegations of non-compliance against the Harris family were treated any differently from allegations against other WAL-holders under investigation by these agencies.

The Commission notes that the complaints about the Harris family's non-compliant irrigation activities were brought to the attention of the department and then WaterNSW between August 2015 and April 2017. This is squarely within the period leading up to and after the transfer of functions to WaterNSW. The Commission considers that the cause of the delays in bringing appropriate enforcement action against the Harris family was multifactorial but essentially came down to the management of the planning and implementation of the restructure process. The delays were contributed to by:

- uncertainty around the resourcing of the SIU prior to completion of the restructure
- the subsequent loss of skilled and appropriately trained investigators
- diminished staff morale
- less than ideal integration of compliance and enforcement functions within a customer-service ethos
- technological and other administrative impediments to compliance activities
- a significant backlog of cases.

In addition, as identified by the Ombudsman, WaterNSW continued to fail to demonstrate that it took its compliance functions seriously and appropriately resource this aspect of its business until after the *Four Corners* program aired.

The Commission finds that the SIU investigation into the alleged unauthorised construction of the irrigation channel on the Harris family's Miralwyn property stalled after approximately 9 September 2015. The Commission finds that a protracted concurrent process of retrospective authorisation of the channel, involving both DPI-W and DPI-L, may in part explain why there was no progression of the investigation and no compliance action taken until early 2018. The repeated re-allocation of the matter to different SIU investigators between September 2015 and July 2017 may also have had a bearing on the lack of progress. The Commission finds no evidence of corrupt or otherwise improper conduct on the part of any departmental or WaterNSW officer in relation to this lack of progress.

Those factors that the Commission finds to have affected the progress of non-compliance investigations are also relevant to the alleged treatment of the SIU (discussed below).

Treatment of the SIU and its disbandment

Proposed compliance operation

At the end of June 2015, Mr Morgan drafted his third briefing note to update Mr Hanlon on a number of current SIU investigations into unlawful water pumping and alleged meter tampering in the Barwon-Darling unregulated river system at Burren Downs, Mungindi and at two properties located near Walgett. The briefing also recommended that Mr Hanlon note that the SIU had identified a significant area of non-compliance within the Barwon River system, between Mungindi and Lake Menindee, and proposed a joint compliance operation with WaterNSW to identify and bring into compliance all users of the unregulated river system in relation to licence conditions and water take.

The aim of the proposed operation was to ensure all licensed sites were fitted with appropriate meters that would be sealed by the SIU to prevent any further illegal extraction or tampering with the devices. It was anticipated that further significant breaches were highly likely to be detected by investigators in any such operation. Significantly, the briefing did not request Mr Hanlon's approval, but rather that he note the proposal in relation to the broader compliance operation. This is consistent with evidence given to the Commission

by Russell Harrison, director of the Monitoring and Investigations Branch at DPI-W, to the effect that approval from Mr Hanlon was not required for operations and that he was briefed to keep him aware of what was happening.

Evidence obtained by the Commission indicates that Mr Morgan continued to propose a proactive compliance operation over the latter months of 2015. However, in an email on 8 March 2016, Mr Harrison advised Frank Garofalow, the then relatively new director of water regulation at the department, that such an operation "was planned but current resourcing is making that difficult to implement". Significantly, he also noted at this time that the SIU had been dealing with a number of breaches in the Barwon-Darling involving the take of significant volumes of water and had directed meters be fitted in some cases.

By May 2016, the evidence indicates that a decision had been made that compliance functions would be split between the department and WaterNSW. Thereafter, the SIU was engaged in planning the imminent transition to WaterNSW with a very high caseload of unallocated and outstanding compliance investigations, including a substantial number assessed as very high-risk, for a significantly diminished number of SIU staff. In addition, the SIU had 46 cases still awaiting endorsement of enforcement action. As Mr Matthews noted in his interim report:

> *…especially from the date of the Transformation project, a culture of seeking to resolve non-compliance in cooperation with water users, and a disinclination to pursue blunt enforcement, became more accepted. Education, facilitation and collaborative problem solving to achieve compliance was encouraged at some expense to traditional professional investigations and strict enforcement action.*

As discussed above, the SIU was effectively dissolved following the transfer of functions to WaterNSW.

Mr Harrison told the Commission that, as far as he was concerned, the proposed compliance operation "had the green light. It was going to happen" and he was just waiting for Mr Morgan to provide the detail. Mr Harrison gave evidence that, in his view, the proposal was not one that required an immediate decision and they were not ready to commence the operation.

He acknowledged that there were delays in progressing action in the Barwon-Darling for "a myriad of reasons", including that staff lost morale and "downed tools" as the new structure of the new department started to emerge. The ordinary workload continued but there were a lot of human resourcing issues caused by the restructure, with a breakdown in relationships and complaints being made by staff against each other. In his view, the operation "was delayed and it got to the point where it just fell through the cracks because of the restructure" and other events overtook it. He noted that, by March 2016, with the staff already lost, the loss of morale in those remaining and the imminent transfer to WaterNSW, "there was just no capacity to get it implemented".

Not corrupt conduct

The Commission finds no evidence that the proposed compliance operation in north-west NSW was ever formally or officially "not approved" by Mr Hanlon. The Commission accepts the evidence of Mr Harrison; that the approval of Mr Hanlon for operations was not required in any event. As noted by Mr Matthews in his interim report:

> *…the plans for the campaign coincided with a period of considerable change in DPI-W. Staff were departing, roles and lines of reporting were changing, and structures were changing. In these circumstances, in most organisations, externally-faced business operations too often take second place to inward-looking internal processes … Nevertheless, it is this investigation's assessment that senior managers, once alerted to an allegation of widespread non-compliance, should have taken more decisive moves to either take action, or to satisfy themselves that action was not necessary. There is no record they did either.*

The Commission finds no evidence to establish that the department's senior management and Mr Hanlon, in particular, acted partially or dishonestly by failing to take action in relation to the proactive compliance operation in the Barwon-Darling proposed by Mr Morgan, or that the SIU was deliberately disbanded for any improper purpose. While there is evidence of a lack of support for strong compliance and enforcement measures, of a failure to renew the temporarily funded SIU investigator contracts, of a lack of commitment to properly resourcing compliance, and of a mindset more in favour of customer service than of customer regulation, the available evidence does not rise to the level of establishing a deliberate or intentional course of conduct by Mr Hanlon and others in senior management in the department and WaterNSW to frustrate or prevent enforcement actions.

The Commission acknowledges that the NSW Government has instituted a number of important changes in enforcement policy since the *Four Corners* program and the Matthews Reports, including the establishment of NRAR in December 2017, and that this has resulted in a substantial increase in the number of compliance officers working in the state and in the enforcement action taken against contraventions of the WMA.

Section 74A(2) statement

The Commission is satisfied that Mr Hanlon is an affected person for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Hanlon.

As Mr Hanlon is no longer a public official, having resigned from the Department of Industry and the NSW public sector in September 2017, it is not necessary to consider any recommendation in relation to disciplinary or dismissal action.

Chapter 9: Mr Bugeja's dam

This chapter examines an instance in 2015 in which the Department of Primary Industries – Water (DPI-W) compliance action apparently deviated from usual practice to the benefit of a water user under investigation by the department for non-compliance with water management laws. The question in issue is whether the water user concerned, Gary Bugeja, a landowner with a dam in north-west Sydney, received partial treatment as a result of the representations made to the minister by his local member, Ray Williams, and whether this was corrupt or otherwise improper.

Background

In 2014, Mr Bugeja increased the size of a dam on his property without approval and in contravention of the *Water Management Act 2000* ("the WMA"). Despite ongoing breaches of the WMA, the department engaged in protracted negotiations with him and proposed "solutions" to bring him into compliance with the law rather than commencing enforcement action against him. When the manager of the Strategic Investigations Unit (SIU) ultimately determined to issue a final direction under s 329 of the WMA, requiring Mr Bugeja to remove or modify his unauthorised dam, senior management directed the SIU manager not to pursue the proposed action.

The Commission's investigation

Mr Bugeja's dam

In 2006, Mr Bugeja purchased a property in Glossodia on which there was an existing unlicensed dam. In May 2012, departmental officers conducted a site visit and later confirmed by letter that, as the dam was built prior to 1 January 1999 and was not used for commercial purposes, no licence or approval was required. The department advised Mr Bugeja, however, that should he seek to relocate the dam further downstream, he would be required to apply for, and obtain, a water supply works approval and development consent from Hawkesbury City Council. In addition, Mr Bugeja was advised that any proposed modification to the dam must not increase the capacity of the existing structure.

At a further site visit in December 2013, Mr Bugeja told departmental officers that he proposed relocating the dam on his property closer to his northern neighbour to enable access to western parts of his property, which the dam was preventing. Departmental officers estimated that the existing dam, which appeared to hold water for stock and domestic purposes only, had a capacity of 8.9 ML. This was considerably more than the harvestable right for the property of 1.04 ML.

In a follow up letter in February 2014, the department advised Mr Bugeja that he would need to apply for a works approval to relocate the dam and would also be required to purchase a water access licence (WAL) to account for the difference in volume between the dam's maximum harvestable right of 1.04 ML and the dam's capacity of 8.9 ML. If he decided not to proceed with the dam relocation, he was authorised to de-silt the dam, provided its capacity was not increased and its footprint remained unchanged.

The evidence indicates that, during 2014, on behalf of Mr Bugeja, Mr Williams wrote first to the Hon Katrina Hodgkinson, and then to the Hon Kevin Humphries (once he became minister for water). He claimed that Mr Bugeja should be issued a WAL free-of-charge. Mr Williams argued that Mr Bugeja had used the dam on his property for commercial agricultural purposes since purchasing the property, and, had Mr Bugeja been appropriately advised by the department to apply for a WAL prior to December 2011 and the end of the water amnesty then in place, he would have been issued one at no cost. He claimed that the requirement for Mr Bugeja to pay for a WAL constituted harsh treatment given that he would have been automatically issued one had the right advice been provided.

Mr Humphries responded to Mr Williams' 2014 representations on behalf of Mr Bugeja, supporting the advice provided to Mr Bugeja by departmental officers. Mr Humphries noted that no commercial activity had been observed on Mr Bugeja's property during the departmental site visits in 2012 and 2013. He reiterated the department's advice to the landowner that, should he wish to rebuild the dam wall downstream of its present location, or use the dam for commercial purposes, he needed to apply for a water supply works approval and purchase a WAL for that entitlement in excess of the property's 1.04 ML harvestable right.

At the 2015 NSW state election, Mr Williams became the local member for Castle Hill and Mr Bugeja ceased to be his constituent. However, he continued to advocate on Mr Bugeja's behalf to the new minister for lands and water, the Hon Niall Blair, for almost a further two years.

Mr Bugeja's dam becomes a compliance matter

Evidence obtained by the Commission indicates that, in June 2015, Hawkesbury City Council contacted the department in relation to a development application for alterations and additions to a dam on Mr Bugeja's property. The council noted that Mr Bugeja was seeking retrospective approval for works that had already been undertaken. Apparently, Mr Bugeja had demolished the pre-existing dam on his property and replaced it with a much larger dam in a different location. This was contrary to repeated advice given to him by the department and was in breach of provisions of the WMA. The department advised Hawkesbury City Council that it would be commencing compliance investigations in relation to Mr Bugeja's actions.

Jeremy Corke, manager of water regulation at the department, told the Commission that, once Mr Bugeja's dam became a compliance matter for the department, the history of difficult dealings with Mr Bugeja and the interest from his local member meant that this was determined to be a matter on which it would be good for the Water Regulation Group and the SIU to work together.

On 29 July 2015, Andrew Mannall, senior investigator at the SIU, wrote to Mr Bugeja to advise that the department was investigating alleged unlawful management works on his property. Mr Mannall advised Mr Bugeja that potential breaches of the WMA were under investigation – namely, an offence under s 91B of the WMA – for his construction of a water supply work without approval, and an offence under s 60A for taking water without a WAL between 1 January and 30 April 2015. Mr Mannall advised Mr Bugeja that the department was considering issuing him with a s 329 direction requiring the modification or removal of the unauthorised dam should he not contact the department before 21 August 2015 to explore licensing options for the unauthorised works.

The evidence obtained by the Commission indicates that Mr Williams wrote to Mr Blair on 30 July 2015. He complained that Mr Bugeja had been intimidated and treated in an "abhorrent manner" by the department. He wrote that Mr Bugeja had de-silted his dam, but contrary to claims made by the department, had not increased its capacity, nor moved it to a different location, but had only moved the dam wall slightly when it was found to be leaking during the de-silting process. He repeated his request that Mr Bugeja be issued with a "free" WAL, given that he should have received one years before.

On 27 August 2015, Mr Blair responded to Mr Williams in a letter supporting the actions of departmental staff. He noted that:

> *…it was found that Mr Bugeja's dam has not simply been de-silted, but has more than doubled in size from under nine megalitres to over 20 megalitres. The dam wall has also been moved.*

Mr Blair's letter noted that there was no capacity under the WMA to grant Mr Bugeja a WAL or an approval without his payment of the appropriate fees, and advised that, on review, the department was satisfied that its staff had acted at all times in a fair and appropriate manner towards Mr Bugeja.

In response to further representations from Mr Williams, on 7 October 2015 Mr Blair wrote another letter in support of the department's actions to that date. He noted that departmental officers had found, on inspection of Mr Bugeja's property, that the dam wall had been moved downstream and the dam's footprint and capacity had increased. He noted that Mr Bugeja still had not provided the information requested by the department to assist with its investigations. Mr Blair encouraged Mr Bugeja to contact Mr Corke, should he have any queries.

The evidence indicates that, on 8 October 2015, Scott Walker, investigator at the SIU, was directed by his manager, Jamie Morgan, and Andrew Windever, then acting deputy commissioner of the Water Regulation Group, to prepare to serve a final s 329 direction on Mr Bugeja as soon as possible. The expectation was that Mr Bugeja would, nevertheless, remain non-compliant, there would be continued representations to the minister, and a prosecution was likely to result.

In late October 2015, Mr Williams wrote a fifth letter to the minister on Mr Bugeja's behalf. His representations included the assertion that, while Mr Bugeja had, upon discovering that the separating wall between two bodies of water on his property was rotten, combined the two into one dam, this had not increased the overall amount of water able to be held on his property and "should not be a punishable offense". The evidence indicates that Mr Williams met with the minister's adviser, Matthew Coulton, shortly after sending this letter.

On 18 November 2015, Mr Corke met with Mr Coulton and Gavin Hanlon, the deputy director general of the department, to discuss ways to resolve the matter. Mr Corke's notes for that meeting detail the options for addressing Mr Bugeja's non-compliance. The first option noted was to refuse to allow the retrospective development consent for the dam and continue with the proposed compliance action.

The second option was to allow the retrospective development consent with conditions. These conditions were that he apply immediately for a works approval and a WAL and that he purchase sufficient water entitlement, or reduce the dam back to its old capacity of 9 ML within six months. A further compromise associated with the second option was that Mr Bugeja would only have to purchase 11 ML, or the difference between the capacity of the old dam and the new dam, rather than 19 ML, or the difference between the new dam and his actual harvestable right of just over 1 ML. There is no record available to the Commission of what, if any, agreement was reached at the meeting.

Mr Corke told the Commission that Mr Bugeja was dealt with differently from the way other water users in the same position would have been. He said that, while the Water Regulation Group would try to deal with people as simply and expeditiously as possible, the department had to deal with Mr Bugeja through his local member. The department continued to try and engage with him to bring him into voluntary compliance because of the local member's continued engagement with the department. Mr Corke told the Commission that, in mid-2015, it was agreed that the SIU would continue with the compliance process while the Water Regulation Group officers would continue to liaise, answer ministerial correspondence and keep the local member informed:

> *…and hopefully that there would have been, you know, a voluntary compliance occurring, so maybe it was naïve, I don't know but, you know, we thought in good faith at that stage that we would, we would attack this on two fronts. We would continue to have SIU take carriage of the compliance, no interference with that whatsoever.*

Mr Corke told the Commission that it was in late November 2015 that, in his view, "things became quite a) dysfunctional and b), you know, potentially inappropriate". He told the Commission that he believed that a final s 329 direction should have been issued at this time. He explained that he had been asked to meet with the minister's adviser and Mr Hanlon on this issue and his advice had been that this was:

> *…a case where basically this fellow was advised from the very beginning what he could and couldn't do. He went ahead and did it anyway and we've done everything we can to try and bring him into voluntary compliance. That has not happened and enough, we need to issue a direction. Now at that stage the Minister's office asked for a few days to think that through basically and then they would get back to us.*

Mr Corke told the Commission that he recalled Mr Coulton discussing at that meeting the fact that there was "considerable pressure" being placed on the minister from Mr Williams, to the effect that he would make it "very difficult" for the minister if the matter was not resolved as he hoped it would be. Mr Coulton therefore wanted it "resolved properly".

Mr Corke stressed to the Commission that he did not consider that he was being asked to do anything improper at that meeting, but he understood from what was being said that attempts should be made to resolve the issue

cooperatively. He said that Mr Coulton was just asking for a bit of space to ensure the minister was aware of what was occurring before any further action was taken and that he would get back to Mr Corke. Mr Corke advised Mr Morgan and other managers of the outcome of that meeting the same day.

Mr Coulton submitted to the Commission that he believes he called the meeting on 18 November 2015 on his own initiative because it was part of his role to handle ministerial correspondence on water matters. The meeting was called because the matter concerning Mr Bugeja was a longstanding one that was taking up extensive ministerial and departmental time and also because Mr Williams had provided Mr Coulton with satellite photographs that appeared to support Mr Williams' position on behalf of his constituent. As this was potential evidence in a compliance matter, Mr Coulton considered it proper to pass those photographs on to the department and to call a meeting to discuss this evidence. Ultimately, as Mr Coulton advised the Commission, the department had much clearer photographs that indicated that its interpretation, and not Mr Williams', was correct.

Mr Coulton stated that he does not remember the actual words used at the meeting on 18 November 2015, but submitted his recollection largely accords with Mr Corke's recollection. He stated that he agrees with Mr Corke's view that he was not being asked to do anything improper at that meeting. Mr Coulton agreed that he was asking Mr Corke for a bit of space to ensure the minister was aware of what was happening before any further action was taken and that he would get back to Mr Corke. However, he disagreed that there was "considerable pressure" that would make it "very difficult" for the minister if the matter were not resolved to Mr Williams' satisfaction.

Mr Coulton submitted that he made no attempt to press for a particular outcome and nor did he suggest that the minister was pressing for a particular outcome. He submitted that at the time of this meeting, Mr Blair had minimal knowledge of the matter and, as far as Mr Coulton is aware, had not discussed it with Mr Williams at all. He also submitted that the position that there should be no ministerial intervention in compliance matters was "crystal clear" and was always well understood and practised by himself, Mr Blair and Mr Hanlon.

Mr Coulton conceded that it was likely that he asked for some time in order to brief the minister so that he would know what was going on in the event that Mr Williams approached him directly. He conceded that he did not report back to Mr Corke, but submitted that he left Mr Blair's office on around 27 November 2015 to take up another job in another city and that his failure to report back was inadvertent and not deliberate. He had no further involvement in the matter from that date onwards.

The s 329 direction

Mr Corke told the Commission that, while he was waiting to hear back from the minister's office, he learnt that Mr Morgan had proceeded to issue a final s 329 direction to Mr Bugeja. The evidence indicates that, on 27 November 2015, Mr Morgan issued a s 329 direction requiring Mr Bugeja to reduce his dam's capacity because of his failure to provide requested information to either the department or Hawkesbury City Council and his failure to explore licensing options within the required timeframe.

On 30 November 2015, Mr Corke emailed Mr Morgan and copied others, including Mr Windever, to note his surprise and concern that a final s 329 direction had been issued to Mr Bugeja before first advising and seeking the agreement of the Water Regulation Group. He stated that this action had "pre-empted negotiations underway with Mr Bugeja via the local member and does not keep faith with those negotiations". He further noted that the outcome of the meeting with the minister's office and Mr Hanlon a week and a half previously was that they "were still exploring communication to ensure that all parties properly understood the situation and that procedural fairness was afforded, prior to taking any further formal action".

The same day, Mr Walker, the SIU investigator with carriage of the compliance matter, emailed Mr Morgan. He set out his understanding of the matter, including his belief that the issuance of a final s 329 direction had been justified on a number of fronts and that "…without the political correspondence in this matter, it would be highly likely that Mr Bugeja would have been issued with the final s 329 direction to reduce the volumetric capacity of the dam 6 plus weeks ago and this matter would have been substantially progressed further than what it currently is". Mr Walker noted that this incident:

> *…again, highlights internal structure short falls in that, there are two separate compliance entities within the same department making compliance decisions, or insufficient policy and procedure when these sorts of matters arise. Those two entities do not always come to the same conclusion for varying factors.*

Mr Corke told the Commission that it was the fact that Mr Morgan acted as he did without first informing the Water Regulation Group that was the problem:

> *…just did it without telling us so we didn't know, we didn't know, that's all. Nothing else. Other than that it's totally appropriate that a direction should have gone out.*

Mr Corke said that he agreed that by that stage, while a direction was the appropriate course of action, he was still waiting on the minister's office to get back to him with

the possibility that negotiations between the minister and Mr Williams might finally result in Mr Bugeja's voluntary compliance. He told the Commission that the department often pursued voluntary compliance with people, although not to the degree that it was pursued with Mr Bugeja, which is "one case that stands out of them all. It's the worst of the worst in that".

The evidence indicates that the final s 329 direction, while issued by Mr Morgan on 27 November 2015, had not yet gone out by registered post and was able to be retrieved by Mr Morgan at the request of Mr Corke. Mr Corke's view, as expressed in an email to Russell Harrison on 2 December 2015, was that the situation had become very difficult following yet another letter received by the minister from Mr Williams on 27 November 2015 (his sixth) and he understood that staff were frustrated at what they saw as regulatory inaction. His position was, however, that this frustration "cannot be the driver of actions taken".

In an email to Mr Morgan on 1 December 2015, copying a number of other departmental staff, Mr Windever directed that the s 329 direction was not to be issued. In addition, he wrote:

> *…firstly, let's be very clear – there is no political interference in this matter. Our customer is simply exercising a right as a citizen of NSW to make contact with a local member of Parliament and ask for assistance/representation on an issue. We are in consultation and negotiation on this matter which involves our customer, his local member and staff of the Minister's office (as this is where representations have been made).*
>
> *Granted, in a straightforward approach in these matters in general the issuing of a direction is the available next step. In this particular matter the direction is another step in the negotiations after the current consultation is concluded.*

The evidence obtained by the Commission indicates that no final s 329 direction was ever served on Mr Bugeja and that, from late November 2015 onwards, Mr Hanlon became involved at the minister's request and the department's efforts were directed towards finding "a mutually acceptable solution".

This included a site visit in February 2016 attended by Mr Hanlon, Frank Garofalow (director of water regulation at the department), Mr Williams and Mr Bugeja. A file note of the site visit records that Mr Bugeja indicated his intention to use the property as a market garden in the future. He claimed that although the newly constructed dam might seem larger than the original, there had been no increase in the overall size of the dam. Mr Hanlon committed to having a formal assessment undertaken of the increase from Mr Bugeja's former water holding to his current water holding, to determine the amount of water Mr Bugeja would need to purchase on the open market (estimated to cost from approximately $10,000 to $20,000) and to consider giving him up to three years after this to come into compliance.

Mr Corke told the Commission that everybody thought that a concession of three years to come into compliance was "ridiculous" and "utter bullshit in this sort of circumstance". In his view, as a rough guide, six months was a more reasonable time for a person to come into voluntary compliance.

The evidence available to the Commission indicates that, in November 2016, the department was still engaged in negotiation to bring Mr Bugeja into compliance, having assessed that he would need to purchase just over 11 ML of water on the open market and apply for the necessary licensing approvals to make his dam lawful, and giving him until 8 January 2017 to do so. By February 2017, however, it appears that Mr Bugeja had determined not to take up this solution, but instead to reduce his dam's water storage capacity back to its original capacity.

On 24 February 2017, Mr Garofalow sent a letter to Mr Bugeja thanking him for his cooperation in reducing the dam's capacity, reminding him that the dam could only be used for stock and domestic purposes and advising him that the letter constituted a formal warning to be kept on file and considered should any further breaches be detected. Mr Bugeja was advised that the department considered the mater closed and that any further action would be dealt with by WaterNSW.

The evidence indicates that the measure taken by Mr Bugeja involved increasing the level of the dam's "by-wash" or "spillway". This did not reduce the dam's size but purported to reduce its holding capacity. Mr Corke told the Commission that, if the department was satisfied that the capacity of the dam had been brought back to whatever was lawful, then that would be considered compliance.

The Commission's findings

In accordance with its jurisdiction, the Commission's investigation focused on whether, from about mid-2015 to early 2017, the failure of senior departmental officers, including Mr Hanlon, to pursue enforcement action against Mr Bugeja for his continued non-compliance with the WMA, amounted to corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

The Commission finds that, from approximately the end of June 2015, officers of the department considered Mr Bugeja to be in breach of provisions of the WMA,

in that he had undertaken unauthorised water management works contrary to clear and repeated advice given to him by the department concerning his rights and obligations.

The Commission finds that the particular circumstances of the matter, including the extended history of interactions with Mr Bugeja and the significant ongoing intervention by his local member, meant that it was reasonable for the Water Regulation Group to take the lead and pursue a more discretionary and negotiated approach, rather than a strict policing one, to seek to bring Mr Bugeja into voluntary compliance. However, the Commission finds that, while these initial efforts to bring Mr Bugeja into voluntary compliance were reasonable in the circumstances, by approximately December 2015, they had become markedly inconsistent with the way in which the department dealt with other non-compliant water users, to the frustration of SIU staff, in particular.

The Commission is satisfied that, in his responses to Mr Williams in the latter half of 2015, Mr Blair did not accede to demands that Mr Bugeja be provided with a WAL free-of-charge and consistently advised that he was required to obtain the proper authorities for the dam and a sufficient water entitlement. Mr Blair was appropriately supportive of the compliance actions and approach taken by his department. The Commission finds no evidence that the meeting between Mr Corke, Mr Coulton and Mr Hanlon on 18 November 2015 amounted to interference in the department's capacity to take appropriate enforcement action.

The Commission finds that, by the end of 2015, it was appropriate that the matter be handed over to the SIU to take decisive enforcement action such as issuing a s 329 direction requiring Mr Bugeja to reduce his dam's capacity back to what was lawful. The Commission finds that, while Mr Morgan may not have acted appropriately in issuing a final s 329 direction to Mr Bugeja without first informing senior management that he proposed to do so, the proposed enforcement action was itself justified at this time.

The Commission finds that Mr Williams' persistent approaches to the minister and criticism of the department's alleged mistreatment of Mr Bugeja influenced the decision made by the minister's office and senior management about how to deal with Mr Bugeja's entrenched non-compliance. The decision to continue negotiating in these circumstances, and to find a "mutually beneficial solution", instead of pursuing the enforcement action required by the applicable legislative and policy frameworks, was at odds with the approach taken in similar circumstances and was not in the public interest. The department adopted an avowedly customer service approach to its compliance functions, which, given its statutory responsibility, was inappropriate.

Not corrupt conduct

The Commission makes no finding of corrupt conduct in this matter.

The Commission finds that Mr Williams' representations on behalf of Mr Bugeja were persistent and protracted and continued even when he ceased to be the member for Hawkesbury. This does not mean that they were improper. There was no evidence available to the Commission of any pre-existing relationship between Mr Bugeja and Mr Williams, to suggest that Mr Williams' advocacy on behalf of Mr Bugeja was improperly motivated, nor any evidence of donations made by Mr Bugeja to Mr Williams, or to his political party.

While the Commission finds that Mr Williams' persistent representations and criticism of the department influenced the way the department dealt with Mr Bugeja, causing an inappropriate reluctance to take enforcement action and an inappropriate leniency in relation to the timeframe allowed for voluntary compliance, the Commission also finds that Mr Bugeja did not receive the "free water licence" or other benefits petitioned for by Mr Williams. Ultimately, Mr Bugeja was required to reduce his dam's capacity and was not allowed to use it for anything other than stock and domestic purposes.

The Commission acknowledges that the establishment in December 2017 of the Natural Resources Access Regulator as a consequence of recommendations in the Ken Matthews reports represents an important change in the state's compliance and enforcement policy and has substantially addressed the problems of a "customer focused" approach to compliance.

Section 74A(2) statement

To the extent that any person is an affected person for the purposes of s 74A(2) of the ICAC Act in relation to this allegation, the Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of any person, nor that it is necessary to consider any recommendation in relation to disciplinary or dismissal action.

Chapter 10: Complaints against former departmental officers

This chapter examines a number of additional matters investigated by the Commission concerning the alleged inappropriate conduct of former departmental staff and the circumstances by which Anthony Manson Hall, former departmental officer, came to be involved in property transfers that resulted in his name being on the title of approximately 18 small subdivisions carved out of much larger rural properties in the north west of NSW. Many of these transfers occurred while he was a public official, between 2003 and 2009, but some occurred after he left the department.

Background

The Commission investigated allegations made by Jamie Morgan, then manager of the Strategic Investigations Unit (SIU), in relation to the inappropriate conduct of a former departmental staff member and a former WaterNSW customer field officer and what were said to be their inappropriate, ongoing relationships with departmental staff at regional offices in northern NSW.

Mr Morgan had initially raised his concerns in mid-2015 with senior management within the Department of Primary Industries – Water (DPI-W) and again with the Commission in the course of the Commission's investigation of the matters aired by the ABC in the *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped"). The Commission has decided not to publish the names of the officers concerned because of questions about whether their identification by Mr Morgan has any evidentiary basis and the fact that the Commission finds insufficient evidence to substantiate that the conduct the subject of the allegations actually occurred.

Following the airing of "Pumped", the Environmental Defenders Office (EDO) complained to the Commission about a number of matters concerning water management in NSW, including those raised in the ABC program and some examined by the EDO itself. The EDO provided the Commission with search results from Land and Property Information showing that Mr Hall was registered on 18 separate titles in NSW. The EDO's own analysis determined that these titles were particularly small subdivisions on most of which were located a bore or bore tank. In all cases, the evidence available to the EDO indicated that the subdivided lot was transferred by a single landholder to two or three other people, one of which was Mr Hall. The landholder would maintain co-ownership with those to whom title was transferred. The EDO questioned why a departmental officer was on the title of the subdivisions.

Mr Morgan's allegations about former departmental staff

In June 2015, while he was investigating compliance issues in the Barwon-Darling, Mr Morgan raised concerns with Russell Harrison, director of monitoring and compliance at the department, about two former staff members being employed as contractors for the metering project in the region and their allegedly inappropriate relationship with current staff. These former staff members had become consultants to a number of Barwon-Darling landowners since leaving their state government positions, but had allegedly also maintained close connections with current senior departmental staff.

In a briefing note on 25 June 2015, Mr Morgan alleged that a former WaterNSW compliance field officer had obtained a MACE series 3 download lead from the WaterNSW Warren office without authority and was actively operating in the area, downloading and changing meter configuration settings. He further alleged that the two former staff members had been given open and unsupervised access to the department's Narrabri licensing office, had access to current departmental staff with responsibility for metering, and were being

provided with departmental information to assist them in their private business interests in connection with metering in northern NSW. He asserted that what he had recently found out about the alleged conduct "seriously compromises our whole regulatory system".

On 26 June 2015, Mr Harrison referred Mr Morgan's allegations to Ron Taylor, director of governance and information requests at the Department of Industry (DOI). On 29 June 2015, Mr Harrison advised Mr Morgan that he had brought his concerns to the attention of Gavin Hanlon, the deputy general director of DPI-W, and had referred them for investigation.

The Commission's findings

The Commission interviewed Mr Taylor, Mr Harrison, Mr Morgan and a number of departmental and WaterNSW staff members identified by Mr Morgan as witnesses or potential witnesses to the alleged conduct. The Commission also reviewed email correspondence between current WaterNSW and DPI-W officers and the former staff members the subject of Mr Morgan's allegations. No inappropriate contact between former and current staff in respect of the aforementioned conduct was identified. The Commission found no evidence to substantiate the allegations of inappropriate conduct.

The evidence indicates that, following the referral of Mr Morgan's allegations to Mr Taylor for investigation, Mr Morgan was asked to provide more detailed and specific information to support his claims, including the source of that information, to allow them to be adequately assessed. Mr Taylor told the Commission that Mr Morgan did not provide the requested information needed to determine whether his allegations had a reasonable basis.

Mr Morgan told the Commission that the information he provided in the briefing note to Mr Harrison was the extent of his knowledge of the matters about which he raised his concerns. He advised that it was what a number of people had told him and he had had nothing further to add to this when he was asked for more information.

Mr Morgan told the Commission that it had been reported to him by an officer undertaking an operation "a few years earlier" that there had been a person accessing licence files in the department's Narrabri office on a weekend. The witness had not identified the person as a departmental employee and had called Mr Morgan to report the incident. Mr Morgan had not witnessed the incident himself and had not identified the person in the office, but he was "pretty sure" it was one of the former departmental staff members who had gone on to work as a private consultant or contractor to local landowners and irrigators. Mr Morgan conceded he had no evidence that either of those former staff members had done anything wrong. The Commission finds that there is an absence of evidence to support the allegations.

The Commission finds a lack of evidence to support the allegation that a former WaterNSW compliance field officer had taken a MACE meter communication lead from the WaterNSW Warren office without authorisation. The alleged source of that information was interviewed by the Commission and was unable to recall any details.

The Commission finds no evidence to substantiate any inappropriate ongoing relationship or interaction between two former departmental staff and current senior departmental or WaterNSW staff. There is no evidence available to the Commission that senior departmental staff may have inappropriately provided confidential information about metering, or other matters of potential benefit to irrigators, to the former departmental staff members who had gone to work for irrigators upon leaving their NSW government positions.

Property transfers involving Mr Hall

The evidence available to the Commission indicates that Mr Hall joined the then Water Resources Commission in 1974 and resigned from the then Department of Water and Energy in June 2009. In April 1991, Mr Hall was appointed to the position of chairperson of Private Water Trusts, Barwon region, Moree.

Bore Water Trusts (or private water trusts) were set up to administer private landholder access to, and recovery of, water from the NSW Great Artesian Basin for stock and domestic purposes. There are 1,400 bores tapping the Great Artesian Basin. Bore Water Trusts provide a means by which decisions can be made between neighbouring landholders about sharing the cost of water supply infrastructure, including its maintenance and operation, rights to go on land, and landholders' water entitlements. These trusts were created under Part 3 of the *Water Act 1912* prior to 2000, when Part 3 was repealed (they are dealt with under Part 4 of Chapter 4 of the *Water Management Act 2000* ("the WMA").

Section 223 of the WMA provides that the minister appoints at least one of the members of a private water trust and its chairperson. Sections 227 and 228 of the WMA set out the duties and functions of members, which are primarily to establish and maintain a management program for the water supply district, to maintain water supply infrastructure, to fix and levy rates and keep proper accounts of all money received and paid. The chairperson presides at a meeting but does not appear to have any powers above those of an ordinary member apart from calling a special meeting and having a casting vote.

Evidence available to the Commission indicates that from the late 1980s, until approximately 2010, 41 trusts in the Narrabri/Moree/Boggabilla areas of the state operated with the chairperson's role being undertaken by a departmental employee. Mr Hall was the minister's nominee for these trusts from April 1991 until his resignation from the Department of Water and Energy in June 2009, after which he was removed as member and chairperson from each of the trusts to which he had been appointed. Departmental officer Richard Wheatley was appointed by the minister to the position of interim chair until February 2010.

In July 2009, after Mr Hall's resignation from the department and removal from trust membership, and as a result of the department's desire to remove possible conflicts of interest and establish a more appropriate regulator/operator relationship with the trusts, it was determined that the minister's nominee should no longer be a departmental employee. The department wrote to the various trusts seeking the nomination of suitable interested persons for appointment as members.

Mr Hall was nominated by all 41 trusts and was appointed by the NSW Commissioner for Water as member and chairperson of these trusts for an initial period of 12 months, from 1 March 2010. He was not appointed to represent the minister, as he had done previously in this capacity, but rather to perform a statutory role for the trusts under the WMA and he received no remuneration from government for this appointment.

Between August 2004 and August 2013, 15 of the 18 properties identified by the EDO appeared to be transferred from landholders in the north-west of NSW to Mr Hall and two other joint tenants. Ten of those transfers occurred when he was a departmental employee and five after he had left the department. The remaining three properties were owned by Mr Hall privately or with his partner.

The evidence obtained by the Commission, including from interviews with owners and vendors of some of the properties involved, indicates that the land on which a bore is situated is required to be transferred to the relevant Bore Water Trust. The title to this small sub-division is held in the name of the chairperson and two other trustees, one of whom may also be the owner of the transferred land.

Not corrupt conduct

The Commission finds that the title to 15 small subdivisions of land was transferred to Mr Hall as a joint tenant because of Mr Hall's position as chairperson and member of relevant Bore Water Trusts in performance of a statutory role, first as a public official and then as appointed by the Commissioner for Water in his private capacity.

The Commission accordingly makes no finding of corrupt conduct in this matter.

Section 74A(2) statement

The Commission is satisfied that Mr Hall is an affected person for the purposes of s 74A(2) of the *Independent Commission Against Corruption Act 1988*. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Hall.

As Mr Hall is no longer a public official, having resigned from the Department of Water and Energy in 2009, it is not necessary to consider any recommendation in relation to disciplinary or dismissal action.

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Chapter 11: Release of confidential information to irrigators

This chapter examines whether Gavin Hanlon, former deputy director general of the Department of Primary Industries – Water (DPI-W), and Monica Morona, former director of intergovernmental strategic stakeholder relations (DISSR) of DPI-W, inappropriately and partially offered to share or disclose, did share or disclose, or directed others to share or disclose, confidential government information with a group of irrigator representatives, in breach of their duties as public officials.

Background

On 24 July 2017, the ABC's *Four Corners* program, "Pumped: Who is benefitting from the billions spent on the Murray-Darling?" ("Pumped") played an excerpt from a secretly taped teleconference, which took place on 12 October 2016, in which Mr Hanlon was recorded offering to disclose sensitive government information and share "de-badged" confidential documents, including legal advice, concerning the state's implementation of its commitments under the Murray-Darling Basin Plan ("the Basin Plan") to a select group of irrigators. He could also be heard consulting with irrigators and advising on options and actions to assist them to further their interests in relation to the Basin Plan and other water management matters.

The allegation that an exclusive group of industry stakeholders had direct access to senior public officials in the department, privileged access to confidential documents, and input into the department's policy development was at the heart of the loss of public confidence in water management in this state that followed the airing of the program. It suggested partiality, a lack of transparency and a shared enterprise with irrigators to undermine the objectives of the Basin Plan.

The Commission's investigation focused on the circumstances leading up to, and surrounding, this teleconference, including Mr Hanlon's formation of the Industry Reference Group (IRG), his relationship with its members, the secrecy surrounding it and the nature and extent of the information he and Ms Morona shared with the IRG on this and other occasions.

The IRG

Mr Hanlon's position and key responsibilities

With effect from 27 January 2015, Mr Hanlon was appointed to the senior executive role of deputy director general at the Department of Primary Industries (DPI), then a department within the NSW trade and investment cluster. He was the first incumbent of this role, which was created to replace the abolished position of Commissioner of the NSW Office of Water. Prior to taking up the role at DPI-W, Mr Hanlon had been managing director or chief executive officer of a number of Victorian statutory water corporations and catchment authorities that manage and provide water-related services, including irrigation delivery, to paying customers.

The role to which Mr Hanlon was appointed reported to the director general of DPI (the incumbent was Scott Hansen at the relevant time) but enjoyed a high level of autonomy. The role was responsible for six direct reports, a workforce of 500 and an operating expenditure budget of $250 million. The primary purpose of the role, as expressed in the role description, was to direct the DPI Water Division to "achieve government objectives to sustainably allocate, conserve and use water" through the delivery of water management programs across the state. According to Mr Hanlon's role description, DPI "supports the development of profitable primary industries that create a more prosperous NSW and contribute to a better environment through sustainable use of natural resources".

Key accountabilities of Mr Hanlon's position included meeting legislative requirements in the delivery of government objectives, and leading and directing

"cultural change to deliver the Government's water reform agenda and drive a customer focused, innovative and results-oriented culture across the Division".
The key challenges of this new role were recognised in Mr Hanlon's employment contract to be:

- *Directing significant water management reform that improves rivers and groundwater while delivering greater security for all water users, metropolitan and rural*
- *Ensuring the state's interests are protected in national and cross-border agreements*
- *Supporting Ministers while managing matters with high levels of political interest and public visibility, including highly sensitive issues that impact on the community, industry, the economy and the environment*.

The role description for Mr Hanlon's position noted that its key external relationships were with "key NSW government and industry stakeholders" and relevant national and interstate government bodies. Relevantly, the position was expected to "manage effective relationships and establish strategic partnerships and networks to solicit support and deliver government, cluster and department initiatives" with these external entities.

In this role, Mr Hanlon was also the NSW representative on the Basin Officials Committee (BOC). BOC, established under the Murray-Darling Basin Agreement (Schedule 1 to the *Water Act 2007*), consists of one official from each of the Basin States and the Commonwealth. Its role is to facilitate cooperation and coordination between the Commonwealth, the Murray Darling Basin Authority (MDBA) and the Basin States in funding works and managing the Murray-Darling Basin's water. It is also responsible for providing advice to the Murray-Darling Basin Ministerial Council (MDBMC) and for implementing MDBMC policy and decisions on matters such as state water shares and the funding and delivery of natural resource management programs within the Murray-Darling Basin.

Ms Morona's recruitment, position and key responsibilities

Mr Hanlon created the DISSR position in mid-2015. He identified the need for a position that could liaise and negotiate strongly on behalf of the state on matters concerning the Basin Plan. Mr Hanlon had known Ms Morona from when she worked as an adviser to the Victorian minister for water. She had gone from that position to work in Canberra for a number of years as the water adviser to the parliamentary secretary to the minister for the environment, initially the Hon Simon Birmingham and, later, the Hon Bob Baldwin.

During a compulsory examination, Mr Hanlon told the Commission that he approached Ms Morona directly to invite her to apply for the role because of his belief in her unparalleled understanding of strategic stakeholder management in relation to the Basin Plan. The position was initially a temporary one, and Ms Morona commenced employment with DPI-W in August 2015. Her contract was due to expire on 17 February 2016, however, Mr Hanlon secured a three-month extension of that contract pending finalisation of recruitment to fill the role as an ongoing one. When the role was made permanent at the end of June 2016, she was appointed to it following a recruitment process that, for the reasons set out below, the Commission considers problematic in a number of respects.

The DISSR position was advertised as a permanent position on the Jobs NSW website on 2 February 2016. Ms Morona submitted her application on the application closing date of 10 February 2016. Of the nine applications received, Mr Hanlon culled eight from the recruitment process and interviewed only Ms Morona. Mr Hanlon told the Commission that "it would have been very hard to find anyone else in Australia who understood strategic

stakeholder management in the Basin Plan … than Monica". He advised that only one of the other applicants had relevant experience, but that person never responded to attempts made to interview them. As Ms Morona met all of the requirements, she was interviewed and recommended for appointment.

The evidence indicates that Mr Hanlon signed a conflict of interest declaration, indicating that he was Ms Morona's current supervisor. He did not declare that he had known her from when they had both worked in Victoria. The other departmental officer sitting on the interview panel, Christobel Ferguson, also signed a conflict of interest declaration, in which she stated that she had neither a personal nor a professional relationship with Ms Morona, despite having been her colleague on the executive team at that stage for approximately a year.

On 22 June 2016, an independent recruitment assessment was conducted by Futurestep. Futurestep's report concluded with respect to Ms Morona that she exhibited a "limited fit with the role" in that "…assessment data indicates limited and/or inconsistent evidence of effective behaviours associated with the capabilities required for this role". On 29 June 2016, DPI secretary, Simon Smith, refused the recommendation to appoint Ms Morona and questioned Mr Hanlon's decision to interview just one person.

Mr Hanlon advised Mr Smith that Ms Morona's Futurestep assessment did not match her performance to date and that there was no candidate other than Ms Morona who had:

- any relevant strategic experience, particularly in the key areas of the Murray-Darling Basin and water allocation in NSW
- the stakeholder contacts relevant to NSW
- the respect of key stakeholders within and outside of NSW.

Later that day, Mr Smith reversed his decision and approved the permanent appointment of Ms Morona. Key accountabilities of the DISSR role, set out in the employment contract signed by Ms Morona on 30 June 2016, included, relevantly, the requirement to collaborate and negotiate with "inter jurisdictional agencies, key industry stakeholders and community representatives for the effective management of the Murray Darling Basin Plan, ensuring the best possible outcomes for regional NSW". In addition, the role required Ms Morona to foster strong links with central agencies at all levels of government and with peak associations, in order "to ensure a coordinated policy and planning approach and leverage common interests, reducing red tape, costs and other industry impediments to the effective management of water resources".

Submissions on behalf of the department contend that the recruitment process for Ms Morona was "procedurally correct". The Commission considers that, while the evidence in relation to Ms Morona's permanent appointment to the senior executive DISSR role indicates some irregularity and partiality towards Ms Morona on the part of Mr Hanlon, there is insufficient basis to conclude that it would amount to corrupt conduct. The Commission has undertaken no detailed assessment of the level of Ms Morona's performance in the DISSR role and no criticism is therefore made of her capacity to perform the role's stated key accountabilities.

"Key stakeholders", the state's objectives and the "triple bottom line"

Mr Hanlon told the Commission that, water in NSW, unlike in other jurisdictions, is managed by DPI, while environmental water is managed by the Office of Environment and Heritage (OEH). He asserted that, because of this, environmental interests in water were primarily represented by OEH, while the key stakeholders of the department were productive users of water. Notwithstanding this purported division between the representation of productive and environmental water interests, he acknowledged that OEH was one of the department's stakeholders in its own right. In his evidence before the Commission, Mr Hanlon made a further distinction between the department's primary and secondary stakeholders on the basis of what he deemed direct versus indirect demands on water.

In his view, the department's primary stakeholders are those associations in each of the state's catchments who are key to owning or delivering water, while Indigenous groups and the environment, who have what he considered indirect interests or demands on water, because they are not key to owning or delivering it, are therefore secondary. That view, of course, reveals a fundamental misunderstanding of the provisions of the *Water Management Act 2000* ("the WMA"), in particular the provisions of it that set out the water management principles and the statutory obligation mandated in s 9(1) of the WMA.

Mr Hanlon told the Commission that, in respect of consultation with Indigenous groups, the department had the only Indigenous water program in Australia at the time and a number of staff funded specifically for that role. Mr Hanlon told the Commission that OEH, as owner of environmental water in the state, was being directly engaged with and was, in turn, engaging with environmental groups. He understood that the primary stakeholders for the department, on the other hand, were the industry groups that he engaged with. Mr Hanlon gave evidence that the broader community

was represented by a range of groups across the state that he met with all the time and that he, together with OEH, also met with environmental groups.

From January 2015, Mr Hanlon reported to Mr Hansen, director general of DPI. Mr Hansen told the Commission, contrary to Mr Hanlon's evidence, that productive water users should not be considered the department's only key stakeholder. He said that, for the purposes of consultation, the department's key regional water management stakeholders are those representative groups that are brought together to constitute the stakeholder advisory panels (SAPs) for each of the state's regions or valleys. Indigenous and environmental groups are therefore primary stakeholders because they "have seats at that SAP table". He told the Commission that it was also the role of the department to consult with environmental interests.

Mr Hansen told the Commission that the department was always being encouraged by the relevant minister to make sure that they were informing, and being informed by, stakeholders, and that it was not through the media that the minister learnt of any concern or complaint that the department had not done something.

Mr Hansen told the Commission that, when Mr Hanlon joined the department, one of the major challenges he faced was managing the state significant projects that were funded under the Basin Plan, including the conversion of Water Sharing Plans (WSPs) to water resource plans, and a whole package of works and consultation the timeframes for which had slipped and needed to be remedied. Mr Hansen told the Commission that, as the NSW representative and principal negotiator in Basin Plan matters, Mr Hanlon was responsible for directly briefing the minister and working with him on the plan's implementation. He enjoyed a degree of autonomy in this role, within the constraints of the NSW Government's commitment to the Basin Plan, which included a commitment to no further compulsory water buy-backs. Mr Hansen noted that he had full confidence in Mr Hanlon's capacity to represent NSW in the Basin Plan negotiations.

Mr Hansen told the Commission that DPI-W was the lead agency for negotiations around the implementation of the Basin Plan on behalf of NSW, noting that the responsibility for regional water moved in 2011 to the Department of Industry (DOI) from the former Department of Environment. Mr Hansen stated that the DOI's strategic prioritisation of enabling job creation and opportunities for economic growth included maximising the productive use of water. Relevant to the Basin Plan negotiations, this priority would translate into programs that enhance economic growth through innovation and that "improve resilience, productivity and drought preparedness". He noted that any position taken by NSW in relation to the Basin Plan is taken by the minister following a Cabinet process, with the approval or clearance of the central agencies involved. Mr Hansen expressed the view that, although the Basin Plan has been agreed to by all Basin States, due to a degree of competition between the states, "there are times when a State's interests are not aligned with the national interest".

According to Mr Hanlon, the Hon Niall Blair, minister for primary industries, had three stated objectives for the state's negotiation of the final outcomes of the Basin Plan. NSW's position, as presented to Cabinet, was that, first, there should be no more water purchased by the Commonwealth out of the open market. Such buy-backs were seen as equivalent to depriving communities of their wealth and productivity. Secondly, there should be no unmitigated third-party impacts as a result of Basin Plan programs or projects, and, thirdly, there should be so-called "real world outcomes".

In Mr Hanlon's view, there was a need to understand the practical implications of what was being negotiated in relation to the Basin Plan on those considered most affected; namely, the state's water users. He stated that what the government was trying to achieve was the best outcome for communities in regional and rural NSW, whose "reason for being" is provided by the irrigation industry and water. As he told the Commission, "…one of the industry bodies did a study where for every dollar spent on water, it related to another three or four dollars into the community. So I think that's exactly what we were trying to achieve".

In accordance with the state's objectives, he explained that the "real world outcomes" sought by the state are the achievement of equivalent environmental outcomes to those required under the Basin Plan through efficiencies and improvements in existing water management, rather than by taking any more water from productive use.

Mr Hanlon told the Commission that the department adopted a "triple bottom line" approach to Basin Plan negotiations. Accepting that the Basin Plan is an environmental plan, he explained that the minister's three priority areas were used as a way of ensuring that the social and economic impacts of the Basin Plan's environmental programs were not overlooked: (i) the Basin Plan looked after environmental considerations, (ii) the priority of ensuring the Commonwealth took no more water from the open market looked after economic considerations and (iii) the priority of ensuring that there were no unmitigated impacts on water users looked after social considerations.

Mr Hanlon was specifically asked whether he agreed that the strategy outlined above in relation to the state's negotiations was ultimately subject to the overriding obligation of the states to work with the Commonwealth,

and to the overriding objectives of the statutory scheme of the Basin Plan, which are environmental. While Mr Hanlon agreed that NSW could not just ignore its obligations to assist in implementing and achieving the outcomes of the state-federal agreed plan, he repeatedly emphasised the need to negotiate to ensure that the objectives of the state as he had described them were achieved within that framework. When it was put to Mr Hanlon that, at the end of the day, as a senior public official he was charged with duties to serve to the best of his ability the *public* interest, he answered, "Absolutely. The interest of the State".

Ms Morona gave similar evidence to the Commission, to the effect that, while the NSW Government had committed to implementing the Basin Plan, her role was to assist the department to deliver on that commitment in the best interests of the community as a whole. She told the Commission that this approach was what they often referred to as the "triple bottom line", which she characterised as giving equal weight to social, environmental and economic considerations. Ms Morona agreed that the Basin Plan is an environmental plan, but stated that it was her view that in order to properly apply a "triple bottom line" approach to its implementation, socio-economic considerations needed to be brought into balance with environmental ones.

She told the Commission that the best possible outcome for regional NSW in connection with the Basin Plan was to deliver the plan's environmental outcomes with the least impact to communities. This meant ensuring that the Basin Plan's objective of increasing water for the environment was achieved through water efficiencies and improvements to the way water was managed, so that as little water as possible would be taken from those communities who used it as the basis for their economic development. Ms Morona told the Commission that she considered the Basin Plan to be necessary but also that it was important to ensure that it was balanced. She denied holding a view that NSW's position in relation to the plan should be to advance irrigation interests in order to restore some balance.

Ms Morona confirmed to the Commission that it was her understanding that the department engaged primarily with irrigation industry stakeholders and OEH engaged with the environmental stakeholders. She told the Commission that the relationship between the department and OEH was practical but tense at times. DPI-W was the lead state agency in the negotiation of the Basin Plan but worked in consultation with OEH. A significant area of difference and tension centred on what the "triple bottom line" should mean or, more particularly, whether it should even apply in the context of an environmental reform. Ms Morona noted that it was particularly challenging to have an agency disagreeing with the government's direction, when the department was trying to present a whole-of-NSW-Government approach.

Ms Morona told the Commission that, around the first half of 2016, there was a heavy emphasis on the need to work with communities and irrigation groups to help them to understand what the government was trying to do in its Basin Plan negotiations. She told the Commission that the minister made it plain that he was keen for NSW to work with irrigator and industry groups as well as community groups to find a way to implement the Basin Plan that would meet "triple bottom line" objectives. She conceded that, at the same time, the department was also under pressure from the NSW Irrigators' Council (NSWIC) about its failure to properly engage with industry about water resource plans, in particular, and Basin Plan matters more generally.

The Commission obtained a letter from Richard Stott, chairperson of the NSW Irrigators' Council, to Mr Blair, dated 10 May 2016, expressing strong dissatisfaction with the department's failure to revise water sharing plans and re-engage the irrigation industry in the process before the 30 June 2016 deadline. This failure to meet the deadline meant that the MDBA would now be involved in revising the plans under the binding Basin Plan arrangements, which was not a result desired by the NSWIC.

Mr Stott advised the minister that, in recent days, his organisation had conveyed to Mr Hansen, Mr Hanlon and the minister's own water adviser, that the:

> *…failure of the Department to deliver on the engagement and communication process it explicitly committed to has led to significant reputational damage to DDG Hanlon, DPI Water Director of Policy and Planning … and we hesitate to say – probably also to you as Minister.*

Mr Stott noted that such was the negative sentiment towards departmental senior management from the irrigation sector, at that point, that the NSWIC demanded an urgent and "iron-clad assurance" that there would be in-depth engagement on water sharing plans after 30 June.

Mr Hanlon told the Commission it was his impression that the minister did not want criticism from NSW water users who felt they had been "rolled" during the original Basin Plan negotiations, when a number of rules that had a large impact on them were changed, apparently without consultation. In response to the minister's frustration, that this might be happening again with the latest round of Basin Plan negotiations, Mr Hanlon said he undertook to put together a targeted stakeholder group of key water users across the state to make sure that the department was getting practical feedback, "to better understand the practical implications of some of the things we were possibly proposing", and so that these water users would not be able to claim they were not being engaged this time around.

Why the IRG was set up: industry's perspective

Mr Hanlon informally established what he described to Ken Matthews' investigation as a "small but geographically representative reference group … to assist the State in the delivery of the key stated objectives of the Basin Plan". Mr Hanlon told the Commission that he selected the members of this group, which came to be known as the IRG, from the representative bodies of, or water suppliers to, each of the key catchment areas across the state. He gave evidence that the group met less than half a dozen times and that no formal minutes were taken at these meetings, nor records kept.

He stressed to the Commission that this was not a decision-making body; it had no authority, but was "purely to enrol and engage and also to seek feedback from". Mr Hanlon told the Commission that the NSW Government and the members of the IRG had a "mutually shared objective"; namely, that no more water would be taken out of regional NSW. He told the Commission that the IRG's interests were "absolutely" aligned with the state's interests, as summarised by the NSW Government's three strategic objectives in its Basin Plan negotiations.

In response to being asked whether the NSW Government, the department and Mr Hanlon, himself, had acted in the interests of only one particular group – that is, consumptive water users in the irrigation industry – Mr Hanlon told the Commission that he:

> *…believed that those groups were representative of communities that were having water taken out of them and continued purchase of water out of the open market would slowly kill a number of those communities, and that had been shown in a number of studies. So I believe again in doing so and engaging this group, they were a broader proxy for the health of regional communities, we were acting in the best interests of the State.*

He told the Commission that, in creating the group, he thought he was doing what was actually expected of him and his "intention was only ever to get the best possible outcome for the State".

Mr Hansen told the Commission that, in situations where the department has a large, diverse stakeholder group, it will often look at how it can bring together a group of individuals:

> *…to keep them updated on the work we're doing, to make sure we have a direct line back in about how the work we're doing is perceived out on the ground, whether it's hitting its mark, missing its mark. And help shape up how we then communicate broader, to make sure we're getting the right messages to the right people at the right time.*

Mr Hansen told the Commission that Mr Hanlon had advised him that he was working with the NSWIC, but was looking to create a smaller group consisting of the executive officers of most of the groups comprising the full council. Mr Hansen stated that he thought it was a "sensible approach" to set up such a group as a reference point, as Mr Hanlon had done officially in 2016, to "gauge what they are seeing or hearing and provide advice about where the department is up to on certain projects". Mr Hansen told the Commission he was not involved in picking the members of the group or setting up the meetings, and nor was he privy to the content of the meetings. The first he heard of any concerns being raised about these meetings was in the lead up to the airing of "Pumped", when questions were being asked of the department by ABC journalist Linton Besser about confidential briefings of selected irrigators.

Ms Morona told the Commission that, in her role as the director for stakeholder engagement, she provided advice to Mr Hanlon about which key irrigation representatives to include in the IRG. The criteria for her recommendations for potential IRG members were that they were representative of larger numbers of irrigators and those with whom constructive discussions could be had around implementation of the Basin Plan. She told the Commission that she knew every member of the IRG from before she came to work at the department.

According to Ms Morona, there were irrigation representatives you could not have constructive discussions with and they were not invited to be members of this necessarily small group. Ms Morona conceded that she may have referred to this group's meetings as "secret squirrel", but said she would have done so "in jest". She, ultimately, conceded that the group's existence and meetings were not publicised at all and explained that this was because from time-to-time "some sensitive matters" were discussed and because of tensions in the industry.

One of the key members of the IRG was John Culleton, then chief executive officer of Coleambally Irrigation, who Mr Hanlon described to the Commission as something of an "informal mentor" to him. Mr Culleton gave evidence to the Commission about his extensive experience and involvement, between 2009 and 2017, in helping to shape the irrigation industry's strategies and responses to the Basin Plan during its inception and drafting and, subsequently, in its implementation. He told the Commission that he was part of the efforts at the irrigation industry's peak-body level to convince the industry that the Basin Plan was "the least worst plan" they were going to get and that it would be to the detriment of industry to continue to rail against it.

The message that he worked with the peak body to convey to irrigators was that there was a clear choice

between continuing to fight against the Basin Plan and taking advantage of the opportunities within the Basin Plan to modernise their businesses. He noted that "the Basin Plan was always supposed to be about achieving a triple bottom line outcome", which he explained as being "an appropriate balancing of the interest of the irrigation industry and the communities in which they operate with … the environmental imperative". He told the Commission that the main concern for the water users he represented, was that the Basin Plan landed "somewhere sensible" and implemented its commitments to provide certainty for irrigators and irrigation-dependent communities; thereby, achieving "triple bottom line" outcomes.

Mr Culleton told the Commission that in the lead up to the development of the plan, he would have focused his efforts on the relevant federal ministers and their advisors, as well as the senior executives of the MDBA. Once the plan was struck, more of his attention was directed towards NSW. His expectation as a lead negotiator for industry stakeholders was that he would enjoy access to decision makers in the same way, he claimed, as those in the environmental movement did. Mr Culleton told the Commission that for a variety of reasons it was initially difficult for industry to get visibility of NSW's position in relation to the contentious issues that had been left to the back end of the Basin Plan negotiations. The concern was that industry was being asked by the state government to support the strategy without actually understanding much of the detail of that strategy.

Mr Culleton told the Commission that, prior to Mr Hanlon's appointment, the department had been staffed by a group of very experienced water bureaucrats who were specialists in this complex area. It was led by David Harriss, a "formidable" Commissioner for Water, recognised as having probably the most complete understanding of the detail of water management anywhere in Australia. In Mr Culleton's view, even if industry did not get the outcome it wanted, it always came away from discussions with these departmental officers with a better understanding of the logic behind what the department was doing.

He told the Commission that, as incoming deputy director general, Mr Hanlon had to deal not only with the re-organisation of an entire department and the loss of a number of senior roles, but also with the Basin Plan at its most critical juncture, with fewer staff who had sufficient expertise. The impact, from industry's perspective, was a decrease in the confidence held by the peak bodies and key industry leaders in the department. In Mr Culleton's view, the communication from the department, such as there was, was "sanitised" and largely meaningless.

During his compulsory examination, Mr Culleton was taken to some notes he had prepared in anticipation of a meeting with Mr Hanlon on 22 September 2016. Under the heading "Engagement with DPI-W", Mr Culleton's notes record "the worst I have known it in my time in the water business – not just a CICL [Coleambally Irrigation Cooperative Limited] view, the view of all of the major industry stakeholders". Mr Culleton's notes list areas of concern and complaint that include the absence of a cogent strategy for the Basin Plan and the assertion that "responsible stakeholders are being kept in the dark" when they could be "powerful allies". His notes also propose a solution: Mr Hanlon should "constitute an advisory group of key players who can be trusted asap", and Mr Culleton suggests 11 specific irrigator representatives from the north and south of the Murray-Darling Basin, as well as from the NSWIC, as members. Mr Culleton told the Commission that the people he suggested, many of whom ended up being part of the IRG:

> *…are the people who have been around the industry the longest, that work the hardest to understand the issues, who are capable of thinking big picture rather than just their immediate backyard, and who enjoyed good relationships in Canberra and generally were widely regarded across the industry.*

Mr Culleton told the Commission that, at the meeting he had with Mr Hanlon to discuss these matters, Mr Hanlon himself came up with a very similar list of names for the group he intended to form as a necessary response to the minister's undertaking to improve the quality of engagement with industry.

Mr Culleton provided a submission to the Commission at the conclusion of the investigation of this matter. In his submission, the formation of the IRG needs to be placed in its proper context. This included the fact that Mr Hanlon had lost his most experienced staff in a departmental re-organisation that "could not have come at a more challenging time". The NSW Government, like the Victorian Government:

> *…had decided, for good reason, to push-back against aspects of the Basin Plan because they were insufficiently developed or were contestable … NSW Irrigation industry and community groups were becoming increasingly fragmented in the face of declining evidence that the promises made by a succession of Commonwealth Water Ministers in order to garner their support for the Plan would ever be met; and many of the deadlines established in the Basin Plan were looming large.*

The other irrigator representatives, who were participants of the IRG, gave evidence to the Commission consistent with Mr Culleton's about the initiation of the IRG, the rationale for its formation, its membership, and its aims. Zara Lowien, executive officer of Gwydir Valley Irrigators

Association and one of the participants in the IRG, wrote an email to the chairman of her association the day after the *Four Corners* program aired, apparently to address some of the claims made on the program about the group and her involvement in it. She noted that the group:

> *…was formed for a specific purpose – information and communication, to smooth NSW negotiations and stop in-fighting and hence, it was actually about implementing the Basin Plan.*
>
> *Gavin often talked about the higher NSW strategy to implement the Basin Plan in the best interests of NSW communities and economy and to ensure NSW, the larger proportion of the Basin, would not carry the remaining states and wear any further impacts for implementing the Basin Plan. When discussing this he provided when possible, a full range of scenarios as outlined but … NSW interests were always a priority.*

The Commission's findings in relation to the IRG

Not corrupt conduct

The Commisison is satisfied that, in around October 2016, Mr Hanlon invited a select group of irrigation industry representatives from NSW catchments across the Murray-Darling Basin to form a reference or advisory group with which he proposed to consult on a regular basis on matters concerning the state's negotiation and implementation of the Basin Plan, which was then at a critical juncture.

The stated purpose of this was twofold. First, it was a direct response to criticism from industry directed at the minister about a lack of meaningful engagement since the abolition of the position of the Commissioner for Water and the restructruing of the department. Secondly, it was to obtain practical feedback and strategic advice from experienced, sensible and influential industry representatives about the government's position in relation to Basin Plan negotiations. This, in turn, would hopefully translate into the support and wider promotion of the government's position by this group of industry leaders throughout the irrigation industry, as a whole, and the communities dependent on it.

The Commission accepts the submission made on behalf of Mr Blair, which was received at the conclusion of the investigation, that, while he was aware of the IRG's existence and supportive of departmental officers consulting with industry stakeholders, he was not consulted about the establishment of the IRG or its membership, nor kept informed by Mr Hanlon about his consultations with the group. Mr Blair does not dispute that the IRG was a "mechanism that provided for Mr Hanlon to give effect to Mr Blair's desire to ensure that industry representatives were consulted in relation to the Murray-Darling Basin Plan".

The Commission is satisfied that Mr Hanlon had the imprimatur of the director general of DPI, Mr Hansen, to form a select group of irrigation industry representatives for the purposes of targeted consultation.

The Commission is satisfied that Mr Hanlon and Ms Morona formed the IRG for the purposes of targeted consultation with key industry stakeholders in good faith and in accordance with what they perceived to be the duties of their positions. The Commission finds that the position descriptions of both Mr Hanlon and Ms Morona, the agency objectives of DPI, and the minister's stated priority areas for the state's Basin Plan negotiations combined to reinforce the view of both of these senior public officials that the department's primary stakeholders were those who owned or delivered water for productive use. These factors also combined to reinforce the view that the state's interests in relation to the Basin Plan were best served by the so-called "triple bottom line" approach to Basin Plan negotiation, which sought to correct the perceived imbalance between the environment and the socio-economic needs of communities in rural and regional NSW created by the Basin Plan.

The Commission is satisfied that Mr Hanlon and Ms Morona believed that their public official duties required them to act in the interests of the state of NSW. The Commission is satisfied that they understood these interests to involve minimising perceived adverse impacts on industry and industry-dependent communities caused by the environmental emphasis of the Basin Plan. The Commission accepts that their pursuit of the minister's stated objectives was an attempt to minimise the plan's socio-economic impacts and that they sought the input and support of a group of stakeholders whose objectives were precisely aligned.

The Commission finds that both Mr Hanlon and Ms Morona held the mistaken view that the department's primary stakeholders are productive users of water and that the environment and Indigenous groups are secondary stakeholders because their interests are "indirect". The Commission finds that they prioritised consultation with only one powerful stakeholder group. The Commission finds that, although the formation of the IRG was manifestly partial towards the interests of industry, given the absence of similar reference groups being formed with other stakeholders, it was undertaken in the good faith belief that it fell within their public official duties and accorded with the minister's wishes.

The Commission therefore makes no finding of corrupt conduct on the part of either Mr Hanlon or Ms Morona in relation to the formation of the IRG.

The dissemination of confidential information

The taped teleconference of 12 October 2016

The *Four Corners* program, "Pumped", featured excerpts of a secretly recorded teleconference between Mr Hanlon, Ms Morona and a group of irrigator representatives, in which Mr Hanlon was heard offering to set up a Dropbox or some similar "safe" means of sharing documents and information with them. He was heard telling the group, "there's a whole lot of ammunition we've got at the moment" and that they could put together some paragraphs, de-badged, to assist, and could even circulate a de-labelled paper they wrote about holes in the modelling to be used by the group as the members saw fit.

The teleconference excerpts played on the program also suggested that "Plan B" – that is, NSW walking away altogether from the Basin Plan – was discussed with the group, and that Mr Hanlon had offered to share departmental legal advice about the implications of doing this. Mr Hanlon was also heard telling the group that he could manage perceptions about its select membership by being seen to meet with "everyone and anyone", and occasionally actually doing so, but that he would in fact only have discussions in confidence with the group.

The Commission obtained a full transcript of this teleconference, which took place on 12 October 2016, and interviewed or compulsorily examined every participant. The Commission also requested from each irrigator representative who dialled into this teleconference a copy of all documents received from Mr Hanlon, Ms Morona or the unofficial "chair" of the group, Mr Culleton, and all records made or communication concerning the business of the IRG.

Information disclosed to the IRG

Northern Basin Review recovery target figures

On the morning of 12 October 2016, Ms Morona emailed the 11 invitees to the IRG a PowerPoint presentation for the teleconference later that day. This consisted of updates in broad terms on key areas of the state's progress on Basin Plan negotiation and implementation. One of the areas for discussion was the Northern Basin Review (NBR).

Around the time of the teleconference, the MDBA's four-year review of the targets set for water recovery in the Northern Basin catchments was coming to a conclusion. The aim of the review was to conduct scientific, hydrological and socio-economic research to assess the Northern Basin's environmental water needs, and the potential social and economic impacts of water recovery. This information was to be used to amend, if necessary, the water recovery target for the Northern Basin, which had been set at 390 GL under the Basin Plan. A fact sheet issued by the department in November 2016 stated that the NSW Government's position in relation to the NBR was that it:

> *…strongly supported reviewing the science and triple bottom line decision making process to ensure that water recovery is necessary and does not create an unacceptable socio-economic impact for communities in the northern Basin.*

The transcript of the taped teleconference indicates that Mr Hanlon told the IRG that the MDBA would be meeting the following day and were expected to make a decision about a revision of the Northern Basin recovery target. A public consultation process would follow, after the relevant ministers had been briefed. Mr Hanlon told the IRG:

> *…our feeling is it's going to end up at 320 GL, not 390 … Now we've just got to wait and see what the MDBA come back on their 320. Their 320 model has, you know, there's not just a 320 number, there's about four or five different permutations on what 320 means. And what we've got on the next slide is what we think it might land on. Now we don't know, and please, this is probably the most sensitive slide in this whole pack, just treat this with, here's, if you like, our run sheet of where we think things might land.*

The slide to which Mr Hanlon directed the IRG's attention was part of the PowerPoint presentation earlier emailed by Ms Morona to participants. It was titled "NBR Water Recovery Scenarios" and it set out in table form expected changes in local recovery targets for each of the Northern Basin water resource areas if, as anticipated, the MDBA proposed a reduction in the overall water recovery target from 390 GL to 320 GL.

Ms Morona told the Commission that the slide Mr Hanlon had described as "the most sensitive in the whole pack" was "sensitive" in the sense that the people they were talking to were concerned about more water being taken from their areas and also that Mr Hanlon was referring to the fact of "it being sensitive information that shouldn't be shared". She accepted that it was not information that would have been publicly known. Ms Morona also told the Commission that this information was "very sensitive" in the sense that they did not know where the NBR water recovery target

would ultimately land "and it's sensitive because the community's concerns or otherwise about the future of their community really rest on this information".

The source of the information on the "sensitive" slide was an email from Phillip Glyde, chief executive of the MDBA, addressed to a number of people, including Mr Hanlon and Ms Morona, and sent on 23 September 2016; a number of weeks prior to the 12 October teleconference. Mr Glyde's email indicated that he was providing detail around one of the scenarios under active consideration, namely, a reduction in the water recovery target for the Northern Basin from 390 GL to 320 GL. The email attached four summary tables setting out different variations of the possible recovery figures for each affected catchment in the Northern Basin, in order to reach the overall 320 GL target. One of the four tables attached to the email (for scenario "320D") contained exactly the same expected recovery targets for the NSW Northern Basin catchments – that is, the intersecting streams, the Barwon-Darling, the NSW Border Rivers, the Gwydir, the Namoi and Macquarie/Castlereagh – as the figures provided for each of the same catchments in the "sensitive" slide shared with the IRG.

The Commission accepts that the information attached to Mr Glyde's email and the email itself were not marked "Confidential"; however, in the body of his email, Mr Glyde wrote "I would be very grateful if you could respect the confidentiality of the information contained within this email". The email contained the dissemination limiting marker (DLM) "Sensitive".

The DOI's records management policy (effective from October 2015) and its classified information policy (effective from July 2016) were policies that applied to Mr Hanlon and Ms Morona at the relevant times. These policies made adherence to the NSW Government's "Information, Classification, Labelling and Handling Guidelines" ("the guidelines"), effective from July 2015, mandatory for all DOI staff. The guidelines provide for the department's classification, labelling and handling of sensitive and confidential information in accordance with NSW Government requirements and the Australian Government security classification system. The guidelines are to be consistently applied across all NSW Government agencies and are consistent with those applied by the Australian Government.

The guidelines provide that protective markings, including "For Official Use Only", "Sensitive" and "Confidential", are used to ensure the confidentiality of certain sensitive information. Each protective marking carries with it certain limitations for dissemination and requirements for handling. If adverse consequences from the compromise of confidentiality could occur or the agency is legally required to protect the information, it is to be given a protective marking in accordance with the guidelines. The person responsible for preparing the information, or for actioning it if it is produced outside the NSW or Australian governments, determines the protective marking.

This person is the "originator", "information owner" or "risk owner". The protective marking is applied when the information is created. The originator is required to assess the consequences or damage of unauthorised compromise or misuse of the information and applies a protective marking in accordance with the guidelines if adverse consequences from compromise of confidentiality could occur or if the agency is legally required to protect the information. The guidelines also provide these protective markings should only be applied when there is a clear and justifiable need to do so. Most official information does not need increased security and may be marked "UNCLASSIFIED" or left unmarked and the guidelines provide that this should be the default position for new material unless there is a specific need to protect the confidentiality of the information.

Relevantly for the email sent by Mr Glyde, which he had protectively marked "Sensitive", the guidelines provide that the controls applied for the storage of information marked "Sensitive" must ensure that the information remains confidential and is available to authorised individuals when it is needed ("need to know").

The dissemination of information classified with a DLM must be for authorised purposes and it is the information owner at each agency who has overall accountability for access that is provided, and is to determine both the internal and external parties requiring access to the information, and the business reason for this access. Authorisation should be explicitly sought from the information owner in relation to these access matters.

The Commission finds that in classifying his email "Sensitive", Mr Glyde, as information owner at the MDBA (an Australian Government agency), was accountable for disseminating the information attached to it for authorised purposes and for determining the internal and external parties requiring access and the business reason for this access.

Any person given access to this information outside the recipients of his email, and the reason for this access, would require his explicit authorisation. Mr Glyde's email itself indicates that the authorised purpose and business reason for this dissemination was further to an undertaking to provide details around one of the scenarios under active consideration by the MDBA to internal and external *government* colleagues in the relevant Murray-Darling Basin jurisdictions engaged at the time in confidential negotiations and discussions concerning a revised water recovery target for the Northern Basin.

Mr Hanlon told the Commission that he did release information to the IRG but he did not believe it to be confidential information. He stated:

> *…the information that I shared was draft in nature. I was the owner/responsible officer for it. It in my eyes didn't have any commercially-sensitive, market-sensitive or security-sensitive information in it, none of the information there. It would have only been shared for the, the purpose of seeking either practical feedback or assisting the State in its case in the Basin Plan.*

The Commission does not accept that Mr Hanlon was the owner/responsible officer for the information that he received from Mr Glyde and shared with the IRG concerning the likely scenario for the NSW Northern Basin catchment recovery targets to be set by the MDBA if, as expected, the overall target was reduced to 320 GL. Likewise, the Commission does not accept the implied submission, made on behalf of Ms Morona, that the subsequent dissemination of some of this information to the members of the IRG was for an "authorised purpose" – namely, stakeholder engagement – or that Ms Morona and Mr Hanlon could determine that because the information was not finalised or marked "commercial-in-confidence" or "market sensitive", it was not in fact confidential.

The guidelines themselves explain that the reason for NSW implementing consistent methods of classification and labelling with the Australian Government is because this "allows sensitive information to be securely shared across jurisdictions, with confidence that the information will be handled and protected according to its sensitivity". The Commission finds that Mr Glyde remained the information owner of the material disseminated in his email. He had the overall accountability for determining the internal and external parties who could access it and the business reason for such access. It should therefore have been his decision, and not Ms Morona's or Mr Hanlon's, to allow, or not allow, dissemination of some of this information to a group of non-government industry stakeholders for the purposes of stakeholder engagement and seeking "practical feedback".

Submissions on behalf of Ms Morona assert that, at the time of the teleconference, she did not hold a view that the information in the presentation was confidential, citing her evidence to the Commission that:

> *I don't know how confidential or otherwise this information was because at the time we were having discussions with our reference group, the Commonwealth MDBA and other jurisdictions also had discussions with industry and other representatives in their areas, so I don't know if this had been shared with any other groups before.*

In circumstances where the chief executive of the MDBA had not only applied a "Sensitive" protective marking but had also specifically asked that the confidentiality of the information be respected, the Commission does not accept that Ms Morona did not know that the information on the "sensitive" slide in the presentation was confidential.

The Commission finds that, at the time of the teleconference, Mr Hanlon also knew that the information set out on the slide he described as "the most sensitive in the pack" was confidential. Despite an expected overall reduction in the water recovery target from 390 GL to 320 GL, the information on the "sensitive" slide presented to the IRG showed an expected local recovery target *increase* for the Barwon-Darling, following the NBR, from 6 GL to 32 GL. This was the figure for the Barwon-Darling contained in the scenario 320D table attached to Mr Glyde's email. The transcript of the teleconference indicates the following exchange between Ian Cole, chairman of Barwon-Darling Water, and Mr Hanlon:

> *COLE: Are you okay if I go off and talk to the MDBA and others about this, because this has just hit me this morning as new information? It changes things radically for our valley and we would not be happy with it.*
>
> *HANLON: So I think all the MDBA would say is we haven't made any decision at all yet, and we're not going to tell you until after we've spoken to Ministers and, you know, if anything they'd say bloody New South Wales had leaked information.*

Mr Hanlon was asked whether he had in fact "leaked" the confidential information received from the MDBA. He responded, "I wouldn't refer to it as leaked, I'd refer to it as targeted consultation on the impacts of what was being potentially proposed and our understanding of it". He described his own use of the term "leaked" as "poor choice of language".

The Commission does not accept Mr Hanlon's explanation for his use of the word "leaked" and finds that the exchange between Mr Hanlon and Mr Cole (quoted above) makes it clear that the information being shared was "new information" and that Mr Hanlon knew that the information provided by the chief executive of the MDBA in his email of 23 September 2016 was not to be "leaked" outside government or, in other words, was confidential.

The Commission also does not accept the submission made on behalf of Ms Morona that, because the information provided by Mr Glyde concerning the expected NBR recovery targets for each NSW Northern Basin catchment was draft in nature, or not complete or final, it was not capable of affecting commercial decisions

about water. The submission was made that the "quality of the information about the water recovery scenarios was put no higher than 'this is our guess at where we think things might land' by Mr Hanlon".

The Commission accepts that, as at 12 October 2016, the information shared with the IRG was not a final determined set of figures for the Northern Basin recovery targets; however, the evidence indicates that Mr Hanlon was quite confident about the numbers he and Ms Morona were sharing with the group. Shortly after telling the participants at the teleconference that the information was their "guess" as to where things might land, he said "my discussions with Phil [Glyde] have been quite positive and, you know, quite accepting of this is where it's at, and if we weren't feeling that confident about these numbers we'd be putting an assumption" and, shortly after that, in response to Mr Cole's anger about what the numbers looked like for the Barwon-Darling, Mr Hanlon advised the group, "…what we've tried to present Ian is just where we think things might – what they're going to recommend".

On 14 October 2016, two days *after* the teleconference, Mr Glyde sent another email to a group of people including Ms Morona and Mr Hanlon, attaching the MDBA's proposed water recovery outcome of 320 GL and the local water recovery targets settled on to reach this. In red font at the head of his email, Mr Glyde warned that "the following contains information that is water market sensitive and should not be distributed outside governments, nor to those intending to participate in this market before 22 November". The attached table of local recovery targets was watermarked in red "confidential – under embargo until 22 November 2016". It contained figures the same in all material respects as those in the 320D scenario table sent by Mr Glyde on 23 September 2016, and those contained in the "sensitive" slide shared with the IRG on 12 October 2016. This information, unlike that sent on 23 September and shared with the IRG, was finalised in nature.

The Commission does not find that the material shared by Mr Hanlon and Ms Morona on 12 October 2016, two days earlier, was also therefore embargoed and water market sensitive, but rather, that those protective markings underscore how confidential and sensitive the information was that they did share, as they were advised by Mr Glyde at the time, and how close to the mark their "guess as to where things might land" actually was.

Ms Morona told the Commission that she would not characterise the provision of this information to the IRG as "leaking". She stated that she and Mr Hanlon did not provide the IRG with all of the information sent to them by Mr Glyde and they made their best judgment as to the "best way to manage that information for NSW". She conceded, however, that this "technically" breached confidentiality and told the Commission that, with hindsight, she might have done things differently, but at the time this seemed the "most appropriate course of managing our stakeholder engagement". She told the Commission that, at the time, they released this NBR information "it wasn't embargoed information. It was talking through potential policy direction". Ms Morona told the Commission that:

> *I think that what we had seen time and again in Basin Plan policy development was a lack of consultation – and this is not just NSW specific – with a lot of the communities that this would impact, and those communities then blowing up, saying 'Noone's consulted with us and you've made these decisions without our knowledge'. And this, at that time, was our best judgement of ways to deal with that so that people were not shocked and surprised by outcomes, and we could, be, have a chance of actually explaining some of the reasoning about these decisions.*

The Commission accepts the evidence of Mr Hansen, who was shown the email dated 23 September 2016 from Mr Glyde, the PowerPoint presentation provided to the IRG for the 12 October 2016 teleconference, and the email dated 14 October 2016 from Mr Glyde, with its caveats and embargo watermark. Mr Hansen told the Commission:

> *…to be sharing information that you know is, God, even before Phillip sends his email around with the red print on it, you're going to know that by narrowing down the options and starting to get a lead to people about, to start to get a lead to people about what a government decision might be about water allocations, around water recoveries, around, I mean, that influences markets. That influences peoples' decision about buying, about selling, about leasing. And that just, that shouldn't have been done. That shouldn't have been there … It doesn't matter whether it's getting water back or having to contribute more water. All of it, if you know it's happening in advance of your neighbour, then you're in a position to influence or make a decision about what you do on that, you know, it's the same as understanding what might be happening with interest rates or something in advance of what someone else is, you know, not everyone knows what to do with that information but there will be some people who do know how to speculate off the back of that.*

Mr Hanlon told the Commission that this information would have been shared only "for the purpose of seeking either practical feedback or assisting the State in its case in the Basin Plan". It was submitted in general on Mr Hanlon's behalf that "Mr Hanlon held the view that the interests of the IRG were not in competition with

other stakeholders. He did not therefore appreciate that what he was doing involved any act of preference".

The Commission does not accept this submission in the context of his sharing the confidential proposed NBR recovery targets information with the IRG. It is important to note that the Northern Basin recovery targets set under the Basin Plan concerned the recovery of water *from* irrigation *for* the environment. The NBR was conducted to determine whether those targets remained appropriate, with a focus on triple bottom line objectives; that is, balancing socio-economic with environmental considerations. Any proposed reduction in those recovery targets was therefore of direct benefit to the irrigation industry and potentially adverse to the environment.

As part of the NBR, the MDBA was considering ways of better using environmental water and of achieving equivalent environmental outcomes with less actual water; that is, through the use of "toolkit" or complementary measures. It is a matter of public record that the NBR was highly contentious. It concerned significant competing socio-economic and environmental interests in the allocation of water in the Northern Basin. In this particular context, the interests of the IRG were the largest possible reduction in the amount of water recovered from irrigation in the Northern Basin and the proposal of a suite of measures to achieve equivalent environmental outcomes that had no adverse socio-economic impacts on, or disadvantage to, industry.

The Commission is satisfied that the competing interests of environmental stakeholders in the NBR context are in part as expressed by Derek Rutherford, senior OEH officer, in his statement to the Commission:

> *…the OEH did not agree that the large adjustment to the water recovery target for the Northern Basin that DPIW proposed as part of the Northern Basin Review adequately considered the environmental consequences of water having been 'over-recovered' and how this would be managed. The adjustment represented a large volume of water currently reserved for the environment potentially being reallocated to irrigators, although how this would occur had not been thought through. The OEH was not in a position to properly evaluate the environmental implications or present alternatives due to our late involvement in the process. Since the DPIW was the lead agency, the OEH could not force its position on the review. The OEH did not feel it had much influence on the review process.*

The Commission does not accept the submission that Mr Hanlon was of the view that the interests of the IRG were not in competition with other stakeholders, particularly environmental stakeholders, in the NBR context.

The Commission finds that Mr Hanlon *did* appreciate that his sharing with the IRG what he considered to be the MDBA's likely recommendation for the Northern Basin review recovery target figures was an act of preference towards irrigators over other stakeholders. At the commencement of the discussion of the NBR recovery slide in the teleconference on 12 October 2016, Mr Hanlon informed the group that:

> *…we're in ongoing discussions with Queensland and the Commonwealth and MDBA. We've had a couple of quick trips all over the countryside in the last couple of weeks. The MDBA Board's meeting tomorrow. We don't think that they'll say anything until after the MinCo* [MDBMC]*, because we've asked them to brief Ministers before they go making public announcements. We think that's only fair.*

The MDBMC meeting to which he referred was scheduled for mid-November 2016. The Commission is satisfied that, in sharing the expected NBR target figures with the IRG on 12 October 2016 and the day before the MDBA was due to make its decision on them, Mr Hanlon was giving the IRG advance warning, well before even ministers were due to be briefed on them, let alone the public.

After discussing what he considered "their guess as to where things might land", in terms of the MDBA's proposed reduction in the overall recovery target for the Northern Basin from 390 GL to 320 GL, Mr Hanlon told the IRG:

> *…so effectively if it is come in at 320 um, we're in good, well look I'll let you guys tell us whether we're in good shape or not, that's just the number. All right, if it does come in at 320, I think we'll be okay.*

The Commission finds that Mr Hanlon's language indicated a clear alignment between the irrigators' interests and the state's in the context of the NBR.

After discussing the figures likely to be applicable to each catchment to reach the proposed overall 320 GL target, Mr Hanlon explained to the IRG that, if the MDBA board signed-off on it at their meeting the next day:

> *…they then have to recommend it to the Commonwealth Minister to allow it to be released. And then it goes out to consultation and then it comes back. If it's anything other than, um even at 320 we'll probably still say that it's, you don't need to do any more at all. If it's above 320 and they go out there with the public consultation, we start taking, well then we start strategising about what happens next and in my view that's when we start taking a few things off the table in some of these discussions. But let's cross that bridge when we get to it.*

Following general discussion around the proposed recovery targets for each valley, Mr Hanlon suggested to the IRG that:

> *…what we could do at the end of this is have a bit of a chat about key messages and what you would like to do with some of this stuff, because in some ways, you know, this information could help you guys to do whatever you'd like to do and there might be some smart things we do as a State about how and what we might do over the next coming weeks and when they do release, finally release what their numbers are.*

The Commission finds this to be clear evidence that Mr Hanlon was providing the IRG with information he considered could be strategically useful to them.

In answer to how this information could help the group do whatever they would like to do, Mr Hanlon told the Commission that they, "could help promote our message, promote what it is we were trying to achieve at the Basin negotiations. They could help promote the Team NSW thing that we were trying to create so we wouldn't get played off". He explained further that:

> *…the observation I'd made several times, before I got to New South Wales and after, was that New South Wales could not present a single voice in any of their negotiations or the way they presented themselves across Basin negotiations, even within this group. So, the idea, if we were going to get a positive outcome in the Basin Plan, we had to be one team, not several teams, and that was what we were trying to achieve there.*

The Commission is satisfied that Mr Hanlon gave the IRG confidential information before other stakeholders and prior to any wider MDBA consultation process in order to give them a strategic advantage. He provided the IRG with sensitive information that was not generally or publicly available, without Mr Glyde's authorisation, of significant and likely proposed changes to Northern Basin water recovery targets.

The Commission finds that Mr Hanlon indicated to the IRG that any figure that the MDBA proposed above 320 GL would be unacceptable and would see those responsible for negotiating NSW's position "strategising" and taking things off the table in the jurisdictional discussions. The Commission is satisfied that this was not an instance of Mr Hanlon seeking "practical feedback". Mr Hanlon was making it clear that NSW's position on the NBR would be one that favoured the irrigation industry.

The Commission finds that, in discussing what the NSW Government would be strategising and advocating for in relation to the NBR, a clear indication was given to the IRG that it would be in the irrigation industry's interests. At this point, prior to any wider consultation on the proposed MDBA figures, including with environmental and Indigenous stakeholders, Mr Hanlon's position was that NSW would pursue a reduction in the amount of water recovered from irrigation.

The Commission finds that this indicates that Mr Hanlon was entirely focused on one group of stakeholders and that he had no regard for other stakeholders who may have sought:

- a smaller or no reduction in the water recovery targets
- the opportunity to evaluate the environmental implications of recovering less actual water
- the opportunity to present alternatives to the mechanisms proposed to achieve environmental outcomes with less water.

Legal advice regarding "walking away" from the Basin Plan

The transcript of the secretly taped teleconference on 12 October 2016 indicates that Mr Hanlon told the IRG that he had received detailed legal advice on what "walking away" from the Basin Plan means for NSW, referred to in the following exchange in the teleconference as "Plan B":

HUTCHINSON: (Murrambidgee Irrigation)	*Plan B would also be interesting, if there is one.*
HANLON:	*Plan B is scary.*
MORONA:	*Plan C is scary. Plan B is fun.*
HUTCHINSON:	*(Laughs) Plan B is Bermuda.*
CULLETON:	*The threat of Plan B might be enough though to bring some bloody sensible adjustment in Plan A.*
HANLON:	*Yeah, so ah, just on what we've been calling Plan B, or a plan, or some sort of plan, we have had detailed legal advice on what walking away means. I might get our lawyers to write up a, um, so I don't breach legal privilege, I might get them to write up a "could you write a general 'what does it look like for me' one-pager?" – so that I can share with you guys about what that looks like. It's not*

> *to say that the one-pager, not to say that walking away isn't doable; it just becomes incredibly bloody messy.*

The Commission obtained an email sent on 29 September 2015 by the acting director of DOI's legal branch to Mr Hanlon and Ms Morona attaching the legal advice they had requested concerning NSW's ability to limit its participation in the Basin Plan, including "walking away" from it altogether. Unsurprisingly, the advice was marked in red as "confidential and privileged". The footer of each page of the advice also noted in red that the document was privileged and that:

> *Disclosing this document or discussing its contents with a third party, may mean that legal professional privilege is lost. Please contact Legal before this document or its contents are disclosed to a third party.*

During his compulsory examination, Mr Hanlon was taken to this legal advice and its caveats on disclosure. Mr Hanlon conceded that it was certainly inappropriate for him to have disclosed to the IRG even the fact that such advice existed, without first speaking to the lawyers who had prepared it. He told the Commission he had thought that saying he could not share the advice with the IRG was enough, but he now realised that this was clearly a mistake.

During her compulsory examination, Ms Morona told the Commission that she did not think there was a problem talking to the IRG about the fact that they had received such legal advice. This was because she believed that "at some points the Minister has also talked about this in communiques and the like in terms of NSW seeking to understand its position and asserting triple bottom line outcomes".

The Commission accepts the submission made on Ms Morona's behalf that none of the detail of the legal advice was disclosed. The Commission also accepts that disclosure of the mere fact of the existence of legal advice does not amount to a waiver of privilege and that it will depend on the circumstances of the matter whether a limited disclosure of the existence and the effect of legal advice is inconsistent with maintaining confidentiality.

The Commission is satisfied that Mr Hanlon, who is not a lawyer, genuinely thought he was not waiving legal professional privilege when he disclosed that he had received detailed legal advice about the implications of NSW walking away from the Basin Plan and that it was "doable [but] … incredibly bloody messy". The Commission finds, however, that he inappropriately ignored the clear caveats on disclosure in the legal advice he received and did not consult with the legal branch before telling the IRG that such advice existed.

The Commission does not accept the submission made on behalf of Ms Morona that the disclosure of the effect of the legal advice – namely, that walking away was "doable [but] … incredibly bloody messy" – is a "statement as to the obvious" in "the context of an inter-governmental initiative concerning a precious natural resource". The Basin Plan is more than an "inter-governmental initiative". It is a highly contentious compact between the Commonwealth and states, provided for by the *Water Act 2007* and enshrined in legislation since 2012, that seeks to address historic over-allocation of water and restore the environmental health of the Murray-Darling Basin in accordance with various international conventions to which Australia is signatory. It imposes significant obligations on the Basin States and has had significant and unpopular impacts on the irrigation industry. That it is even legally possible for one of the states to "walk away" from such a compact is not obvious.

The Commission finds that Mr Hanlon's disclosure – that he had obtained legal advice that it was possible for NSW to walk away – also signalled to the IRG that this was something that he had at least contemplated and enquired about as an option. The Commission considers that Mr Hanlon was imparting not insignificant information. The Commission finds that Mr Hanlon's disclosure to the IRG, that he had obtained legal advice about this possibility, is a further instance of Mr Hanlon providing information to the IRG that he did not have authorisation to disclose.

The Commission does, however, accept the submission made on Ms Morona's behalf that, when the transcript of the teleconference is carefully considered, Ms Morona made no comment about the fact of the existence of the legal advice or its effect. Her comment that "Plan B is fun" referred not to the legal advice, but to the concept of limiting the involvement of NSW in the Basin Plan. When giving evidence before the Commission, Ms Morona made the reasonable concession that the remark was not appropriate and that she regretted making it. The Commission also accepts the submission that Ms Morona was not in a position to control what Mr Hanlon said about the existence of the advice.

Basin Official Committee (BOC) paper: Menindee update and update of Tandou Farm (Tandou) negotiations

Following the taped teleconference on 12 October 2016, there was a second teleconference on 1 November 2016 held with the IRG. On 31 October 2016, in preparation for that teleconference, Mr Hanlon sent Mr Culleton an email to which he attached two documents and asked that these be forwarded to the members of the IRG.

The first of the attached documents was a paper titled "Menindee update", prepared on 20 October 2016 for

an upcoming BOC meeting. It was marked in red in the header as "For Official Use Only – Sensitive and Confidential Information". In his email, Mr Hanlon advised Mr Culleton that it was "a working draft that hasn't been circulated anywhere yet".

The paper's stated purpose was to update the BOC of the options for the Menindee Lakes Water Savings Project and the potential for sustainable diversion limit (SDL) adjustment mechanism opportunities. The paper noted that the scope for potential savings from the Menindee Lakes Water Savings Project "has been expanded with the expected purchases of Lower Darling High Security entitlements and the disconnection of Lake Tandou irrigation operations, both subject to commercial negotiations".

The paper set out six options under consideration by NSW to maximise the adjustment to the SDL from the water "saved" as a result of the reduction in evaporative losses to be achieved by the Menindee Lakes Water Savings Project and from the purchase of entitlements on the Lower Darling. These options ranged from allowing Lakes Menindee and Cawndilla to be used exclusively for environmental purposes, to creating a totally new type of water entitlement out of the "saved" water that could be traded, to crediting the volume of "saved" water to an environmental account. The paper noted that these options represented major changes to the Menindee Lakes Water Savings Project that would need BOC approval.

The second document sent by Mr Hanlon to Mr Culleton was a PowerPoint presentation put together by Mr Hanlon, titled "Update". This presentation contained slides primarily setting out high-level goals, plans, positions and to-do lists for the NSW Government in relation to its Basin Plan negotiations. One of the slides titled "What's needed for achieving goals" contained some detail, including that NSW needed to deliver from 100 GL to 120 GL from Menindee and from three to four strategic purchases, and another slide noted that Lower Darling and Tandou negotiations were "on the drawing board".

Mr Culleton forwarded these documents to the group the same day and noted in his covering email:

> *…he* [Mr Hanlon] *stresses that both are* ***sensitive*** *and should* ***not*** *be shared with others. Clearly, the release of these two documents will be seen as a "test" of the IRG and I appreciate that this may create some dilemmas for some. However, the alternative is to be denied an understanding of where things are really "at" or "headed". If anyone feels that they will be compromised by the requirement not to share sensitive information, please touch base with me asap. (I appreciate that there is no point getting access to sensitive information if we don't use the information, so our challenge is to work out how to use information without compromising continued access).*

Mr Culleton told the Commission that a lot of the information in the PowerPoint presentation had been made available in one form or another in documents distributed widely throughout the irrigation community, in the minister's communiques or discussed at NSWIC meetings, and he noted that almost every one of the bullet points it contained would have been reasonably known by most of the industry people involved in strategic-analysis planning. He told the Commission that, within the irrigation companies and senior membership of the NSW and national irrigator councils, there was nothing contained in the PowerPoint that would not have been widely known.

For Mr Culleton, the significance of the document was that it "very succinctly highlights those keys issues that New South Wales, you know, is pursuing". He told the Commission that, with the removal of one or two bullet points, this could have been a presentation given to the wider industry. He said that those bullet points that referred to South Australia keeping money and negotiations with Tandou – although it was widely known that the latter were occurring – would not have been appropriate for a wider audience.

Ms Morona gave evidence to the Commission that the draft BOC paper was "obviously sensitive". She told the Commission:

> *I pulled this document together and I put on there 'For official use only. Sensitive and confidential'… and I had developed this document for Gavin Hanlon as the NSW BOC member who was bringing forward this update. So I prepared that for Gavin, and on that basis – in me providing it to him – I felt this was sensitive and confidential, and then it's obviously his document ultimately … to use as he saw fit as the BOC member.*

Ms Morona explained to the Commission that she had designated the document for official use only:

> *…in the sense that it would be going to that committee I felt it prudent to put 'for official use only' in relation to the other jurisdictions' understanding that this had what I consider sensitive information in there.*

She explained that the reason she considered the information sensitive and confidential at that point in 2016 was that, "we still hadn't got an agreed proposal from New South Wales that we had developed and had Cabinet sign-off, so it was very embryonic at that stage in talking about concepts as to what we might do".

She told the Commission that she felt "uncomfortable" on learning it had been shared with the IRG in the format

in which she had drafted it, and she had told Mr Hanlon that was her view. Ms Morona told the Commission that, if she were going to share this information with shareholders, she would have put a "couple of key dot points around the higher level objectives of what we would try to do".

In relation to the PowerPoint presentation forwarded by Mr Culleton to the IRG at the same time as the BOC paper, with caveats in his email as to both documents' sensitivity and confidentiality, Ms Morona gave evidence to the Commission that the information it contained was very "high level" but that being able to discuss it with the IRG provided the necessary context. She said that she would have been concerned had it been shared further by the IRG because such context and explanation would be missing. She told the Commission that the high-level description of Lower Darling and Tandou negotiations on one of the slides was "okay" because, as at 1 November 2016, everyone knew that these had been ongoing for years; although, no one knew to what extent.

The Commission obtained the written notes of Karen Hutchinson, general manager for policy and communication at Murrumbidgee Irrigation, who attended the teleconference on 1 November 2016. In relation to the BOC paper, Ms Hutchinson recorded "not shared w States yet". In relation to the PowerPoint slide noting Lower Darling and Tandou negotiations, Ms Hutchinson had underlined the comment "Not Shared Yet". She gave evidence to the Commission that she could not recall what she meant by either comment but that she assumed that the information that had not yet been shared "was still a NSW internal discussion as part of their proposal for Menindee".

Mr Hansen expressed the view in his statement that it was inappropriate for Mr Hanlon to have shared both the BOC paper and the PowerPoint presentation with the IRG. He noted that the BOC paper was marked as sensitive and confidential and was for the BOC. It was inappropriate to share information that needed to be protected and controlled for the purpose of policy decision-making. He stated, "this information has been classified and needs to be treated accordingly".

Mr Hanlon's evidence was that he should not have let the document concerning Menindee, in particular, go out to the group with the "Sensitive and Confidential" and "For Official Use Only" labels on it and that it was "careless and rushed" of him not to de-label them first. He asserted that this was because the document did not need those labels on it because it was a draft or options paper using an MDBA template that they were considering tabling at the MDBA and there was actually nothing sensitive in it. He told the Commission that the document contained no definitive recommendation, but rather a series of options about which he was seeking practical feedback. He asserted that he had told Mr Culleton it was sensitive and not to be shared only in the sense that he would prefer not to read about it on the front page of the newspaper the following day.

In relation to the information contained in the PowerPoint presentation, Mr Hanlon told the Commission that it was sensitive:

> *…only from the perspective that I didn't really want the South Australians or … others that we were negotiating with or the Commonwealth knowing what we were actively considering as part of our position, other than for it to come from me when I was ready to, ready and in a position to do so.*

In relation to the slide noting negotiations with Tandou and the Lower Darling, Mr Hanlon told the Commission that, at that time, it was well known that the Lower Darling Horticultural Group was in discussions about a purchase of its water entitlements and that "something had to happen with Tandou if anything at all could happen with Menindee". Mr Hanlon told the Commission that he gave this already known information to the group "to get their feedback again and to engage and enrol in what it is that we're trying to achieve". Mr Hanlon stated that he did not think the IRG would get anything directly out of the information he had provided them:

> *…other than a feeling of confidence that the New South Wales Government is following through … or trying to follow through on its three stated objectives, which would give the broader community some confidence.*

The Commission is satisfied that Mr Hanlon released a draft paper in relation to Menindee intended for the BOC that he knew contained sensitive and confidential information. It had been drafted by Ms Morona for his use as the NSW representative on the BOC and she had classified it for official use only and as containing sensitive and confidential information because she considered its contents warranted the classification. The Commission is satisfied that it was intended for the BOC's official use and should not have been released outside government.

The Commission does not accept Mr Hanlon's explanation that the paper was mislabelled and that there was nothing sensitive or confidential in it. That assertion is contradicted by his own email to Mr Culleton, noting it had not yet been circulated anywhere, by Mr Culleton's clear understanding that it was sensitive and should not be shared and, most significantly, by Ms Morona's evidence as the document's author and the person who classified the information in that way. The Commission does not accept the submission that it was merely "careless" of Mr

Hanlon to distribute a document so marked and that he should have first removed the information classification. The information would not have thereby ceased to be for official use only or lost its sensitivity and confidentiality.

The Commission accepts that the PowerPoint presentation did not contain commercially sensitive, market sensitive or security-sensitive information. The Commission is satisfied, however, on the basis of the caveats included in the email from Mr Culleton to the IRG, Mr Culleton's evidence and Ms Hutchinson's notes, that the information contained within the PowerPoint presentation in relation to Lower Darling and Tandou negotiations was sensitive in the sense that it was confirmatory of the government's position, and had not yet been shared elsewhere.

The Commission does not accept Mr Hanlon's evidence that he shared information with the IRG that they already knew solely for the purpose of getting their feedback on these matters. Likewise, the Commission does not accept Mr Culleton's submission that, while it may have been established that Mr Hanlon and Ms Morona breached their contractual obligations regarding the use of official information, the finding that they did so with the intention of benefitting only one group of departmental stakeholders would be manifestly unjust. He further submitted that there was no evidence to suggest that the members of the IRG "benefitted" from the documents that were provided to them.

The Commission is satisfied that, through Mr Culleton, Mr Hanlon provided the IRG with a sensitive and confidential draft BOC paper that was intended for his representations to that committee, and a high level understanding of the government's priorities and objectives in relation to Basin Plan negotiations, in order to provide this group with significant information before any other party, including other Basin States and other stakeholders. Being privy to significant information before other interested parties with competing interests confers a strategic advantage. As Mr Culleton appreciated when forwarding this information to the members of the IRG, "there is no point getting access to sensitive information if we don't use the information, so our challenge is to work out how to use information without compromising continued access".

The Commission accepts Mr Hansen's evidence that:

> *…sharing information about what the options are with only a select group of people is untenable and inappropriate. In addition, it damages reputations and leads to a loss of confidence in our State partners as well as our staff in regards to appropriate consultation with external stakeholders.*
>
> *Sharing such information with irrigation industry CEOs and not others, and using them as a sounding board in that way also puts them in a very awkward position as their job includes forecasting trends in the irrigation business. Providing a select group of people with knowledge that their Board may need to know for the purposes of their business and government expecting them not to share it is untenable.*

The Commission finds that Mr Hanlon wanted the IRG to use the information he gave to the IRG in a strategic way, to support, behind the scenes, the government's own strategy and objectives in relation to the Basin Plan, for the reason explicitly agreed to by Mr Hanlon in his evidence before the Commission, that he understood that the NSW Government's and the IRG's objectives, were "absolutely" aligned.

Draft letter to Paul Morris regarding toolkit measures

On 1 May 2017, Mr Hanlon sent an email with the subject "Draft letter in confidence" to several of the IRG members from the Northern Basin and the chair of the NSWIC. The email attached a draft of Mr Hanlon's letter to Paul Morris, first assistant secretary at the Commonwealth Department of Agriculture and Water Resources (DAWR), concerning the NSW approach to implementation of the NBR and proposed "Toolkit" measures. It also attached a table titled "Toolkit Implementation Plan" with the footer in red stating "For Official Use Only – Without Prejudice". In his email, Mr Hanlon told the recipients that he intended to send the letter that night and that he welcomed their comments.

In his evidence to the Commission, Mr Hanlon stated that it was another example of his "carelessness" to have kept the protective marking on the document before sending it out to get feedback on the government's response to the toolkit measures. He said he would have considered it "normal practice" and expected of him in his role to seek such stakeholder input. He said that the people he sent these documents to were those he considered "the key group of stakeholders for DPI for that part of the world".

It is clear to the Commission that environmental stakeholders, with clear competing interests in the contentious context of the NBR, were again at the very least forgotten or overlooked in this process. Mr Hanlon told the Commission that throughout his career when "drafting letters about issues that would directly impact key stakeholder groups, I would seek their feedback before sending it off, as I had my feedback sought from me in previous roles".

Mr Hansen expressed the view to the Commission that sharing a draft letter with an external source for comment is not normal practice. While it may be appropriate to fact-check something specific, it would not be appropriate to share the whole document. Mr Hansen noted:

> *…there is nothing uncontentious in the water space. The toolkit measures proposed in this document should not have been distributed, as they relate to alternative approaches to delivering river health. It is likely to involve discussion about water extraction, volumes of water, infrastructure projects, expenditures and the like.*

The Commission is satisfied that the draft letter to Mr Morris and the attached table of proposed toolkit measures for the NBR should not have been shared. The Commission is satisfied that Mr Hanlon's disclosure of it and his request for input into draft correspondence with a Commonwealth Government department was not "normal practice" for a public official. Requesting input into the inter-jurisdictional presentation of NSW's policy position on such a contentious issue from only one group of stakeholders was also inappropriate and partial.

Mr Hanlon's and Ms Morona's obligations of confidentiality and impartiality

Mr Hanlon signed his contract of employment with DPI on 11 January 2015, agreeing to perform the duties and responsibilities of the assigned role in accordance with the government sector core values under s 7 of the *Government Sector Employment Act 2013*, which include the requirements to act with honesty, consistency and impartiality, to uphold the law, institutions of government and democratic principles, and to provide transparency to enable public scrutiny. Another relevant requirement of both his and Ms Morona's employment contracts was that they "not disclose, without lawful authority, any confidential or secret information acquired as a consequence of the employment".

Consistent with the contractual confidentiality requirement, the department's records management policy prohibited the unauthorised disclosure of confidential information. The policy required that unauthorised use or disclosure may give an individual or organisation an improper advantage. It required that "sensitive information is only shared with people who are authorised to access the information and have a 'need-to-know'".

The DOI's Code of Conduct, in effect from March 2016 and applicable to both Mr Hanlon and Ms Morona, requires that "sensitive information is only discussed with people, either within or outside the department, who are authorised to have access to it". The Code of Conduct prohibits the misuse of official information and documents, examples of which include, relevantly:

> – ***disclosing sensitive information**, including information pertaining to individuals, agencies or businesses, to members of the public, clients, political parties, members of Parliament, **lobby groups, industry personnel**, other public servants or other government organisations **without proper authority***
>
> – *providing **advice of proposed technological or statutory changes** to a company, organisation or person **if that advice is not generally available**.* (Emphasis added)

The Code of Conduct provides that breaches may result in disciplinary action or performance management measures ranging from counselling to dismissal. The considerations involved in the decision to take such action include protecting the integrity of the department, maintaining public confidence and trust and the seriousness of the misconduct.

Both Mr Hanlon and Ms Morona were subject to a clear obligation not to disclose confidential information acquired in the course of their employment without proper or lawful authority.

Submissions were made on behalf of Mr Hanlon that, whatever conclusion might be drawn regarding the confidentiality and sensitivity of the material he shared with the IRG, Mr Hanlon's genuine belief was that the material was not confidential or sensitive, and that in distributing the material as he did he had not breached any duty.

The Commission does not accept this submission in relation to the majority of the information he shared. For the reasons outlined above, the Commission finds that Mr Hanlon knew that the information provided by Mr Glyde in relation to the NBR recovery targets was both confidential and sensitive and he cautioned Mr Cole against raising it with the MDBA for fear that NSW would be accused of "leaking".

The Commission finds that Mr Hanlon knew that the draft BOC paper and the PowerPoint presentation that he emailed to Mr Culleton to provide to the IRG in advance of the teleconference on 1 November 2016 were both confidential and sensitive. Ms Morona had classified the draft BOC paper "sensitive and confidential" and Mr Hanlon himself had stressed to Mr Culleton the sensitive nature of both documents and the fact that they had not been circulated elsewhere. Mr Hanlon was not the information-owner of the MDBA figures or of Ms Morona's draft BOC paper. He disclosed that information to the IRG without authority.

The Commission finds that Mr Hanlon knew that he was sharing confidential information with select IRG members when he asked for their comments on his draft letter addressed to Mr Morris of DAWR, and its attached table of proposed NBR "toolkit" measures" marked "For Official Use Only". The Commission rejects Mr Hanlon's contention that he was merely "careless" in leaving the protective markings on the documents

and that, as the originator or owner of the information, he could distribute it as he saw fit, as long as it did not contain commercially sensitive, market-sensitive or security information. The mere removal of protective markings before dissemination does not alter the fact that the information was sensitive and confidential when those markings were applied.

The Commission finds that a draft letter from the deputy director general of a state department to the first assistant secretary of the counterpart Commonwealth department, setting out the "NSW approach to implementation of the Northern Basin Review and Proposed 'Toolkit' Measures", is self-evidently confidential; but, in any event, Mr Hanlon described his own letter to Mr Morris as a "draft letter in confidence" in the subject line of the email by which he sent it outside government to those industry representatives whose input he sought.

The Commission finds that while Mr Hanlon genuinely believed he was not breaching the confidentiality of privileged legal advice that he had received concerning NSW's ability to limit its participation in the Basin Plan, including walking away from it altogether, his disclosure to the IRG of its existence and that walking away was "doable [but] … incredibly bloody messy" was also a disclosure that it was a possibility that had been contemplated and could be again. This was not insignificant information, albeit not the detail of the advice. The sensitivity of the fact and effect of the advice was underscored by the requirement on the legal advice document itself that authorisation needed to be sought before the document or its contents were disclosed to a third party.

As discussed above, submissions for Mr Hanlon asserted that he held the view that the interests of the IRG were not in competition with other stakeholders and he therefore did not appreciate that what he was doing involved any act of preference. The Commission does not accept that that view could have been genuinely held by him in the controversial and contested space of the NBR, which set up a fundamental contest between the interests of the irrigation industry and the environment or in the language of the "triple bottom line" approach of the MDBA and the department, between socio-economic and environmental considerations.

The Commission finds that Mr Hanlon's role gave him the ultimate responsibility for developing and presenting the state's position in relation to the NBR, which he told the Commission was that "there was no need for any more water to be taken out of the Northern Basin". He explained that NSW was committed to achieving the environmental outcomes of the Basin Plan, but that it was "absolute nonsense to try and protect the flows themselves". If NSW knew the environmental outcome being sought by the MDBA, it wanted to be able to come up with approaches to deliver it that did not rely on water recovery alone.

So much is also apparent from his draft letter to Mr Morris at DAWR, setting out the state's position on the NBR as at 1 May 2017. Mr Hanlon wrote that "strategic" water recovery could be achieved in the Northern Basin "through water infrastructure investment, toolkit measures and water resource planning" and that this would "avoid potential third party impacts and deliver win-win outcomes for water users in the northern NSW valleys. Mr Hansen stated that Mr Hanlon "was autonomous in implementing the NSW government's commitment to the MDBP and the NSW's Government's commitment to have no further compulsory water buy backs".

The Commission finds that it was in the context of implementing that commitment and demonstrating to the IRG the extent of that commitment, that Mr Hanlon breached Mr Glyde's trust and shared the proposed NBR recovery target figures sent in confidence to him and other relevant government officials. It was also in that context and for the same reason that he asked the Northern Basin irrigators for their direct input into his letter to Mr Morris.

Mr Hanlon's discussion of the NBR recovery target figures with the IRG in the taped teleconference on 12 October 2016 reveals that the position of the NSW Government and of the irrigation industry was absolutely aligned; namely, that a reduction in the Northern Basin recovery target from 390 GL to 320 GL would be an acceptable reduction.

There is no evidence available to the Commission that Mr Hanlon had shared this information with OEH, a recognised departmental stakeholder, and ascertained and ensured that such a reduction in the water recovered from irrigators would also be acceptable to environmental or Indigenous stakeholders in the development of NSW's position. There is no evidence that Mr Hanlon sought the input of OEH or other environmental and Indigenous stakeholders, as he did from Northern Basin irrigator representatives, when he drafted his letter to Mr Morris about proposed toolkit measures to enhance environmental outcomes in the Northern Basin without recovering actual water.

Mr Hanlon told the Commission that his intention was to have a group that he could "bounce ideas off and get advice from". He believed that there were:

> *…balances and checks after this to ensure that this view wasn't the only view, but also I didn't believe that this group would have any material advantage for themselves, the advantage was only going to be for the State, is what I hoped would be the case; it's what I was aiming to do.*

The Commission accepts that the idea of having such a group and for such a purpose was endorsed by Mr Hanlon's superiors, but the Commission also accepts the submission made on behalf of Mr Blair at the conclusion of this investigation, that at no time did he ever give his approval – expressly, impliedly or tacitly – for the process of consultation with industry stakeholders to involve or be used in any way as a vehicle for the disclosure of confidential government information. At all times, Mr Blair's expectation was that Mr Hanlon and Ms Morona would respect their legal and contractual obligations to ensure that the confidentiality of information intended only for government officials would be preserved.

The Commission accepts Mr Hansen's view, as expressed in his statement to the Commission, that reference groups are a valuable tool, but only if they are used the right way, namely:

> *a. we are not sharing anything that is not available to anyone else who needs to know or should know*
>
> *b. we are not making available any information that gives an advantage to those in the room over others that were not invited*
>
> *c. we document everything we are doing, so if anyone ever wants to know what was our interaction with that group, they can apply and receive that information.*

The Commission shares Mr Hansen's concerns, not only about the nature of the information shared with the IRG, but also about the absence of recordkeeping in relation to that stakeholder engagement. The Commission finds that Mr Hanlon's failure to ensure that records were kept of his meetings with the IRG constituted a failure to provide transparency to enable public scrutiny and has contributed to a loss of public confidence in the integrity of government decision-making in the public interest in the water space in this state.

The Commission also finds that the provision to the IRG of information such as the MDBA NBR recovery figures in advance of a scheduled consultation process, the provision to the IRG of a sensitive draft BOC paper in advance of the information having been shared with other Basin States, and the provision of information about the government's policy positions before these had been signed-off by Cabinet or shared outside government, indicates that Mr Hanlon prioritised sharing confidential and sensitive government information with the IRG over protecting and controlling that information for official use only; that is, for the purposes of policy and decision-making by the public officials with responsibility for these official functions.

The Commission finds that, in sharing the information with the IRG that he did, and in the way that he did, Mr Hanlon failed to maintain a distinction between the public and private spheres, which is critically important for maintaining public confidence in the integrity of government decision-making in the public interest.

The Commission notes that, notwithstanding the concerns expressed by Mr Hansen about the conduct of Ms Morona and Mr Hanlon in relation to their engagement with the IRG and inappropriate disclosure of sensitive information to them, he believes that they both:

> *…acted in the public interest at all times in their dealings with stakeholders in negotiations. I can only assume that they provided this sort of information to these stakeholders as a form of arming themselves for a potential discussion or debate with other States because they knew already what certain stakeholders would say. That would help them to respond and be able to use some of those arguments to shape their discussion. I still do not believe that Gavin and Monica did it to harm anyone or anything. I do not believe they did it to provide a commercial advantage to anyone. I really do believe they did it to try to give themselves an edge in the negotiation with the other States.*

The Commission is satisfied that Mr Hanlon believed he was exercising his public official duties in the interests of the state of NSW. The Commission finds that he understood these interests to involve minimising perceived adverse impacts on industry and industry-dependent communities caused by the environmental emphasis of the Basin Plan. The Commission accepts that his pursuit of the minister's stated objectives was an attempt to minimise the plan's socio-economic impacts, which were being felt by industry and industry-dependent communities and that he sought the input and support of a group of stakeholders who shared those objectives.

The Commission finds Mr Hanlon also believed that the interests of the state of NSW were sometimes in conflict with the interests of other Basin States and the Commonwealth itself and that, having the support of the IRG, including its capacity to spread and promote the NSW Government's objectives in relation to Basin Plan negotiations behind the scenes, would be to the ultimate advantage of NSW because it would enable the state to present a unified front in those negotiations.

The Commission's findings

Ms Morona

The Commission is satisfied that Ms Morona inappropriately disclosed confidential and sensitive information that she acquired in the course of the exercise

of her official functions when, on 12 October 2016, she sent a PowerPoint presentation to members of the IRG containing a slide, setting out the likely local water recovery targets for NSW Northern Basin catchments if the MDBA determined to reduce the overall recovery target for the Northern Basin from 390 GL to 320 GL, as was expected. The figures that were shared were taken from summary tables provided to Ms Morona, Mr Hanlon and other government officials by the chief executive of the MDBA in a protectively marked email with a specific request that the confidentiality of the information be respected.

The Commission finds that Ms Morona knew at the time that this was sensitive information that was not publicly known and that it should not be shared further. In light of Mr Glyde's specific request to respect its confidentiality, the Commission cannot accept the submission that she did not know that it was confidential.

The Commission finds that Ms Morona's motivation in disclosing this confidential information to the IRG was less to confer an advantage on one particular stakeholder group and more directed to preventing that powerful group of stakeholders from "blowing up", complaining about a lack of consultation and being shocked and surprised by decisions that impacted on them being taken without their knowledge, which had occurred frequently in the recent past. Stakeholder engagement was the key accountability of Ms Morona's role.

The Commission accepts the submission made on her behalf, to the effect that the Commission might conclude that her disclosure of the NBR information to the IRG was an error of judgment, which she has subsequently recognised. The Commission accepts that she did not initiate the disclosure, but was acting in consultation with her senior manager, and in the pursuit of what she understood to be the objective of her employer at the time to engage more meaningfully with industry stakeholders.

The Commission is satisfied that while it was Ms Morona who sent out the PowerPoint presentation, it was Mr Hanlon who took the lead in the more detailed and substantive disclosure of the confidential NBR recovery targets during the teleconference. It was Mr Hanlon, rather than Ms Morona, who explained the significance of the numbers to the IRG, cautioned Mr Cole against raising them with the MDBA, and discussed the need for "strategising" if the MDBA's decision was anything higher than 320 GL.

The Commission finds that Ms Morona had no authorisation to disclose the 320D scenario NBR recovery target figures to the IRG, and that she did not ensure, as she was obliged to do, that the confidentiality of information intended only for government officials was preserved. The Commission considers that her conduct is an example of misuse of official information prohibited by the Code of Conduct. The Commission does not find, however, that it was a wilful or intentional misuse of information, or that it was done with an improper motive such that on its own it rises to the level of seriousness required to make a finding of corrupt conduct.

The Commission accepts the submission made on her behalf that, although Ms Morona was present during the teleconference when Mr Hanlon disclosed to the IRG that they had received confidential and privileged legal advice concerning the implications of NSW limiting its participation in the Basin Plan, including walking away from it altogether, Ms Morona did not contribute to that disclosure. She made no comment about the existence or effect of that legal advice.

The Commission makes no finding of corrupt conduct in relation to Ms Morona.

Mr Hanlon

The Commission is satisfied that Mr Hanlon engaged in conduct that involved the misuse of information or material that he acquired in the course of the exercise of his official functions, in breach of the Code of Conduct and his employment contractual obligations. He deliberately disclosed sensitive government information, without proper authority, to an exclusive group of irrigation industry representatives. The information he provided was not generally available outside government, and concerned proposed statutory changes and sensitive government policy positions. It was provided to the group in advance of public consultation processes and not to other stakeholders.

Mr Hanlon engaged in this conduct on the following occasions:

- during a teleconference with the IRG on 12 October 2016, when he discussed local water recovery target figures provided in confidence by the chief executive of the MDBA for one of the scenarios in contemplation if the MDBA determined to reduce the overall recovery target for the Northern Basin from 390 GL to 320 GL, as was expected to happen at its meeting the following day
- during a teleconference on 12 October 2016, when he disclosed that he had received detailed legal advice setting out the implications of NSW limiting its participation in the Basin Plan, including walking away from it altogether, when that legal advice had required that he contact the legal branch before the document or its contents were disclosed to a third party

- on 31 October 2016, when he provided the IRG with a draft paper providing updates on the Menindee Lakes Water Savings Project for an upcoming BOC meeting, which was a document classified ""For Official Use Only – Sensitive and Confidential Information"
- on 31 October 2016, when he provided the IRG with a PowerPoint presentation containing sensitive information concerning government negotiations of a commercial nature in relation to Tandou
- on 1 May 2017, when he provided to four members of the IRG a draft letter from himself to a Commonwealth public official and a table of toolkit measures relating to the NBR marked "For Official Use Only", both of which contained sensitive government information.

The Commission is satisfied that these were serious breaches of Mr Hanlon's public official obligations, occurring in close proximity to each other, with the conduct directed to an exclusive group with no entitlement to the information it received. The conduct demonstrated no regard for his obligations towards the interests of other stakeholders, particularly environmental stakeholders, and no regard for the obligations of his position to protect confidential information. In relation to the information provided by the chief executive of the MDBA, with the request that it be kept confidential, Mr Hanlon's conduct amounted to a particularly significant breach of trust.

On the objective facts found by the Commission, Mr Hanlon disclosed significant sensitive and confidential information, acted knowingly and privileged only one group of stakeholders. He took responsibility for supplying information to this group that was not otherwise available in order to give them the benefit of this information. The Commission finds that Mr Hanlon's submissions – that he believed the information was not confidential, was draft in nature and that most, if not all, of it was already in the public domain – are really just assertions unsupported by the evidence.

The issues in relation to Mr Hanlon's conduct fall to be assessed under the provisions of the *Independent Commission Against Corruption Act* 1988 ("the ICAC Act"), in particular, whether having regard to the provisions of s 7, s 8 and s 9 of that Act such conduct was "corrupt conduct" within the meaning of those provisions. In that assessment, there is to be brought into account the nature of the public office held by Mr Hanlon as well as the responsibilities and the obligations that are attached to his office of deputy director general of DPI-W.

Plainly, that office carried important responsibilities and obligations. Certain of these related to the Basin Plan, which in turn involved public interest considerations that required Mr Hanlon, as the deputy director general, to exercise the powers and functions of his office with integrity and to deal with relevant competing interests fairly and objectively. In that respect, exercising public power in a way that involved improper preferencing of one stakeholder group over another was completely unacceptable given, in particular, the evident intent that informed the Basin Plan. To do so, as in this matter, by means that involved breaches of confidentiality and of trust elevates the gravity of such impropriety.

As in many areas of public administration, the exercise of public functions may not always operate equally or evenly as between individuals or vested interest groups because of objective considerations (for example, limited resources) that provide the justification for such outcomes. But no such circumstances existed by way of justification in relation to the acts and omissions of Mr Hanlon that are the subject of consideration in this chapter.

The overarching principle is that the institutions of government and public officials must, in the exercise of public functions vested in them, serve the interests of the public.

In the present matter Mr Hanlon, as the deputy director general of DPI–W, was bound to serve the interests of the public by reference, among other matters, to the interests of all relevant stakeholders in relation to or concerning the Basin Plan. This, by way of example and, as discussed above, clearly applied in the controversial and contested space of the NBR, which set up a fundamental contest between the interests of the irrigation industry and the environment or, in other words, between socio–economic and environmental considerations. On the evidence, Mr Hanlon failed to consult with or inform stakeholders (in particular, environmental or Indigenous groups) on matters he pursued in relation to the IRG/irrigators' interests but that could potentially affect the interests of the other stakeholders.

In determining whether Mr Hanlon's conduct constituted corrupt conduct the Commission has given close consideration to:

- the relevant standards of conduct, set out below, that apply to public officials, including Mr Hanlon in his role of deputy director general, in the discharge of official functions
- the particular acts and omissions of Mr Hanlon
- his state of mind at the time of such acts and omissions.

The general standards of conduct referred to above require that public officials:

– *must act under and in accordance with the law;*

– *must exercise their offices honestly, impartially and disinterestedly and be seen to do so;*

– *must act fairly and with due regard to the rights and interests of the public and of other officials with whom they deal;*

– *must exercise their office conscientiously and with due care and skill;*

– *must be scrupulous in their use of their position and of public property and of information to which they have access, and*

– *must be prudent in the use of public resources.*[11]

The Commission finds that Mr Hanlon's failure to adhere to his confidentiality obligations and his partial treatment of the IRG meant that he did not in fact act in the public interest, and that his belief in what constituted the best interests of the state was not properly considered but skewed to one set of powerful stakeholder interests. Mr Hanlon's conduct was "improper", in the sense that it was wholly focused on the industry stakeholder group. His state of mind can be ascertained from his decision to act on what he considered a greater imperative than Mr Glyde's request to keep the information confidential, which he ignored, or on the obligation to keep sensitive government information protected, which he ignored. His conduct was improper in the sense of being deliberate and not accidental or inadvertent. It was done with a purpose. These are serious matters that cannot be treated as minor misdemeanours. Public officials cannot be permitted to get too close to one sector in their portfolio and ignore the other stakeholders.

While, as discussed below, Mr Hanlon was motivated by a belief that he was expected to consult closely with and support irrigation interests, the methods or means by which he did so were improper in the respects that have been discussed. He did not act in those matters under direction to act in ways that were improper. The decisions to do so were his own. In the assessment as to whether any conduct by him constituted corrupt conduct the issue of his state of mind is critical. In that respect, while he took it upon himself to act in the various respects discussed above, he did so in the misguided belief that the means justified the ends. In so doing, however, he did not stand to personally benefit. Nor is it a case of him placing his personal interests before the legitimate interests of others.

When considering Mr Hanlon's underlying motivation for this conduct, the Commission has determined to give Mr Hanlon the benefit of accepting that he was doing what he thought his superiors and his role expected of him and not for anything he might gain as an individual. The Commission finds that an explanation for Mr Hanlon's motivation in releasing confidential information to the IRG may be found in the then recent context of troubled communication between the department and industry, and Mr Hanlon's desire to do his best to get the IRG members on board with the government's approach to the Basin Plan and to make them feel that they were getting the detailed information and meaningful engagement they had complained was being denied to them. The evidence available to the Commission from a number of sources, including Mr Hanlon himself, indicates that he believed he was acting in the best interests of the state of NSW. The Commission accepts that he genuinely held this belief.

Although the Commission finds on the objective facts that Mr Hanlon's breach of his public official obligations discussed in this chapter is very serious, it does not find Mr Hanlon's subjective intent or motivation to have been improper and does not find that he wilfully misconducted himself. Taking into account the atmosphere he was working in, his subjective motive, purpose and intent, the Commission finds that he was doing what he thought was expected of him.

The Commission therefore makes no finding of corrupt conduct in relation to Mr Hanlon.

Section 74A(2) statements

The Commission is satisfied that Mr Hanlon and Ms Morona are affected persons for the purposes of s 74A(2) of the ICAC Act. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of either Mr Hanlon or Ms Morona.

Mr Hanlon resigned from the DOI in September 2017. Ms Morona was terminated from her senior executive role pursuant to s 41 of the *Government Sector Employment Act 2013* in September 2017. As both Mr Hanlon and Ms Morona are no longer public officials, it is not necessary to consider any recommendation in relation to disciplinary or dismissal action.

[11] Report of the Royal Commission into Commercial Activities of Government and Other Matters, Part 11, chapter 4, *Integrity in Government* at para [4.6.3], 1992.

Chapter 12: The Commonwealth's purchase of Tandou Farm's water entitlements

This chapter examines whether NSW public officials, in particular Gavin Hanlon and Monica Morona, acted partially or dishonestly by encouraging the Commonwealth Government to purchase the water entitlements of Tandou Farm (Tandou) from Webster Limited for an inflated price.

Background

In June 2015, Webster finalised a takeover arrangement with Tandou Ltd, an Australian water investment and agribusiness, acquiring the company for $114 million. Webster acquired a number of Tandou Ltd's farming properties at Menindee and Hay in NSW, and $90 million of water entitlements across the Murray, Murrumbidgee, Lower Darling and Goulburn water sources. Tandou, a property south-east of Broken Hill, near Menindee Lakes, cultivated cotton in summer, and wheat and cereal in winter, and had pastoral operations involving organic lamb production. It held 2,540 ML of Lower Darling high security and 19,361 ML of general security water entitlements, valued by Herron Todd White (a valuation company engaged by Tandou Ltd) at approximately $18.7 million at the time of Webster's acquisition.

In regulated water sources, such as the Lower Darling from where Tandou extracted its water, a high security water entitlement is a form of entitlement where the supply of water is guaranteed irrespective of circumstances. It is more valuable than a general security water entitlement, where orders for water are accepted subject to storage/demand circumstances. The difference between the two types of entitlement is the respective reliability of supply. Town water supplies and the irrigation of permanent plantings generally require high security water.

In June 2017, the Commonwealth Department of Agriculture and Water Resources (DAWR) agreed to purchase Tandou's water entitlements for $78 million. This figure comprised just over $38 million for the transfer of Tandou's water entitlements, and just under $40 million as compensation, in consideration of the diminution of the value of the property and some decommissioning of existing irrigation works. The $38 million value attributed to the water entitlements is to be contrasted with the approximately $18.7 million valuation of those entitlements in mid-2015.

On 28 November 2017, the Hon Jeremy Buckingham submitted a complaint to the Commission, primarily based on information reported in a number of articles by *Guardian* journalist Anne Davies, that the purchase price paid by the Commonwealth Government for Tandou's water entitlements was based on a private valuation reportedly commissioned by the department headed by Mr Hanlon. The Commonwealth Government accepted the valuation obtained by the state department, even though it was much higher than the separate valuation of $24.7 million arrived at by the Commonwealth Australian Bureau of Agricultural and Resource Economics and Sciences.

Mr Buckingham also noted that the Commonwealth buy-back of Tandou's water entitlements occurred at a time when the Commonwealth had previously announced a suspension of water buy-backs, and it took place without a public tender. He alleged that the Commonwealth failed to obtain value-for-money, but gifted Webster a $36 million windfall profit, and he queried the rationale for the involvement of the department in this matter.

The Commission's investigation

In accordance with its jurisdiction, the Commission's investigation focused on the nature and extent of the involvement of NSW public officials in the Commonwealth's buy-back of Tandou water entitlements and whether any part of this involvement was corrupt conduct. The Commission's investigation sought to identify whether the buy-back was a natural evolution,

arising out of considerations that had been previously undertaken in the context of the proposed Menindee Lakes Water Savings Project, or whether the buy-back was an initiative proposed by NSW for unconnected and potentially improper reasons.

The Commission's investigation examined the conduct of NSW public officials involved in initiating, encouraging and facilitating the Commonwealth's purchase, including their conduct in obtaining private valuations of the water entitlements in question, their communication and negotiation with Webster representatives, and their representations to the Commonwealth. It focused on whether the conduct of the NSW public officials involved partiality towards Webster in particular and/or irrigators more generally, whether it involved dishonesty and whether they acceded to the demands of powerful private interests rather than being motivated by the duty to act in the public interest.

Accordingly, as outside its jurisdiction, the Commission's investigation did not focus on the conduct of the Commonwealth public officials responsible for taking over the final negotiations with Webster and agreeing to the valuation and purchase price ultimately recommended. The Commission's investigation did not consider whether the Commonwealth's assessment and buy-back of Tandou's water entitlements accorded with the requirements for Commonwealth procurement, nor whether it represented value-for-money for the Australian taxpayer. The Commission notes that the Commonwealth's purchase of Tandou's water entitlements, as one of three large strategic water purchases undertaken by DAWR in 2017, was referred to the Australian National Audit Office (ANAO) for assessment of whether it was conducted consistent with government policy, was supported by appropriate program design, was planned and executed appropriately, and achieved value-for-money. The ANAO tabled its audit report in July 2020.

The Commission reviewed material provided to it by Ken Matthews' investigation team and the documents relevant to the Tandou purchase tabled in response to the Senate's Order for Production of documents in October 2017. The Commission reviewed relevant departmental staff email accounts and obtained documents from the department, Webster, and valuation company Herron Todd White under compulsory notice. Some records requested by the Commission were voluntarily provided by DAWR. Call charge records from mobile telephones issued by the department to Mr Hanlon and Ms Morona were examined to establish the frequency and regularity of contact between them and Webster representatives, in particular, Joe Robinson.

The Commission conducted compulsory examinations of Mr Hanlon and Ms Morona, and interviewed Allan Whyte (Lower Darling Horticultural Group), relevant officers of the Department of Industry (DOI) and Department of Primary Industries – Water (DPI-W), including Tim McRae (group director, economics and analysis) and Paul Simpson, Digby Jacobs (former DPI-W team leader, river works and management), Andrew Brown (senior water-modeller) and Shane Noonan and Scott Fuller (Herron Todd White valuers engaged by the department).

The Commission commissioned a report from an environmental scientist and water expert to assist its understanding of the rationale for, and mechanics of, the Commonwealth's buy-back of Tandou's water entitlements.

The context for the Tandou buy-back proposal

Menindee Lakes Water Savings Project

The Menindee Lakes are a collection of four large and several medium and small lakes that fill from the Darling River. The biggest lakes are, from upstream, Wetherell, Pamamaroo, Menindee and Cawndilla. They are located

in a hot, windy, semi-arid environment, with a combined surface area of approximately 457 square kilometres. They are relatively shallow, and prone to average evaporation losses of over 420 GL annually.

The construction of the Menindee Lakes Water Storage Scheme was completed in the 1960s and was originally designed to secure the water supply for Broken Hill (approximately 115 kilometres from Lake Menindee) and to foster economic development in far western NSW. Lake Tandou, at the southern end of the Menindee Lakes, is not part of the storage scheme, but rather a lakebed farm that was previously watered by neighbouring Lake Cawndilla, or, if Lake Cawndilla held insufficient water, through the Penellco Channel from the Lower Darling River.

Water in the Menindee Lakes is a resource shared between NSW and Victoria. The Lakes are owned by the NSW Government, leased to the Murray-Darling Basin Authority (MDBA) and operated by WaterNSW. Operation of the Lakes is subject to the Murray-Darling Basin Agreement between NSW, Victoria, South Australia and the Australian Government (Schedule 1 to the *Water Act 2007*). The agreement allows the MDBA to use the water in the lakes to meet downstream demand in the Murray River when the Lakes' volume rises above 640 GL and until it drops below 480 GL. Should the volume drop below 480 GL, control reverts to NSW to manage water supply for local use.

The Lower Darling River flows from the Menindee Lakes to its junction with the Murray River at Wentworth. It is regulated by releases from the Menindee Lakes Water Storage Scheme. Nearly all of the water flowing through the Lower Darling comes from the rivers of southern Queensland and northern NSW through the unregulated Barwon-Darling river system. In the regulated Lower Darling water source, water allocations are high security, general security or supplementary. As previously noted, high security water has higher priority and is a more reliable source of water for water users and hence more valuable on the market.

In July 2010, the Hon Julia Gillard, then prime minister, and the Hon Kristina Keneally, then NSW premier, signed a memorandum of understanding (MOU) to work together to investigate options for modifying the Lakes to improve their operational efficiency and reduce the large evaporative losses being incurred. The MOU provided for up to $400 million in Commonwealth funding to invest in the reconfiguration of the Lakes. This was intended to realise substantial water savings of up to 200 GL, which would in turn become part of the Commonwealth's environmental water holdings. The parties to the MOU agreed that precursors to achieving the contemplated water savings were the provision of an alternative, secure water supply for Broken Hill (thereby making it less reliant on the Lakes) and the demonstration that neither existing entitlement holders' water security, nor the environment, would be adversely impacted as a result of the changed operations at the Lakes.

In May 2011, the Hon Barry O'Farrell, then NSW premier, terminated the MOU, citing an assessment that the proposed operations of the Lakes under the MOU, which would have effectively decommissioned two of the lakes, would cause unacceptable adverse impacts on the reliability of water supply to downstream users and on the environment. Notwithstanding the termination of the MOU, the NSW and Commonwealth governments entered a detailed agreement to continue to work together to develop a project at the Lakes that would deliver both an alternate water supply for Broken Hill and water savings. The Commonwealth Government provided specific funding for the NSW Government to undertake project planning, stakeholder consultation and detailed design work for a water savings project to reduce evaporation at the Lakes by an average of 80 GL annually.

Sustainable diversion limit adjustment measures

The Murray-Darling Basin Plan ("the Basin Plan"), which became law in November 2012, establishes the baseline diversion limit (BDL) in the basin as being the level of water extraction in the Basin in 2009. It determines that, to guarantee a sustainable level of take in the long-term, or a sustainable diversion limit (SDL), 2,750 GL less water than the BDL (an approximately 20% reduction) needs to be taken from the Basin for consumptive use on an annual basis. This water recovery target is legislatively fixed under the Basin Plan and shared across the whole of the Basin. The Commonwealth Government has committed to recovering 2,750 GL of water for the environment through a combination of water licence buy-backs, and water recovery and efficiency projects. Buy-backs involve licence-holders selling their water licences voluntarily to the Commonwealth, to enable the Commonwealth environmental water holder to hold that water in its own portfolio and release water when needed for the environment.

Chapter 7 of the Basin Plan includes a mechanism to adjust the Basin's SDLs. The SDLs can be adjusted upwards, if the Basin Plan's required environmental outcomes can be achieved with less water. That means, in effect, that if less water needs to be recovered to achieve those environmental outcomes, more water can be extracted for consumptive use, including irrigated agriculture. Projects that achieve equivalent environmental outcomes with less water are called supply measures (for example, environmental works, changes to river

operations and evaporation savings), such as contemplated by the Menindee Lakes Water Savings Project.

The SDL adjustment mechanism in the Basin Plan allows an increase in the SDL of up to 650 GL of water from supply measures; that is, supply measures can result in an additional 650 GL being made available for consumptive use, including irrigated agriculture. It is one of the principal ways in which the economic and social costs of the implementation of the Basin Plan can be reduced while in theory achieving the same environmental outcomes. NSW's allocated share of this 650 GL was 328 GL, with the remainder available to Victoria and South Australia.

Efficiency measures are those projects which recover *additional* water for the environment through improving the efficiency of irrigation or water delivery. That is, projects such as replacing or upgrading inefficient on-farm irrigation decrease the amount of water required for consumptive use and the water savings that result can be made available for environmental use. The SDL adjustment mechanism allows an additional 450 GL to be recovered for the environment, on top of the 2,750 GL recovery target, through efficiency measures. These efficiency measures are required to reduce consumptive use in ways that will not lead to negative social and economic impacts.

In January 2014, the NSW Government entered into the Intergovernmental Agreement (IGA) for Implementing Water Reform in the Murray-Darling Basin. Under the IGA, the Commonwealth committed to bridging the gap between BDLs and SDLs in the Basin Plan by 1 July 2019. The Basin States committed to identifying measures within their own jurisdictions that could deliver an SDL adjustment or improve the effectiveness of environmental water delivery, and that could warrant the development of a business case for assessment by the MDBA. The critical relevant timeframes, as revised in March 2017, required the:

- first notification of a proposed project by mid-2015
- second notification by 1 December 2016
- completion of a business case, if applicable, by 30 June 2017
- implementation of the project by 2024.

Under the IGA, the Commonwealth Government agreed to provide funding to assist the development of business cases and to fund the implementation of the supply measures ultimately approved by the Murray-Darling Basin Ministerial Council (MDBMC). NSW was to receive approximately half of the $34.5 million allocated for the purpose of assisting the development of business cases.

Tandou's water supply

As at November 2014, the NSW proposal with the largest potential to deliver a high SDL adjustment was the Menindee Lakes Water Savings Project. Work was ongoing on the development of a business case for this project and it was recognised that its feasibility was contingent on securing town water supply for Broken Hill and certain local works, measures and operational rules to maximise local amenity and agricultural production.

One of the local factors impacting on the feasibility of the project was the need to ensure that there was no reduction in the security of Tandou's water supply. Tandou obtained its water by gravity feed from Lake Cawndilla, and the proposed decommissioning of Lake Cawndilla as a water storage would mean that Tandou would instead have to pump its water from the Darling River using the Penellco Channel, at much higher cost.

The evidence indicates that, by this time, discussions had commenced between the department, and Tandou's manager, about the potential impacts the project might have on the security of Tandou's water access and its ongoing business needs. The evidence available to the Commission also indicates that the Hon Kevin Humphries, then minister for water, was in regular contact with Tandou representatives in relation to the project and gave undertakings that, should changes be made to the Lakes, there would be no adverse impacts on Tandou and other Lower Darling irrigators.

One of the options for securing Broken Hill's water supply detailed in a draft departmental paper, dated 31 March 2015, involved, in part, the construction of a block-bank between lakes Menindee and Cawndilla that would enable the consolidation of water within Lake Menindee rather than spread between both storages. The paper noted that this option, while it would greatly reduce the evaporative surface area, would necessitate the construction of an alternate water supply for Tandou, and Tandou would be likely to seek reimbursement for the additional pumping costs that would result. Significantly, the paper went on to note:

> *…there is a possibility that Tandou will sell their entitlements to the Commonwealth as part of their buy-back program. If this happens, it resolves a major issue with this block-bank and makes it a much more favourable and cost-effective option.*

Commonwealth and irrigator interest in the Lakes project

In a letter dated 11 March 2015, Tony Slatyer, first assistant secretary of DAWR's water division, wrote to Mr Hanlon, the recently appointed deputy director

general of DPI-W, complaining about the slow progress being made on the Menindee Lakes Water Savings Project. He noted the significant funding provided for the project by the Commonwealth Government because of its potential to make a "significant contribution" to the 650 GL SDL adjustment under the Basin Plan. Mr Slatyer advised Mr Hanlon that, "if progress under the current project arrangement remains inadequate, we may need to consider other arrangements for progressing and delivering this important project".

The evidence indicates that it was not just the Commonwealth Government that was keen to progress the Lakes project. On 4 May 2015, the NSW Irrigators' Council (NSWIC) set out its policy position in relation to the project in an email that was forwarded to Mr Hanlon by the Department of Primary Industries' Bruce Whitehill, acting director of the Basin Plan and state priority projects. Mark McKenzie, CEO of the NSWIC, wrote that his organisation broadly supported the proposed amended rules for the Lakes, which were designed to avoid evaporation losses and achieve the approximately 80 GL SDL offset for the plan estimated by the department. However, Mr McKenzie also noted that the NSWIC "is currently pushing additional measures to maximise the SDL offsets". One of these additional measures involved securing and piping an alternative groundwater or Murray River water supply for Broken Hill. He asserted that this would reduce the requirement for the MenindeeLakes to hold sufficient water to underwrite Broken Hill's water supply for up to two years, would add a further 100 GL in average annual SDL offset savings and would significantly reduce the frequency of cease-to-pump embargoes in the northern valleys.

Another additional measure proposed by the NSWIC was consideration of the "strategic" buy-back by the Commonwealth Government of water from Lower Darling irrigators, estimated to provide up to 80 GL a year in further savings. These purchases would allow access to more water in Lake Cawndilla for deployment downstream to South Australia, which could be credited against required flows elsewhere in the system. Overall, with these additional measures, the NSWIC was of the view that the Menindee Lakes Water Savings Project could yield up to 240 GL of average annual savings and "bridge the gap under the Plan targets for NSW and leave a significant volume of water in play for agriculture production and not targeted for buyback by the Commonwealth".

Lower Darling Horticulture Group

The Lower Darling water entitlements that the NSWIC supported the Commonwealth Government purchasing included Tandou's and those of six horticultural families with permanent plantings downstream of Menindee. The evidence indicates that the six families, together called the LDHG, submitted a proposal to the Commonwealth in January 2015. This group recognised that the current security of supply for high security water users on the Lower Darling River was inadequate for them to continue their existing irrigation businesses producing high-value horticulture, stone fruit and wine grapes. Accordingly, they put together a proposal to remove all of their permanent plantings on the Lower Darling and approached the Commonwealth to sell their high security water entitlements to the Commonwealth Environmental Water Holder (CEWH) and to seek Commonwealth funding to assist the group's members to make the necessary business transitions.

For the LDHG, the consequence of the NSW Government's proposed management of the Lakes, which would include the need to provide Tandou its water supply from the Lower Darling via the Penellco Channel (rather than from Lake Cawndilla) was that the security of its water supply would be even further reduced and their businesses rendered completely unviable. On 12 May 2015, Rachel Strachan, on behalf of the LDHG, wrote to Mr Hanlon to advise that, if the proposal went ahead, the group would expect some sort of compensation to enable them to change their irrigation practices and farm businesses to adapt to a more opportunistic and less secure water supply.

Evidence available to the Commission indicates that, as at July 2015, the Commonwealth Department of the Environment was actively considering the LDHG proposal and the effect of "turning off" their high security and Tandou's water entitlements in the context of the Menindee Lakes Water Savings Project. The Commonwealth requested the MDBA to conduct modelling of Menindee water savings options, including an assessment of whether removing the need to ensure water supply to the LDHG irrigators and Tandou would produce better outcomes for the project in terms of reduced evaporation and the potential for an additional SDL offset.

On 15 July 2015, Mr Brown, senior water-modeller at the department, reviewed the initial modelling provided by the MDBA and noted that there would be no real benefit in terms of water savings if the Commonwealth intended to purchase the Lower Darling water licences and simply retain them as part of the recovery effort. NSW would still have to operate the Lower Darling system to meet its obligations to supply those entitlements, whoever held them.

In his view, the primary benefit would be obtained by the purchase and retirement of all the high security licences to complement the provision of an alternate water supply

for Broken Hill. This would reduce the necessity to hold reserves, make more water available to the Murray River and the environment and cause the Menidee Lakes to be drawn down faster, which would reduce evaporation losses. In relation to the Tandou purchase, his expectation was that the primary benefit would be a removal of the need for expensive infrastructure works to deliver water to Lake Tandou from the upper lakes.

On 27 July 2015, the Hon Bob Baldwin, parliamentary secretary to the federal minister for the environment, wrote to Ms Strachan and advised that the NSW water minister had agreed to consider the LDHG's proposal under the Menindee Lakes Water Savings Project and that Mr Hanlon would be responsible for further joint discussions with the group in relation to its proposal.

The Commonwealth Government's position on water buy-backs

Another relevant aspect of the context to the Tandou purchase was the decision by the Commonwealth Government to legislate to impose a Cap of 1,500 GL on the amount of water that could be sold back to the Commonwealth. The *Water Amendment Act 2015* was introduced in May 2015 and came into effect on 13 April 2016. It gave effect to the government's prioritisation of investment in water-saving infrastructure projects over water-purchasing as a means of recovering water and restoring the health of the Basin environment. The government's position was that, since the Basin Plan's commencement, water buy-backs had caused unacceptable socio-economic harm to regional communities.

In his second reading speech, delivered on 28 May 2015, Mr Baldwin stated that the legislation was the culmination of the government's commitment to "achieve a triple-bottom-line outcome for the Basin Plan". Notwithstanding the government's focus on infrastructure and efficiency projects, he conceded that, meeting the 2,750 GL water recovery target, would not be a simple task and a number of water recovery methods would be required to implement the Basin Plan. To that end, he announced that the government would continue to pursue "strategic and targeted purchase opportunities".

In relation to a number of significant Commonwealth strategic purchases in 2017 (including that of Tandou's entitlements), the Commonwealth Department of Agriculture notes on its website that strategic purchases:

> *…generally result in water being recovered at lower cost than infrastructure programs, but may not be as cheap as open tenders. This is because they are aimed at achieving multiple objectives, not just the lowest price.*

Some of the factors considered in a strategic purchase include the need for the purchase to:

> *…lead to economic or social benefits beyond the actual financial transaction, such as supporting state government policies and programs; or reducing the need for purchasing that would have greater social and economic impacts.*

The department's role in the Tandou negotiations

Negotiations begin with Tandou

The evidence available to the Commission indicates that, in early March 2016, Mr Hanlon and Ms Morona began to discuss the need to engage with Tandou in the context of the Menindee Lakes Water Savings Project, and to seek a commitment from the Commonwealth for a potential buy-back of Lower Darling high security entitlements held by both the LDHG and Tandou as a package. On 1 March 2016, the LDHG had emailed Ms Morona its detailed proposal for the removal of irrigation of permanent plantings on the Lower Darling, representing approximately 1.5 GL of water savings, and she had agreed to meet with them in coming weeks.

At that time, in the context of the design and development of the Menindee Lakes Water Savings Project, the department was faced with the option of either needing to supply upgraded Penellco Channel infrastructure for Tandou at a cost of over $70 million, or potentially negotiating a commercial arrangement with Tandou that would see the reduction or cessation of cropping and the possibility that much less costly alternative water supply works could proceed.

Mr Robinson was Webster's representative in relation to Tandou negotiations with these senior departmental officials. Mr Robinson was then a non-executive director of Webster, managing director of Australian Food and Fibre and chairperson of Gwydir Valley Irrigators Association. Evidence obtained by the Commission indicates that there was contact between Ms Morona and Mr Robinson around mid-March 2016, during which Mr Robinson indicated that Tandou may consider being "bought out" by the Commonwealth.

On 14 April 2016, Mr Robinson emailed some notes to Ms Morona, in preparation for a meeting scheduled with her later that day in relation to Tandou. Mr Robinson's notes set out two options for Tandou in the context of the proposed Menindee Lakes Water Savings Project. The first option was described as "Status Quo" and the second, as "Ranges from 'Shutdown of cotton operation and opportune irrigation of cereals' to 'Exit'".

The first option noted the need for Tandou to continue to receive its current access to water, unimpeded in all respects, including access to the same volume of inter and intra valley trade allocation, which would require major infrastructure upgrades. The second option offered a number of suggestions for compensating Tandou, if it exited the Lower Darling and thereby avoided the need for the state government to provide "expensive and politically toxic infrastructure". These suggestions primarily involved the conversion or swapping of water entitlements from the Lower Darling to the Murrumbidgee water source, rather than the purchase of those entitlements or the payment of any money.

The previous day, Ms Morona had emailed Mr Hanlon draft costings for the Menindee Lakes Water Savings Project. Two options were listed for Lake Tandou. The first option, being combined Penellco Channel works, was costed at just over $72 million and the second option, being "alternative commercial arrangement," was noted to be "subject to negotiation".

Mr Hanlon told the Commission that Mr Robinson:

> *…was one of those people that were always around. Joe did, and this should be in my diary somewhere, request a couple of formal meetings which I can't remember when but they'd be in my diary. He did ask me once to explain to the Chairman of his board what the Basin Plan was and how Tandou fit within that. So, I did that and that was all public domain information anyway but, but that's about it.*

Call charge records obtained by the Commission indicate that in the period between the end of February 2016 and the end of March 2017, Mr Hanlon made 10 telephone calls and sent two text messages to Mr Robinson from his department-issued mobile telephone. Between mid-March 2016 and mid-July 2017, Ms Morona made eight telephone calls and sent one text message from her work mobile telephone.

The NSW approvals process for the LDHG and Tandou proposals

On 22 April 2016, Mr Hanlon received internal legal advice in response to his request whether, among other things, there was any legislation to guide NSW's negotiations on proposals such as the one submitted by the LDHG. The advice received from a senior DOI legal officer was that there is no specific legislation that guides or restricts NSW in its negotiation on such proposals, nor that places limits on what NSW (or the Commonwealth) can pay for water entitlements. It was noted, however, that there may be departmental and NSW Government policies and procedures that apply; for example, an obligation to consult with the NSW Treasury.

On 20 May 2016, Mr Hanlon updated Ms Strachan on the LDHG proposal negotiations and acknowledged at the outset the frustration of the participating landholders with the process and timelines. He advised her that because of the size of the proposal, the department's role would be to:

> *…progress and facilitate an agreed package through various approvals that may be required by both Governments … the only avenue available for NSW to assist is to seek approval to have funding made available from existing Commonwealth water programs.*

Mr Hanlon advised Ms Strachan that he was in the process of confirming the approvals process that may be required by central NSW Government agencies, such as Treasury and the Department of Premier and Cabinet, but that state government approval *would* require the department to prepare a business case. He further advised that while, originally, the LDHG proposal had been included as part of the Menindee Lakes Water Savings Project business case, they had now "started the process of carving this out and creating a separate business case to seek approval outside of the SDL process of the MDBA for this package. This should speed things up".

While the LDHG proposal apparently required the submission of a standalone business case to Treasury, the evidence indicates that no such business case was ever completed for the Tandou proposal and that Mr Hanlon actively sought to avoid the application of NSW Government assessment processes to it.

Webster negotiates with both the NSW and Commonwealth governments

In June 2016, Ms Morona and Mr Hanlon were engaged in discussions with the Commonwealth on options to progress funding for both the LDHG and Tandou packages. At the same time, the NSWIC met with senior DAWR officers on 24 June 2016 to discuss Commonwealth interest in the Tandou buy-back, and, Richard Stott, chairperson of the NSWIC, rang Mr Robinson to tell him that the Commonwealth was "keen to discuss a deal".

The Commission conducted a compulsory examination of Mark McKenzie, chief executive officer of the NSWIC, who described the Menindee Lakes Water Savings Project as "the absolute crown jewel in the savings program that avoids further recovery of water from our irrigators". Similarly, he explained that, because the Tandou purchase meant that not as much water would need to be held in Lake Cawndilla to supply it for Tandou's commercial purposes, that:

> *…purchase was very strongly supported by NSWIC … It gave us the greatest degree of flexibility in how the Government might and the MDBA might deploy that water to get the best possible savings.*

Mark McKenzie confirmed to the Commission that the information concerning the LDHG/Tandou commercial negotiations released by Mr Hanlon to the Industry Reference Group (IRG) during the taped teleconference on 12 October 2016 (discussed in the previous chapter), was not "news" to him. McKenzie told the Commission:

> *…the Lower Darling irrigators group had briefed us on their approach to Federal Government and asked for our support, because the Federal Government would probably ask did the NSW Irrigators' Council, as would the State Government, have a position on this? We weren't – even though we probably seeded the idea with the Federal Government that Tandou might consider, or Websters would consider, a sale of the Tandou water entitlement, at that point we backed out of any direct involvement in that. That was simply a commercial discussion that we don't get involved in. Similarly with the Lower Darling irrigators, they briefed us. They asked that if the Federal Government agency spoke to us, to look kindly on the proposal, which we would because we believe ultimately it's in the best interests of irrigators in the Southern and Connected Basin.*

On 15 July 2016, Christopher King, policy officer at DAWR, noted in an email to other DAWR staff members that "…recently, via the CEWO [Commonwealth Environmental Water Office], we received information that Webster (who acquired Tandou) are interested in selling water to the government". He reported that Mr Robinson had, that morning, attended a teleconference with senior DAWR officials, during which he advised that Tandou currently only received sufficient water to operate at capacity for two out of six years, and that the current conditions, while viable for dryland farming, were not suitable for cotton. He indicated that Webster was ready to transition and would be looking for compensation for the potential economic value of its Tandou property. Mr Robinson told DAWR officials that he would continue having discussions with Mr Hanlon but the parties agreed that separate, independent expert valuations would be needed under any arrangement.

The same day, 15 July 2016, Mr Slatyer had a discussion with Ms Morona concerning Tandou and she conveyed her understanding that Tandou would "prefer a quick clean exit rather than being entangled in a process tied to the Lower Darling outcome, or worse for them, an inter-government process". Despite Tandou's hopes for a "quick clean exit", however, the evidence available to the Commission suggests that, from early August 2016, the relevant DAWR officials began to view Tandou's proposal less as a simple water sale to the Commonwealth and more as a state-led water recovery project. DAWR officials were aware that Tandou was also discussing its options with the NSW department and they began to express concerns that the proposal may present some significant risks for the Commonwealth's purchasing program, may not meet Commonwealth procurement rules for limited tender, and may not even represent value for money.

By the end of August 2016, the Commonwealth appears to have recognised that, while the Tandou purchase as a standalone water purchase may not meet the applicable Commonwealth procurement rules, it nevertheless had considerable strategic value. A paper on how to deal with Tandou's unsolicited proposal, compiled by the Water Acquisition and Conveyance Branch at DAWR, recognised that the known and potential values of the purchase of Tandou's water entitlements included the removal of a significant barrier to the NSW Government's Menindee Lakes Water Savings Project, which could reduce the southern SDL by up to 50 GL. In addition, the Commonwealth would not be able to achieve the SDL for the Lower Darling without Tandou's entitlements because of the limited recovery to date, and the entitlements also had "high environmental value to the Commonwealth". The removal of constraints at Menindee would also enhance environmental flow outcomes and the NSW Government would no longer have the ongoing costs of maintaining the Cawndilla and Penellco Channels to supply water to the Tandou operation.

The paper proposed that, if a Commonwealth-led water purchase was not possible, the other options available to realise the strategic value of Tandou's entitlements required NSW to take the lead. The first option would involve NSW finalising its negotiations with all Lower Darling entitlement holders and submitting a state priority project (SPP) proposal to use unallocated funds to facilitate water recovery and structural adjustment in the Lower Darling region. This option would require the department to provide a "valid and eligible" business case. The second option would involve NSW negotiating a water purchase from sellers in the Lower Darling needed to bridge the gap. NSW would consolidate the entitlements and then sell them to the Commonwealth under the State Purchase Framework.

These options and the importance to Mr Hanlon of the Tandou deal proceeding, are reflected in his comments to the IRG during the taped teleconference on 12 October 2016 (discussed in the previous chapter). Mr Hanlon told the IRG that, based on the modelling available at that time, the Menindee Lakes Water Savings Project would yield an SDL offset somewhere in the vicinity of between 50 and 150 GL for NSW. At that time, Mr Hanlon

told the IRG that there were three or four options for Menindee Lakes under consideration and:

> *…it's fair to say that … to get the best possible, well one of the better options here, because they all have different benefits to them, is some sort of strategic buyback without getting into the detail of that for obvious reasons.*

However, in the same teleconference on 12 October, Mr Hanlon revealed what was actually his preferred option in relation to the Tandou deal:

> *…the other side of the, the other part of that jigsaw is that if things land the way we would like, it would be New South Wales creating some sort of entitlement that it would sell directly to Canberra and the other States have absolutely bloody no say in it anyway, because that would be a straight sale and it wouldn't be part of the SDL offset. It would be real water and that's where you get the upper bound of the 150 type mark … you can see here that for things to really go our way Menindee has got to yield a big number and it's got to yield a big number for New South Wales not the other States. So you know there's a pretty big egg in that basket.*

On 22 August 2016, Mr Robinson sent a text message to Mr Hanlon, stating that he had "built some Tandou models as discussed and can send them when it suits". The following day, he emailed Mr Hanlon an Excel spreadsheet with a "Tandou Model" attached. The spreadsheet gave an overview of Tandou and Webster's valuation based on three different models of its water, land and infrastructure assets, as ranging between approximately $94 million and $126 million, dependent on model variations. Webster calculated the value of its water entitlements alone as approximately $34.7 million. The spreadsheet also identified water availability, market data for Murrumbidgee general security water versus Lower Darling prices in the period from 2004 to 2016, and historical water usage at the property.

On 26 August 2016, Ms Morona and Mr Hanlon attended a meeting with DAWR officials about the Menindee Lakes Water Savings Project. Ms Morona emailed her notes from the meeting to Mr Hanlon, setting out key points from the discussion. Relevantly, Ms Morona's notes include a reference to Webster's asking price being between $60 million and $94 million, and that an offer of $50 million would be too low. She noted a multiple of 1.1 to 2.5 using the Murrumbidgee as a reference price and recorded that the Commonwealth "is set up much better than NSW".

The multiple noted by Ms Morona was a means by which the Commonwealth could value Tandou's Lower Darling water in the absence of any market price to guide it. Lower Darling water would be valued at 1.1 to 2.5 times the value of Murrumbidgee water, the value of which could be ascertained on the market.

Ms Morona told the Commission that the market multiple referenced in her notes was in the typical range for the Commonwealth to use for such purchases and the Murrumbidgee was used as a reference price because there was no water in the Lower Darling at the time and therefore no market price to use as a reference. Ms Morona said that this had been the situation in the Lower Darling since late 2014.

An email sent on 25 January 2017 from John Robertson (DAWR assistant secretary) to Ms Morona, in which he provided DAWR's views on the department's draft business case regarding the LDHG proposal, suggests that the Commonwealth's "official" position was somewhat different from Ms Morona's understanding. Relevantly, he commented that this business case "does not include any justification for applying a 2.5 market multiple and the Commonwealth does not support this approach as water purchases are made on market prices".

The Commission notes, however, that on 1 February 2017, just a few days after this email, Mr Robinson created a document concerning aspects of the seller's price Webster would offer the Commonwealth. In that document, he noted that it was ok because the market had not traded for a considerable time, Webster was using the Murrumbidgee water market for comparative purposes and that, "Unofficially the Govt agrees with the pricing methodology".

Ms Morona explained that the Commonwealth was better placed to undertake the purchase because it had its own water-purchase funding. This evidence was echoed by Mr Hanlon, who also told the Commission that the Commonwealth was better placed to take on strategic water purchases because it had the processes, delegations, models for valuations, multipliers and compensation, whereas NSW had none of that in place.

Ms Morona's notes also set out some "simple thoughts" from David Parker, DAWR deputy secretary, including that the deal with Tandou should be done first "to get them off the table" and that NSW should be the first point of contact in dealing with Mr Robinson. Funding options and sources would be discussed at a later date, but that the Penellco Channel funds should be used. The agreed next steps recorded in Ms Morona's notes included examining the NSW Government process options, "residual SPP money" and a "business case proposal that needs to go through a Government approval process"; the latter two steps corresponding with the options set out in the DAWR analysis paper concerning options for dealing with Tandou (discussed above).

Mr Hanlon arranges the valuation of Tandou

Mr Hanlon told the Commission that, on 26 August 2016, following the meeting with the Commonwealth:

> *I couldn't afford to wait for the Commonwealth to say, lead us along, and then at the last minute say, no, we're not doing it. So my diary will show I went and met with Treasury, I think his name was Rick someone, who was a level above me in Treasury to say here's how all this fits in, what's the process I'd have to go through, and then the strategy and policy person, her name was Liz Moore, what sort of things, and they've said, just assume it's Cabinet and start from there. I said right. So a Cabinet process means the very first step is a business case, very first step of a business case is a valuation.*

On 21 October 2016, independent valuer Opteon reported the results of its desktop review of the valuations of the LDHG properties that had earlier been commissioned by the department from valuation company Herron Todd White. David McKenzie, Opteon's managing director, reported to Tim McRae, group director of economics and analysis within DPI's Strategy and Policy branch, that Herron Todd White's valuation reports were well researched, applied sound methodologies, and took all relevant market evidence into account. He concluded that they were robust and defendable conclusions and there were "no red flags".

On 24 October 2016, Mr Hanlon asked Mr McRae to arrange for a Herron Todd White valuer to look at Tandou and advised that he had spoken to Mr Robinson, who was agreeable to this happening. On 25 November 2016, Mr McRae formally engaged Herron Todd White to undertake an independent valuation of the land, buildings, irrigation infrastructure and water entitlement assets of Tandou. Mr Noonan, from the Herron Todd White Mildura office, and Mr Fuller, from the Herron Todd White Dubbo office, were appointed the task and were required to provide a draft report by 22 December 2016.

On 28 November 2016, Mr Noonan emailed Herron Todd White's national rural director concerning the contract with the department to value Tandou. He advised:

> *I am dealing with a Joe Robinson at AFF* [Australian Food and Fibre] *Limited who now own/run the property. He has forwarded some modelling to come up with a figure near $100m which he has presented to government, "who were not blown away by the number". I doubt it is worth anywhere near that however some of his models look ok in the scheme of things.*

The evidence indicates that, on 14 November 2016, after Mr Hanlon had made him aware that Herron Todd White would be valuing Tandou for the department, Mr Robinson provided Mr Noonan with the same modelling he had provided to Mr Hanlon on 23 August 2016. This included an overview of Tandou and its valuation based on three separate models and a spreadsheet identifying water availability, market data for Murrumbidgee general security versus Lower Darling prices in the period from 2004 to 2016, and historical water usage at the property.

Avoidance of NSW Cabinet processes

On 25 October 2016, Mr Hanlon emailed Scott Hansen, director general of DPI, to seek his guidance on a number of water-related matters, including negotiations with the LDHG and Tandou. Mr Hanlon advised:

> *…we have the valuations for the lower darling irrigators and organising one for Tandou.*
>
> *Commonwealth have agreed to allow us to allocate future funding towards this. This money is not in of* [sic] *any treasuries forward projects or out budgets.*
>
> *Im keen to strike while the Iron is hot, we are currently trying to organise a process that looks like the commonwealth is specifically contracting us to do this and therefore a letter from our minister to the premier should be suffice. Might need your help with this as some parts think the whole thing should go to ERC* [Expenditure Review Committee]. *We will probably have missed the opportunity if this is the case.*

Notwithstanding Mr Hanlon's evidence to the Commission, to the effect that, following the meeting with the Commonwealth he commenced the necessary steps in the process to obtain Cabinet approval for the Tandou purchase, there is significant evidence available to the Commission that demonstrates that Mr Hanlon in fact wanted to avoid having to go through Cabinet's ERC processes. As he informed Mr Hansen, he was "keen to strike while the iron is hot" and feared missing the opportunity of securing a deal with Tandou if the process was protracted and complicated. This is in keeping with Ms Morona's information to Mr Slatyer, that Tandou wanted to avoid being "entangled in a process tied to the Lower Darling outcome, or worse for them, an inter-government process".

On 4 November 2016, Mr Slatyer emailed DAWR colleagues and advised that he had received a briefing from Mr Hanlon on where matters were up to with Menindee. In relation to funding options, Mr Slatyer noted that, Mr Hanlon "wants to meet with me/us early next week to discuss possible funding sources with the

objective of avoiding NSW cabinet processes is [sic] possible".

On 5 November 2016, Mr Robinson emailed Chris Corrigan, Webster chairman, to advise his current understanding of the NSW department's approach to "the deal". He explained that the department was looking to secure "some sort of water buyback/structural adjustment with Federal funds" and to achieve savings from not having to construct alternative supply works for Tandou. Two days later, on 7 November 2016, Mr Hanlon met with Mr Robinson and Mr Corrigan in a Sydney café. There is no evidence that an official written record of the conversation was made. After the meeting, Mr Robinson sent Mr Hanlon a text message, as follows:

> *Gavin, thanks for giving us your time this morning, although it was in line with my reporting I think it was very useful for Chris to meet you and hear for himself. Thanks for continuing to move this along – I'm capable of making a fool of myself without the uncertainty. Joe*

The evidence indicates that the ongoing uncertainty about the transaction was of concern to Webster. A month before this meeting, on 3 October 2016, Mr Corrigan had provided an email to Webster's directors in which he expressed the:

> *…need to try and gauge the real level of interest and timing of Government agencies in cutting some deal in regard to Tandou. Re-staffing the farm will be difficult enough without the uncertainty of an imminent transaction … time is of the essence to try and ascertain the likelihood of a transaction.*

The Commonwealth takes over the Tandou purchase

On 10 November 2016, Mr Hanlon had an email discussion with Mr McRae and his colleague from DPI's Strategy and Policy branch, who were, at that time, working on the draft business case for the LDHG. He informed them that he had "a really productive discussion with TSY [presumed to be NSW Treasury] and Commonwealth" and stated "I think we can convince Commonwealth to deal directly with Tandou. And for the lower darling guys we probably just need to get a letter from the Minister to the premier and maybe the treasurer".

Mr Hanlon told the Commission that:

> *we would prefer the Commonwealth did it … We knew it had to be done. We were supportive of someone doing it. It had to be done and the Commonwealth had the processes in place, so we were more than happy for them to do it.*

He also confirmed that, because the Commonwealth ultimately took over the transaction, a business case for the Tandou proposal was not needed in the end.

The evidence obtained by the Commission from DAWR indicates that, on 10 November 2016, Mr Slatyer and Mr Robertson discussed the possible sources of funding available to the Commonwealth "to help land Tandou". Mr Robertson noted that NSW had unilaterally walked away three or four years previously from an agreement with the Commonwealth on Menindee and Broken Hill water security-related matters and no funding remained in connection with it. He commented that he "understood that Gavin [Hanlon] was keen to avoid central agency processes in NSW and hence why we were looking at using SPP purchase funds where possible". Mr Slatyer responded:

> *…if the old agreement is flexible enough to cover Tandou buyout costs in excess of water value, then resuscitating it by agreement at Ministerial level, if it was possible to do so, could save us a world of pain trying to find a basis to fund all this. We need to think creatively how to make this all work.*

Ms Morona's notes of a meeting on 9 December 2016, between DPI-W and DAWR, record that "Tandou need an indication by mid-January". Her notes suggest that, although Mr Robinson had provided a valuation for Tandou of $94 million, Webster was prepared to negotiate in relation to offers over $70 million. This is in keeping with emails on 6 December 2016 between Maurice Felizzi, Webster's chief financial officer, and Gabi Gabila, Webster's tax manager, in which Mr Felizzi confirms that, "the price range is between $75 and $85m. The construct of this value is totally unknown at this stage".

Ms Morona's notes from the meeting on 9 December 2016 also record the following:

> - *Who talks with Joe? Cth/NSW?*
>
> - *Preference for Cth to speak with Joe, with NSW in the room; want to keep the deal at arms length from NSW*
>
> …
>
> - *Arrange a discussion in Canberra between Joe, DAWR and DPIW; identify hurdles currently, allow Tandou to make decisions; before Christmas meeting.*

Ms Morona told the Commission that the reference to keeping the deal at arm's length from NSW meant that:

> *…this was a Commonwealth purchase and they run their own processes … The State will generally be part of providing information and some analysis is required to the Commonwealth, but they run the negotiations themselves.*

The pre-Christmas meeting indicated in Ms Morona's notes took place by teleconference on 16 December 2016, with Paul Morris, Mr Slatyer's replacement as first assistant secretary, Mr Robertson, Mr Hanlon and Mr Robinson in attendance. Reporting on that teleconference in an email, Mr Morris noted that:

> *Joe* [Robinson] *is keen to proceed and to get an answer quickly. We have arranged to meet in early to mid-Jan to discuss details and next steps.*
>
> *Gavin* [Hanlon] *has indicated he will come to the meeting.*
>
> *In the meantime Gavin will provide us all the details they have on the valuations and modelling (within the next few days).*
>
> *I didn't commit to timelines (other than to meet in early to mid Jan).*
>
> *Joe indicated that they didn't have anything happening on the property at present, but they would need to gear up and do things on the property if the sale wasn't going ahead. He said that he had no emotional commitment to the property at this stage.*
>
> *Gavin said NSW was keen to proceed.*

From this point, the evidence available to the Commission indicates that the Tandou purchase was led in all respects by the Commonwealth.

On 23 December 2016, Mr Hanlon wrote to Mr Morris to formally recommend both the LDHG and Tandou proposals for Commonwealth funding. In view of the history of discussions and joint negotiations between the NSW department, DAWR and Webster to that point, this letter was really a formality in the effective handover of the transaction from NSW to the Commonwealth. A heavily redacted copy of a letter dated 23 December 2016 from Mr Hanlon to Mr Morris was released to the Senate under an Order of Production of Documents (OPD) 420. The Senate motion No 420 of 16 August 2017 called for the tabling of documents relating to the Murray-Darling Basin and the administration of programs associated with the Barwon-Darling Unregulated River.

The letter of 23 December 2016 appears to be the primary source of the allegation that Mr Hanlon petitioned the Commonwealth to acquire Tandou's water entitlements. As the evidence shows, however, in relation to the proposed purchase of Tandou's water entitlements, the Commonwealth had been engaging with Webster on its own terms since at least July 2016, and in connection with the NSW department since approximately August 2016.

In his letter to Mr Morris, Mr Hanlon stated that DPI was currently finalising the business case for the Tandou proposal and it would be provided early in the new year, once completed. In fact, the evidence shows, and Mr Hanlon confirmed for the Commission, that no discrete business case in relation to Tandou was ever completed or submitted to the Commonwealth or elsewhere. Once the Commonwealth had agreed to take over the negotiations, as it effectively did at the meeting on 9 December 2016, there was no longer any need for a business case by NSW. What DAWR did expect NSW to provide, however, was the valuation it had commissioned from Herron Todd White in November 2016, and which had been required in draft form by that time, but was still outstanding.

The valuation of Tandou

By 18 January 2017, the Herron Todd White valuation of Tandou was still unfinished and Mr Hanlon expressed his disappointment about the valuers' performance in an email to Mr Morris on that date. Mr Hanlon forwarded to Mr Morris an indicative valuation from Herron Todd White, which showed an assessed value of between $85 million and $90 million, on a full water basis, with 100% allocation each year. With a 0% irrigation entitlement, the property's value would fall to approximately $4 million.

The same day, internal DAWR email communication discussed the fact that there was insufficient information to assess the valuation and that it had been based on 100% water allocation per year "and not average water reliability (as adopted by Tandou)". In July 2016, Mr Robinson had advised DAWR officials that Tandou only received sufficient water to operate at capacity two out of six years.

In an email on 19 January 2017, Mr Robinson stated to Mr Corrigan:

> *…due to the continued absence of the valuation report from HTW* [Herron Todd White] *and therefore the inability of the Feds to interrogate the valuation they are not willing to discuss a number regarding an offer for Tandou today.*
>
> *I could tell Gavin was embarrassed/frustrated and so I sent a text to invite him for a coffee. He told me he had wanted to discuss a number and so I said if you have been 'allowed' what would it have been? He said 80+ or – a bit.*
>
> *He told me the valuation number is c80m with water and 4m without.*

This is evidence that Mr Hanlon disclosed to Mr Robinson – the party with whom the Commonwealth were in direct negotiations – commercial-in-confidence information that had a direct bearing on those negotiations.

When Ms Morona emailed Mr Morris an executive summary of its Tandou valuation on 8 February 2017, because the full valuation was still outstanding at that date, she reminded Mr Morris that the document was "in confidence".

On 1 February 2017, Mr Felizzi emailed Ms Gabila a document authored by Mr Robinson concerning the Tandou "deal". Mr Robinson had set out a number of key aspects of the Commonwealth's proposed purchase and in relation to pricing, he stated, relevantly:

> *There will be two transactions. The first is a water purchase between a willing seller and buyer at arm's length based on a market valuation. Suggest in the vicinity of $40-45m. (The market has not traded for considerable time but we are using the Murrumbidgee Water Market for comparative purposes. Unofficially the Govt agrees with the pricing methodology).*

Given that Webster was in direct negotiations with the Commonwealth by this stage, the Commission assumes that Mr Robinson's reference to the "Govt" is a reference to the Commonwealth. The Commission considers the use of the Murrumbidgee water market as a reference is one of the more contentious aspects of the valuation of Tandou's water entitlements because its acceptance by the Commonwealth, as a legitimate valuation methodology (as ultimately occurred), meant that the prices for Tandou's water entitlements doubled from the value that using Lower Darling water market prices would have realised (discussed below).

On 14 February 2017, Mr Robinson made the following record in his notebook obtained by the Commission, under the heading "Tandou Tax":

- *Water*
- *Compensation*

1) Revalue market value up from $18.7 – $40m

2) compulsorily acquiring water – CGT rollover relief

Scenario – compensation for permanently damaged asset

Water

Compensation for asset value reduction – Land, structures, Gin – 43.5

45–38.5.

The evidence available to the Commission indicates that the valuation of Tandou's water entitlements at $18.7 million, as recorded in Mr Robinson's notes, comes from a Herron Todd White valuation prepared for Tandou Ltd of its total water portfolio in NSW and Victoria, as at 29 May and 30 June 2015. There is no evidence that the department chose Herron Todd White as the valuer for the purpose of the later Tandou proposal because of its previous involvement with Tandou Ltd, or that any departmental officer knew of the existence of this earlier valuation when Herron Todd White was engaged.

The idea that Webster would be compensated for the reduced value of its land without water entitlements, in addition to being paid for the water entitlements themselves, appears to have originated from Webster and to have been first contemplated at this time. The amount of $78 million, ultimately paid by the Commonwealth, corresponds almost exactly with Mr Robinson's calculation of $40 million for water and the $38.5 million he contemplated as the lower end of what would be acceptable compensation, as recorded in his note.

On 15 February 2017, Brendan Barry, Tandou's water manager, emailed Ms Gabila valuations for high security and general security water prices in the Lower Darling and the Murrumbidgee. The total valuation of Tandou's water entitlements using the Lower Darling prices was calculated at just over $18.7 million; using the Murrumbidgee prices, the total came to approximately $44.6 million. In his email to Ms Gabila, Mr Barry said:

> *Lower Darling water entitlement should be worth at least $42 million on the books, since the Commonwealth has the cheque book out we wouldn't want to offend by using other data so maybe we should adopt the $45 million scenario.*

The evidence indicates that Tandou's water entitlement valuation would more than double using Murrumbidgee water market prices and achieve at least the increase sought by Mr Robinson, as recorded in his note from the day before. DAWR officers had previously noted the use by both the LDHG and Tandou of an external water market for calculating a purchase price for their proposals, and that it was "curious that the Lower Darling group align their water with the Murray and Tandou with Murrumbidgee. Presumably this gets each a more favourable outcome".

Herron Todd White's valuation

On 21 February 2017, Mr McRae emailed Mr Hanlon and Ms Morona the full report of Herron Todd White's Tandou valuation. Herron Todd White valued Tandou's water, on a full 100% allocation basis, at $41.48 million, based on a valuation of Lower Darling general security water at $1,500 per ML and high security water at $3,500 per ML. Herron Todd White justified its values for Lower Darling water as follows:

> *…there are limited sales of Lower Darling irrigation entitlements available to help ascertain value and we*

have utilised our knowledge of the Murrumbidgee and Murray systems to help determine value. We have done this to reflect the agreements in place which allow for the free transfer of entitlements from the Murrumbidgee system to Tandou. This situation is unique and is not available for other holdings, which also adds to the difficulty in determining the added value of this benefit.

On 9 March 2017, an officer from DAWR's Water Markets Policy Section contacted Mr Noonan and Mr Fuller, Herron Todd White valuers, directly by email to ask for further details to explain the basis for this assessment. Mr Noonan forwarded DAWR's email to Mr Robinson the next day:

…we are just hoping you can help with some information/clarification (confidentially) that the Feds wish us to provide back to them in regards to the report (see below). I thought we explained it ok in the report but they have asked for additional stuff that you may be privy to. Anyway check it out and if you can provide anything back that would be great.

On 13 March 2017, Mr Barry responded to Mr Noonan on behalf of Webster. In an email marked "HIGHLY CONFIDENTIAL", he provided Mr Noonan with clauses 52 and 53 of the "Water Sharing Plan for the NSW Murray and Lower Darling Regulated Rivers Water Sources 2015", claiming that these enshrined the agreement referred to in Herron Todd White's report about which DAWR was seeking further detail. He provided a detailed analysis of what these rules meant for Tandou's carry-over practices. On 27 March 2017, Mr Fuller's response to DAWR was, almost word-for-word, the same explanation as that provided to him by Mr Barry, but without attribution.

The evidence available to the Commission indicates that, on 7 April, 9 May and 24 May 2017, the DAWR officer concerned was still seeking clarification from Herron Todd White in relation to Tandou's asserted ability to "transfer entitlements from the Murrumbidgee system". There is no evidence available to the Commission that Herron Todd White provided clarification to satisfy the Commonwealth of the basis for the reference to Tandou's "unique" ability to freely transfer entitlements from the Murrumbidgee system, which was the assumption underlying the significantly increased valuation of Tandou's Lower Darling water entitlements.

ABARES valuation

On 27 February 2017, DAWR received a draft report prepared at its request by the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), the science and economics research division of DAWR itself. The report, titled *Valuing water entitlements for environmental use: Benefits to the Commonwealth from acquiring Tandau* [sic] *station entitlements*, provided a valuation of Tandou's water entitlements in the range between $25 million and $52 million, using current Lower Darling market prices as the lower bound and "model estimated prices (under a Lower-Darling trade constraint scenario) as an upper bound value".

The ABARES report did not price the upper-bound value for Lower Darling water by reference to Murrumbidgee water, as Herron Todd White had done. ABARES estimated the upper-bound by reference to a modelled scenario in which there was no trade constraint in the region. An allocation trade constraint applies whenever the Lakes' storage volumes fall below 480 GL and any trade into, or out of, the Lower Darling is prevented. ABARES assumed that, in the event the Lakes reconfiguration project was completed, the trade constraint would no longer apply, and the value of Lower Darling entitlements would increase.

The "deal" is agreed between Webster and the Commonwealth

Notwithstanding the fact that DAWR still had significant unanswered questions about the basis for the Herron Todd White valuation of Tandou's water entitlements, on 31 March 2017, Mr Robertson emailed a number of DAWR colleagues to report on a conversation that he and Mary Colreavy, DAWR assistant secretary, had had that day with Mr Robinson and Mr Barry (Tandou's manager):

…the side details just need to be confirmed in writing and we have a clear pathway to a very good SDL outcome at Menindee. A transaction outcome that satisfies them but more importantly addresses and mitigates our key risks, is value for money, provides significant gap bridging water and enables key infrastructure that stakeholders on the Lower Darling and at Broken Hill have been strongly supporting at meetings over the last few days.

It is also a lower figure than the one Gavin Hanlon told me we would need to pay to make this work.

The same day, Mr Robinson sent a text message to Mr Hanlon, stating:

Pretty much agreed deal–v close to the number and can fill in the detail when we talk. I'm in Sydney for the weekend now and happy to talk any time or next week. Thanks. Joe.

The Commission obtained Mr Robinson's detailed, handwritten notes of a teleconference meeting on 4 April 2017 (incorrectly dated 2016) between Webster

representatives and Webster solicitors, which indicate that Mr Robinson and Mr Barry had recently met with DAWR staff to discuss the detail of their offer to handover Tandou's water rights to the Commonwealth, de-commission Tandou as an irrigation property, and no longer grow cotton there. The notes record $78 million as the agreed purchase price and that the Commonwealth had indicated it could make a one-off payment on 10 July 2017 of this amount.

The notes also record the following significant details of the transaction:

> *Hold the rights until July*
>
> *hand the licences over to the feds*
>
> *operate farm up until March 18 then agreed it is shut down …*
>
> *one licence held onto for some water during the year…*
>
> *Govt want to happen in July to add to their no's for the licences and the rule changes*
>
> *The licence we would hang onto would be very small in the scheme of things. 200 ML …*
>
> *Operational → need to hold onto the licences until mid July so we can take the allocation of water …*
>
> *40 water*
>
> *7 Gin*
>
> *31 Land?*

As at 4 April 2017, the notes suggest that the agreed sum of $78 million for Tandou could be comprised of a proposed $40 million for the water rights, $7 million for the cotton gin, and $31 million for the land. The notes make no reference to a compensation component.

On 10 April 2017, Mr Barry emailed Mr Robinson and Webster's lawyer and advised that he had just spoken to Mr Robertson from "Canberra". Mr Barry reported:

> *…he said we can put in what we think it needs to be for the water (say $40 million??) and the rest can be for the loss of business value and decommissioning ($2 million for the works approvals??) and the balance for the farm decommissioning.*

On 18 April 2017, Mr Robinson addressed a formal letter of offer to DAWR, containing what he described as an indicative offer from Webster to sell the 21,901 ML of water entitlements at Lake Tandou to the Commonwealth and decommission the irrigation works at the property. In relation to the consideration of $78 million sought by Webster, Mr Robinson wrote that it:

> *…comprises a payment of $38 million for the transfer of water entitlements and payment of compensation of $40 million for the reduction in value of the Lake Tandou irrigation project as the result of decommissioning of the irrigation works.*

On 4 May 2017, Mr Barry emailed Ms Colreavy and Mr Robertson a "Tandou Water Value Breakdown" spreadsheet, and advised that, further to their conversation the previous day, he had attached a schedule of water licences to which he had "assigned proposed values that total the $38 million". The value that Mr Barry used to calculate the cost of the high security water is $3,253 per ML, which is less than Herron Todd White's valuation of $3,500 per ML. This evidence further suggests that, independent of any valuation, independent or otherwise, it was Webster itself dictating the basis for the purchase price, working backwards from the agreed sum.

On 16 May 2017, Mr Morris recommended to the Hon Barnaby Joyce, then Commonwealth minister for agriculture and water resources, that he approve:

> *…as a proper use of relevant money, in accordance with section 71 of the* Public Governance, Performance and Accountability Act 2013 *(PGPA Act), funding to the value of $78,000,000 plus any applicable GST, from the Sustainable Rural Water Use and Infrastructure Program (SRWUIP) to acquire Tandou's Lower Darling water entitlements and require Tandou to implement associated measures.*

On 7 June 2017, DAWR received advice from the Department of Finance that the procurement of water rights had, from 1 March 2017, become exempt from Division 2 of the Commonwealth Procurement Rules. Tanya Stacpoole, director of DAWR's Water Purchase and Conveyance Division, shared the "good news" with the first assistant secretary, advising that the exemption:

> *…provides government agencies with increased flexibility in building and managing the Commonwealth's portfolio of water rights. In particular, the department's water recovery programme and the Commonwealth Environmental Water Office's portfolio management.*

On 13 June 2017, DAWR prepared a draft departmental analysis of the valuation of Tandou's water assets undertaken by Herron Todd White for the assistant secretary to note. It concluded that the:

> *…method adopted by the valuation firm is considered to be within market expectations … The report is considered to be the strongest source of information given that it was commissioned for the purpose of market value for acquisition purposes and it is the*

most recent source of information on Tandou's assets.

Significantly, it noted that the "key requirement in assessing this valuation is to consider the appropriateness of applying the value of the Murrumbidgee water source to the Lower Darling". In relation to that matter, DAWR's analysis noted, relevantly, the following points:

> *…given the unique situation, the carryover provisions and the ability to gravity feed the property the valuers stated the subject water is superior to Lower Darling values … Therefore when considering the value for this property, it is accepted that the water should have a premium applied…*
>
> *The comparison to other water sources is not new and is often done when there is little evidence in the subject catchment. This valuation methodology is conventional and generally considered to be fair and reasonable…*
>
> *The critical factor in the determination of the HTW* [Herron Todd White] *valuation was the application of the premium to the Lower Darling water entitlement values. In my judgement the reasons behind the application of the premium have been stated. Although the application of NSW Murray values may be considered slightly more appropriate given the hydrological connection compared to Murrumbidgee the argument that a premium is necessary has been justified.*

On 21 June 2017, Webster and DAWR entered into an agreement for the Commonwealth to purchase Tandou's water licences and to compensate Webster for the resulting diminution in the value of the property from the loss of water entitlements and the decommissioning of irrigation works. The financial breakdown of the $78 million purchase price involved $38,001,116 for transfer of the seller's water rights and $39,998,884 for the diminution of the value of the property and the obligations imposed on Webster in relation to it under the agreement. The Commission notes that the sum for the water entitlements is the exact figure provided to the Commonwealth by Mr Barry on 4 May 2017 (noted above).

There is no evidence available to the Commission of the reasoning behind the payment of compensation to Webster by the Commonwealth, other than Mr Robinson's notes and internal Webster communication that suggests that this aspect of the transaction originated from, and was calculated by, Webster itself, working backwards from the agreed purchase price. There is no evidence available to the Commission that the compensation component of the consideration paid by the Commonwealth was the result of the Herron Todd White valuation, or that it was proposed or encouraged by any NSW departmental officer.

After the announcement of the Commonwealth's purchase of Tandou's water

On 21 June 2017, after the Commonwealth's acquisition of Tandou's water entitlements was confirmed to the media and stock exchange, Mr Hanlon wrote to Mr Morris. He advised that the NSW department considered it essential that the LDHG structural adjustment package be progressed as soon as possible as a package deal with the strategic purchase of Tandou, and not treated in isolation, in order to ensure the Menindee Lakes Water Savings Project could achieve the maximum offset potential outcome for the SDL offset.

The same day, Ms Morona prepared a draft document answering a number of questions concerning the Menindee Lakes Water Savings Project. Ms Morona noted in this document that the NSW Government had submitted a business case on 16 June 2017 and that:

> *DPIW have been clear that the LDHG and Tandou purchases are of fundamental importance to achieving the maximum offset from the Menindee Lakes project, which in turn will assist to deliver the full 650 GL committed to under the SDLAM* [Sustainable Diversion Limit Adjustment Mechanism].
>
> *The Business Case highlights the importance of the structural adjustment package as part of the overall approach to Menindee, but notes that this is a matter for the Commonwealth as the lead for negotiations and engagement with LDHG and Tandou.*

The Commission's findings

The Commission finds that neither Mr Hanlon nor Ms Morona, nor any other NSW public official, acted partially or dishonestly by encouraging the Commonwealth Government to purchase the water entitlements of Tandou from Webster for an inflated price.

The Commission finds that staff at the department were in discussion with Tandou Ltd about the impact of the Menindee Lakes Water Savings Project on the security of Tandou's water supply well before Webster acquired Tandou. The Commission also finds that, as early as March 2015, there was evidence of pressure being exerted on the new deputy director general, Mr Hanlon, by DAWR, to progress the Menindee Lakes Water Savings Project, because of the important contribution it could potentially make to achieving the 650 GL SDL adjustment provided for under the Basin Plan.

Mr Hanlon and Ms Morona began negotiations with

Webster in relation to a possible purchase of Tandou's water entitlements as a condition precedent to the success of the Menindee Lakes Water Savings Project, in approximately April 2016. The Commission is satisfied that the Tandou purchase was important to both Mr Hanlon and Ms Morona, not because of any benefit to Webster, but because of its intrinsic importance to the success of the Menindee Lakes Water Savings Project, which would yield an SDL offset of between 50 GL and 150 GL "for NSW" and not for the other states. The Commission is satisfied that both public officials believed in good faith that pursuing the highest possible SDL offset for NSW was a significant requirement of their official functions.

The Commission finds that, from mid-July 2016, independently of its negotiations with NSW, Webster commenced direct negotiations with the Commonwealth for a standalone water buy-back. The Commission finds that when, from approximately August 2016, the Commonwealth began to see difficulties with the Tandou proposal as a simple water sale, it became a NSW-led project, effectively under the auspices of the Commonwealth.

The Commission finds that Mr Hanlon took appropriate steps to ascertain whether any legislation governed NSW's obligations in relation to water purchases and to ascertain from his colleagues from the Strategy and Policy branch the processes he needed to follow for NSW to lead the Tandou purchase. In preparation for a business case process that Mr Hanlon was reluctant to undertake, he nevertheless organised a valuation.

There is no evidence to suggest that the decision to utilise Herron Todd White was in any way corrupt or improper. There is no evidence of a connection between Mr Hanlon and this company. Herron Todd White's previous valuation of the LDHG properties had been independently assessed as robust and defensible.

The Commission finds that Mr Hanlon actively sought to circumvent state government approval processes; however, the Commission finds that he did not do so dishonestly. The Commission finds insufficient evidence that he did this to improperly avoid NSW Cabinet or ERC scrutiny. The Commission is satisfied that Mr Hanlon believed that time was of the essence to secure a deal with Webster in relation to Tandou and that any delay or a protracted and complicated process might mean that the opportunity was missed. While the Commission finds that he actively organised a process to short-cut potentially protracted Cabinet and ERC processes, relevant DAWR officers knew about and condoned this conduct. Significantly, Mr Hanlon advised Mr Hansen, DPI's director general, and asked for his assistance.

The Commission finds, on the available evidence, that the perceived need to speed up the process and the fact that the Commonwealth would ultimately fund it and had its own processes in place, meant that it made sense for the Commonwealth to take over negotiations with Webster from early December 2016.

The Commission finds that the Commonwealth recognised the value of the Tandou purchase independently of any representations made by Mr Hanlon or Ms Morona and that it was keen to acquire its water entitlements, initially as a straight water purchase and then as a part of a state-led water recovery. The merits of the Commonwealth's purchase of Tandou, outside the Menindee Lakes Water Savings Project, may be debatable, but the Commission finds no evidence available that those who made the decision to purchase it as a "strategic purchase" did so because they were misled by any NSW public official.

The Commission finds no evidence that Mr Hanlon, Ms Morona, or any other departmental officer exerted any improper influence on the valuation process or on the ultimate valuations of Tandou provided by Herron Todd White.

A key assumption behind Herron Todd White's valuation of Tandou's water entitlements, and that which resulted in a significant increase in value from market price, came directly from Webster and was not independently ascertained or confirmed by Herron Todd White. There is no evidence that any public official from the department, and in particular Mr Hanlon or Ms Morona, had any involvement in suggesting this aspect of the valuation to Herron Todd White, or encouraging its acceptance by the Commonwealth.

There is no evidence that Mr Hanlon or Ms Morona, or any other NSW public official, had any involvement in suggesting or encouraging the determination and acceptance of the compensation component of the purchase price paid to Webster by the Commonwealth.

The Commission is satisfied that, once the Commonwealth took over negotiations with Webster in early December 2016, it made its own determinations about the value of the transaction, whether it represented value-for-money or posed unacceptable risks, and that these determinations were not influenced by any representations made by either Mr Hanlon or Ms Morona. The key aspects of the sale of Tandou's water entitlements to the Commonwealth, including the water valuation ultimately accepted by the Commonwealth, the overall price, the compensation component, the agreements in relation to decommissioning, and all other entitlements under the sale agreement, were determined as between the Commonwealth and Webster, and neither Ms Morona

nor Mr Hanlon had any substantive input into, or influence over, these matters.

The Commission is satisfied that, on 19 January 2017, Mr Hanlon improperly disclosed to Mr Robinson that Herron Todd White had provisionally valued Tandou at approximately $80 million with water and $4 million without water. This was the disclosure of sensitive, commercial-in-confidence information with a direct bearing on confidential negotiations between the Commonwealth Government and Webster, in which he was not a party.

The Commission is not satisfied, however, that Mr Hanlon disclosed this information deliberately in order to advantage Webster and disadvantage the Commonwealth Government in relation to the negotiations between these parties. The Commission is not satisfied that Mr Hanlon's conduct in releasing this information to Mr Robinson was a pre-meditated or strategic attempt to undermine the Commonwealth's bargaining position, or that it was done dishonestly to favour Mr Robinson and Webster.

The Commission finds that there had been a specific agreement between DPI-W and DAWR on 9 December 2016, that it would be the Commonwealth who "talks with Joe" and that the deal needed to be kept "at arm's length from NSW". Mr Hanlon's decision to continue to engage in communication with Mr Robinson in these circumstances demonstrated extremely poor judgment.

The Commission notes that the report of the ANAO, *Procurement of Strategic Water Entitlements*, was published on 16 July 2020. The audit examined $190 million of strategic water procurements through limited tender arrangements between January 2016 and December 2019. The Tandou purchase was one of these procurements. The ANAO found that the DAWR's *Guidelines for Limited Tenders*, which were approved on 23 June 2016, were not used in the Tandou procurement, which was apparently managed by a different team within the department to other strategic purchases.

The ANAO also concluded that DAWR did not develop a framework designed to maximise the value for money of strategic water entitlements purchased through limited tender arrangements. The ANAO's examination of departmental documentation found that two key elements were the most influential in the department's assessment of a proposal and whether to pursue the offer: whether the purchase was considered "gap-bridging" and whether the price offered was equal to or less than the maximum price identified by valuation. The ANAO noted that DAWR only negotiated price for one procurement and that was not the Tandou purchase.

The ANAO's analysis recorded that the DAWR received valuations for Tandou's water entitlements between $25 million and $52 million, that the seller offered the entitlements for $38 million and that this was the final purchase price. While ANAO noted in a footnote that "the Lower Darling purchase also included an additional $40 million compensation payment", it provided no analysis of or commentary on this payment, which appears to have been unprecedented and never again repeated.

Not corrupt conduct

The Commission makes no finding of corrupt conduct in this matter.

Section 74A(2) statements

The Commission is satisfied that Mr Hanlon and Ms Morona are affected persons for the purposes of s 74A(2) of the *Independent Commission Against Corruption Act 1988*. The Commission is not of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of either Mr Hanlon or Ms Morona.

As noted previously, Mr Hanlon resigned from the DOI in September 2017 and Ms Morona was terminated from her senior executive role pursuant to s 41 of the *Government Sector Employment Act 2013* in September 2017. As both Mr Hanlon and Ms Morona are no longer public officials, it is not necessary to consider any recommendation in relation to disciplinary or dismissal action.

Chapter 13: Corruption prevention

The commencement of the *Water Management Act 2000* ("the WMA") nearly two decades ago was aimed at providing a pivotal legislative mechanism for protecting and managing water in NSW. During the period of this investigation, however, the mandated priorities of the WMA were undermined due to a repeated tendency on the part of the NSW Government's water agencies to adopt an approach to water management that was unduly focused on the interests of the irrigation industry.

At a policy level, the development and implementation of the 2012 Barwon-Darling Water Sharing Plan (BDWSP) represented a failure to adhere to the priorities set out in the WMA. As outlined in chapter 3, changes were made to the draft BDWSP after the public consultation period that were aimed at maintaining the existing conditions for productive water users, even where this had adverse implications for the environment and downstream users.

The BDWSP rules, in keeping with historical access conditions, permitted A- and B-class licence irrigators to extract low-flow water, considered to be critical to the health of the river and its water quality, when flows were imminent. The rules setting annual extraction limits at 300% of a licence's share component, with no limit to the amount of unused water that can be carried over from one year to the next, were also indicative of the irrigator focus of the department.

In terms of greatly increased water take at low flows, the impact of the BDWSP rules was made worse by the failure to implement daily limitations to extraction rates through daily extraction limits (IDELs) and total daily extraction limits (TDELs). As IDELs and TDELs were not implemented, there was no environmental safeguard in place to mitigate against the consequences of transitioning licences under the old *Water Act 1912* to access licences and works approvals under the WMA. This conversion meant that A-class licences could be attached to larger pump sizes and that low-flow water extracted above immediate requirements could be stored. Furthermore, as the BDWSP was not audited within the required time period, an opportunity to determine whether its provisions were being given effect to was missed.

More generally, the irrigator focus of the Department of Primary Industries – Water (DPI-W) was entrenched in its approach towards stakeholder consultation, which focused on select irrigators, while restricting information available to other stakeholders, such as environmental agencies. As a result, the policy-making process became vulnerable to improper favouritism, as environmental perspectives were sidelined from policy discussions.

The impact of continual administrative changes to water management in NSW also resulted in a loss of corporate memory as well as creating considerable morale problems among remaining staff and generating challenges for maintaining information systems. Specific failures in the administrative arrangements concerning water regulation and compliance also created an atmosphere that was overly favourable to irrigators. This was largely due to chronic underfunding, organisational dysfunction and a lack of commitment to compliance.

The Commission has made 15 recommendations to help address the concerns exposed by this investigation. The recommendations are aimed at complementing and entrenching many of the substantial reforms that have been implemented by the NSW Government since 2017 in the area of water management.

Restoring the priorities under the WMA

Reflecting mandated priorities in key documents

As discussed extensively throughout this report, in developing the BDWSP, the department deviated from the priorities in relation to water sharing established in

the WMA and preferenced economic outcomes in many respects; namely, those to the benefit of the irrigation industry. As noted by the Natural Resources Commission in a review of the BDWSP published in September 2019, the water sharing plan (WSP) did not achieve the prioritisation of the WMA, which was the "protection of the water source and dependent ecosystems, followed by basic landholder rights including native title, and then other extractive uses". Ultimately, the precedence given to economic considerations in the drafting of the BDWSP contributed to poor environmental and downstream equity outcomes.

As discussed in chapter 11, the Commission also found that Gavin Hanlon's and Monica Morona's position descriptions and the Department of Primary Industries' (DPI) agency objectives reinforced the view that the department's's primary stakeholders were those who owned or delivered water for productive use.

In its submissions, the Commission proposed a recommendation concerning the need for the water strategy and other key documents of the Department of Planning, Industry and Environment (DPIE) to reflect mandated priorities.

It was submitted on behalf of the department that the recommendation was not warranted or appropriate. The submissions argued that the Commission should reject the suggestion it had favoured economic considerations. The submissions also argued that the proposed recommendation would undermine the priorities of the WMA. Additionally, it was submitted on behalf of the department that it is not appropriate for specific policies and priorities to be embedded in employment documentation.

The Commission rejects the submissions made on behalf of the department on these matters. As noted in this report, the Commission's investigation found that economic considerations were favoured in certain respects in the drafting of the BDWSP. The Commission also notes there was no impediment to the department embedding its view about the prioritisation of certain stakeholders in accordance with the provisions of the WMA in the position descriptions for the role of deputy director general and director of intergovernmental and strategic stakeholder relations at the time Mr Hanlon and Ms Morona were appointed to these positions.

RECOMMENDATION 1

That the DPIE publicly records:

- **its water strategy, objectives and priorities for the use and management of NSW's water resources in a manner consistent with the mandatory duty in s 9 of the WMA**
- **the need to ensure the water management principles in s 5, and in particular those that relate to sharing, as set out in s 5(3) of the WMA, are all given effect.**

Section 9 of the WMA should also inform relevant key departmental records, including agency policies, guidelines and role descriptions, concerning the management of NSW water resources.

Amending WSPs

All NSW WSPs are now developed and the DPIE has submitted all water resource plans (which are required to incorporate WSPs) to the MDBA for its assessment and approval prior to accreditation by the Commonwealth. As WSPs may need to be amended over time, it is important that the DPIE has a mechanism in place to ensure that it effectively achieves the prioritised protections of the WMA when undertaking this task.

It is also important that the DPIE has regard to the advice and recommendations provided in statutory audits of WSPs, which are now conducted by the Natural Resources Commission under s 44 of the WMA.

These audits provide significant understanding into how a WSP is operating and its progress against performance indicators. For example, the most recent audit of the BDWSP, published in October 2019, revealed several important issues, including that there was no evidence of reporting against performance indicators in the WSP during the audit period.

The Commission proposed a recommendation concerning the amendment of WSPs. In response to the DPIE's submissions, this recommendation has been redrafted to ensure it accurately reflected the relevant legislative provisions and to remove any ambiguity around its meaning.

RECOMMENDATION 2

That the DPIE develops and publishes a protocol and procedures for amending WSPs that reflect the principles for water sharing in s 5(3) of the WMA and give priority to those principles in the order in which they are set out in that subsection in accordance with the mandatory duty imposed by s 9 of the WMA. The protocol should also have regard to audits conducted by the Natural Resources Commission.

The Barwon-Darling Water Sharing Plan

Failure to fully implement the BDWSP

While certain rules in the BDWSP undermined the order of priorities for the water sharing principles set out in the WMA, this order was also undercut by a failure to effectively implement the WSP's provisions, most notably in relation to IDELs and TDELs. In its submissions, the DPIE accepted there were failures to implement aspects of the BDWSP in a timely manner, particularly with respect to IDELs and TDELs.

In developing the BDWSP, both the department and the Barwon-Darling Interagency Regional Panel (IRP) recognised the risk of removing pump-size restrictions for licences assigned A-class access conditions. The department subsequently proposed IDELs and TDELs as the method to "mirror" the previous pump-size restrictions through the provision of daily limits on rates of extraction. As IDELs and TDELs were not implemented, the extent to which A-class water could be extracted was dramatically increased, which ultimately caused unprecedented volumes of ecologically critical low-flow water to be pumped from the river system at a given time.

As noted in chapter 4, ostensibly the main barrier to implementing IDELs was the $370,000 in funding required to upgrade the licensing system. The evidence before the Commission, however, revealed that the failure to implement IDELs and TDELs was not in fact solely due to a lack of funding. Prior to the July 2017 airing of the *Four Corners* program "Pumped: who is benefitting from the billions spent on the Murray Darling?" ("Pumped"), the department had not commenced planning, or even applied for funding, to upgrade the licensing administration system to allow IDELs and TDELs to be implemented. This is suggestive of operational failures and ultimately a lack of will to implement IDELs and TDELs. Moreover, even without upgrading the system, IDELs and TDELs could have been imposed on licences, albeit with limited capacity for enforcement.

Responsibility for WSP implementation rested formally with the department's WSP implementation team ("the implementation team"). This team took over from the planning and policy teams responsible for developing WSPs once plans were gazetted. The implementation team was small, chronically under-resourced, and under significant pressure at the time due to the high number of WSPs being gazetted.

The implementation team did not have in place any formal policy, guideline or procedure governing how WSPs were to be implemented. Instead, the implementation process was largely ad hoc with no formal handover process from the planning and policy teams. In practice, the process relied on staff memories and a task list developed and prioritised by the implementation team's managers, with little input from those who had developed WSPs.

Despite its name, the implementation team spent only a fraction of its time putting WSPs into effect. As one of the team's managers noted "everything that didn't fit anywhere else, this unit got to do". Most of the team's time was spent on urgent ad hoc work, such as responding to water take requests during droughts or floods and preparing ministerial briefings. As another of the team's managers stated:

> *…the team title 'Implementation' always seemed quite interesting to me … I understand … that was what it was probably created and intended to be. But, in my team in that unit, it spent the vast majority of its time doing ad-hoc work that was responsive to … one off pieces of work coming through the door.*

Although the implementation team was primarily responsible for implementing WSPs, to some degree the responsibilities for giving effect to WSPs were diffused across the department. As IDELs required a licensing system upgrade, this task rested with the licensing and compliance division, from where it did not proceed. As most members of the implementation team considered the system upgrade a prerequisite for IDELs, along with upgrades to water meters and flow gauges, they did not pursue their implementation further. With responsibility

for giving effect to IDELs being diffused, their implementation stalled. As one senior manager involved with the process stated, "…really nobody drove it. There was nobody to take it on … Nobody to make it happen".

Moreover, since there was no formal handover from the WSP development team or the IRP, the implementation team was never informed of the importance of IDELs and TDELs to the BDWSP or of the risks associated with their non-implementation. In addition, it appears that few in the team understood what IDELs and TDELs were. While the senior director with oversight of the implementation team did understand that low-flow extractions could increase without IDELs and TDELs, he did not believe this would happen because there had been little change in water take or water trade over the preceding decade.

More generally, WSP implementation was not a priority for the department, especially for the less-populated and unregulated water sources, such as the Barwon-Darling. At the time, NSW Office of Water's (NOW) focus was on developing WSPs before the Murray-Darling Basin Plan "the Basin Plan" took effect, rather than ensuring WSPs were effectively implemented. As one senior officer noted:

> *…we spend 80 per cent of our effort or 90 per cent of effort on the first 10 per cent of the process and then we forget to do the other 90 per cent, and that's a classic here where we've, planning's done its job, got the plan out of the line. It's exited.*

Several departmental officers involved with WSP development and implementation also believed that failures in WSP provisions, or in their implementation, would be detected and remedied later, when WSPs were incorporated into Water Resource Plans (WRPs) as part of NSW's transition to the Basin plan. As an agency under significant pressure to manage a change in water management, which was severely resource-constrained and suffering ongoing disruption from near-continual restructures, the department prioritised policy development over practice, with the intent to reconcile the two once resources permitted.

Overall, the record of WSP implementation across the state is poor. Many of the provisions of the state's WSPs had never been implemented, including some that were first gazetted in 2004. As one departmental manager noted, "effectively what you have is plans that could be in place for 10 years but never effectively turned on".

In response to the 2017 investigation undertaken by Ken Matthews ("the Matthews investigation"), the 2019 Natural Resources Commission review of the BDWSP and the independent assessment of the 2018–19 fish deaths in the Lower Darling, the DPIE has proposed several changes to the BDWSP. These are intended to ensure the BDWSP's rules are consistent with the Basin Plan. The changes include:

- implementing IDELs and TDELs (including trade limits on IDELs)
- raising A-class cease-to-pump thresholds based on up-to-date environmental water requirements to better protect low-flow water from extraction
- removing imminent flow provisions to prevent extraction of low-flow water, even when higher flows are anticipated
- introducing resumption of flow rules to protect the first flow of water after a dry (low or cease-to-flow) period from extraction
- establishing management provisions to protect upstream environmental water releases from being extracted when they reach the Barwon-Darling.

Once implemented, these changes will resolve much of the inconsistency between the BDWSP and the WMA. The Commission supports these changes and notes the DPIE's advice that these changes are proposed for a new BDWSP and that it is more generally focusing on the implementation of WSPs. The Commission remains concerned, however, that there are other WSPs in NSW that are yet to be fully implemented.

The department did not resist the making of recommendations 3, 4 and 5. In submissions made on its behalf, the department also noted that it is currently progressing the recruitment of 10 full-time positions for a new implementation team.

RECOMMENDATION 3

That the DPIE implements all changes it has proposed to the BDWSP rules to ensure its consistency with the WMA, specifically:

- **implementing IDELs and TDELs (including trade limits on IDELs)**
- **raising A-class cease-to-pump thresholds based on up-to-date environmental water requirements to better protect low-flow water from extraction**
- **removing imminent flow provisions to prevent extraction of low-flow water even when higher flows are anticipated**
- **introducing resumption of flow rules to protect the first flow of water after a dry (low or cease-to-flow) period from extraction**

- **establishing management provisions to protect upstream environmental water releases from being extracted when they reach the Barwon-Darling.**

RECOMMENDATION 4:

That the DPIE establishes a dedicated and adequately funded WSP implementation team to ensure all of the state's WSP rules are implemented effectively.

RECOMMENDATION 5:

That the DPIE publishes a list of all WSP rules that have not yet been implemented and develops and publishes timelines for implementing these rules.

Failure to audit the BDWSP

As previously mentioned in this chapter, a WSP is required to be audited by the Natural Resources Commission for the purpose of ascertaining whether its provisions are being given effect to.

The Natural Resources Commission's role commenced on 1 December 2018 under changes to the WMA. Before this time, audits were to be conducted by a panel appointed by the minister. Prior to 2012, the State Interagency Panel, comprising members of the department, Office of Environment and Heritage (OEH), DPI and two catchment management authorities, ensured the implementation of WSP provisions were audited against a set of objective metrics.

Audits are required to be conducted within the first five years of a WSP's implementation (originally the audit period was an interval of no more than five years). Despite the BDWSP commencing on 4 October 2012, an audit of the plan was not completed until October 2019 – a period of seven years. In fact, the Commission's investigation revealed that audits were not undertaken for several years following 2012. The Commission was unable to ascertain why audits stopped around this time.

The failure to audit the BDWSP is of particular importance, since one of the only environmental concessions made to the WSP during its development was a provision to amend flow-class rules after five years if, "a study shows to the satisfaction of the Minister that the current access rules are having an adverse impact on an endangered aquatic ecological community". This provision was included in response to NSW Fisheries' submission to the draft BDWSP, which raised concerns about the BDWSP settings failing to prevent environmental harm. This provision was also key to the IRP approving the draft BDWSP. As stated by the IRP's OEH representative, "[although] the IRP process has been compromised by unrealistic timeframes … I can live with the end result because there are other checks and balances [including] the 5-year … reviews".

Former departmental officers told the Commission that, if the BDWSP had been audited within the time period required, the failure to implement IDELs and TDELs, and the associated effects, would have been identified and these provisions would subsequently have been given greater priority. However, some officers who spoke to the Commission doubted the department's capacity to respond effectively, even if an audit had identified serious failures. Regardless, the lack of an audit meant a chance to ascertain whether the BDWSP's provisions were being given effect to was lost.

The requirement for the Natural Resources Commission to undertake WSP audits will address past issues with delays. However, the Commission understands that, because the DPIE has chosen to remake, rather than amend, some contentious WSPs as part of its development of water resource plans, these WSPs will not have been subject to s 44 audits under the WMA for well in excess of five years. The Commission accepts the DPIE's explanation that it has elected to remake these WSPs because this approach is more straightforward than making significant amendments to these plans, and that the changes to these WSPs have all been designed to increase environmental protections. Despite this, the Commission remains apprehensive about the lack of a timely independent review.

RECOMMENDATION 6

That the DPIE prioritises and seeks to bring forward audits of any WSP that have not, to date, been audited under s 44 of the WMA.

The Sustainable Rivers Audit

In 2012, the Murray Darling Basin Authority (MDBA) ended its three-yearly Sustainable Rivers Audit (SRA) program, which it described as "the most comprehensive assessment of the ecological health of rivers in the Murray Darling Basin", along with a number of other environmental programs. The MDBA ended these programs, as NSW dramatically reduced its funding contribution.

In 2011–12, NSW contributed around $31 million to the "joint activities" managed by the MDBA on behalf of participating jurisdictions. In June 2012, the NSW Government advised that its contribution for joint activities undertaken by the MDBA would be capped at $12.43 million in 2012–13, and $8.9 million in 2013–14 and 2014–15, representing a 71% reduction. According to a briefing prepared for the premier, this reduction "was intended as both a savings to the NSW budget as well

as a means of forcing a fundamental review of the joint programs and the governance arrangements of the MDBA".

The SRA was a source of information for evaluating the effectiveness of WSPs in restoring environmental flows and protecting their water sources. According to NSW Fisheries' submission to the draft BDWSP, SRA data had suggested "that the health of the Barwon-Darling is in decline", with many species threatened and large-scale water extraction a key cause. Given such information, it is likely that the SRA could have detected the failures of the BDWSP well in advance of the *Four Corners* program airing.

While NSW has, to a large extent, restored its funding contributions to the MDBA, contributing $29.72 million in the 2018–19 financial year, the SRA program has not been restored.

It was submitted on behalf of the department that, while it does not oppose the funding of monitoring and evaluation programs, it does oppose recommencing funding for the SRA on the basis that it was designed as a long-term river health condition audit as opposed to providing specific details on causes and effects. The submissions also noted the department's involvement in a monitoring, evaluation and reporting program ("the MER program") developed with the Department of Regional NSW, which will have a role in reviewing WSPs. The submissions advised that the effectiveness of the MER program is contingent on ongoing operational expenditure funding. They also noted that the MDBA has established a cross-jurisdictional Monitoring, Evaluation and Reporting Working Group.

The Commission believes that the objectives of the SRAs remain worthwhile and supports the undertaking of independent audits to determine the ecological health of rivers; however, it accepts that it may be desirable to introduce a different and more detailed type of audit.

RECOMMENDATION 7

That the NSW Government recommences funding of scientific audits that periodically monitor the environmental health of its rivers and river flows to provide independent assurance of the effectiveness of its water management policies.

Consultation

The sustainable management of water as a resource is a fundamental goal of the NSW Government. The achievement of this goal necessitates a science-driven approach that accords with legislative obligations; something which is uncompromised by the views of organised interests. Clear and transparent processes, underpinned by independent scientific studies, should be used to determine the NSW Government's overarching water policy position. Within the limits established or prescribed by such an approach, however, it is important that water agencies consult with stakeholders over policy details and implementation measures.

The practice of government consultation is important in a democracy. In a pluralistic society, consultation requires equality of access. Consultation processes also form part of the dialogue that a government has with its citizens and is part of the lifeblood of public discourse. If well executed, the participation of citizens in government consultation activities can:

- foster public engagement
- garner expert knowledge
- inform public opinions and preferences
- provide an opportunity for government to test the fine details of policy proposals
- enhance transparency and accountability.

Consultation processes can also confer legitimacy on government decisions and engender trust between government and stakeholders.

Regardless of the general benefits associated with consultation, a targeted consultation approach, if not conducted fairly, can be associated with unbalanced outcomes. Similarly, where consultation is dominated, or even monopolised, by the most vocal, organised or persistent viewpoints, the policy-making process becomes vulnerable to improper preferencing or favouritism.

In emphasising the need for effective consultation with stakeholders over policy details and implementation measures, the consultation must be built on and give effect to accepted principles and standards that inform public office-holding and that arise under the statutory standards set by the WMA.

As discussed in this report, all functions exercised under the WMA must be exercised in ways that give effect to the statutorily prescribed water management principles and the water sharing principles. That necessarily requires meaningful consultation, as appropriate, between government and those in public administration, and between relevant public officials and stakeholders. Additionally, in the exercise of functions under the WMA, proactive application of, and compliance with, the provisions of the WMA is essential.

The department's's consultation with external stakeholders

As water policy is a controversial area, with disparate and often competing stakeholders, it is important that water

agencies aim to achieve a level playing field, so that those without money, connections or special influence, can be heard effectively and have access to information that they are entitled to receive. Any sidelining of parties that do not represent irrigators' interests also creates a risk of regulatory capture and skewed policy outcomes.

In the context of his former role as secretary of the Department of Industry (DOI), Simon Smith observed that water users with direct monetary interests in water allocation outcomes tend to be more vocal and organised than people with diffused interests who are concerned about the non-monetary uses of water. Productive water users are also a highly visible group, often choosing to approach government directly.

Mr Smith also observed, in relation to sharing access to publicly owned assets or granting special privileges or rights, potential benefits tended to flow to a small number of people who were advantaged significantly in the short term. This was despite costs and externalities being shared collectively across many people, affecting current and future generations.

The adoption of a broad approach to stakeholder consultation and public participation acts as an antidote to organised interests by counter-balancing their influence. Mr Smith specifically recognised the need for public administration to engage with diverse communities and listen to a variety of views to ensure a balanced and fair approach to water policy. Mr Smith and Scott Hansen, director general of DPI, both recognised that this responsibility sat with the water portfolio, regardless of whether it was located within the industry or environment cluster.

Although the department had a general burden of responsibility for initiating broad consultation with water stakeholders, it did little to promote or enforce this obligation. Despite the Commission's finding that the Industry Reference Group (IRG) was created by Mr Hanlon and Ms Morona in good faith, its creation, and the absence of similar reference groups comprising other stakeholders, meant consultation with only one influential stakeholder group was prioritised. The provision of information to this group in advance of public consultation processes also highlighted the lack of balance in the department's approach to external stakeholder engagement; a bias recognised as such by at least some of the IRG irrigators and some senior departmental staff.

The Matthews investigation examined the issue of stakeholder engagement. Mr Matthews noted that the DOI acknowledged deficiencies in its previous approach, which "was seen as non-transparent, not even-handed, and not fair, equitable, nor accessible".

Mr Matthews also noted that the department had more recently developed a stakeholder engagement strategy. Specific initiatives undertaken by the department as part of the strategy include the identification of key stakeholders, the monitoring and recording of contact with stakeholders, and the broadening of engagement to include the full range of stakeholders. Additionally, Mr Matthews recommended that the DOI find ways to provide greater access to environmental groups.

In line with the recommendations made in Mr Matthews' interim and final reports, the department released its "Water stakeholder and community engagement policy" in March 2018. The department further amended and re-released the policy in December 2018. The policy sets out the principles applying to all stakeholders and community engagement processes, specifically requiring that engagement activities must be purposeful, inclusive, timely, transparent and respectful.

In particular, the policy requires that the department develop a stakeholder and community engagement plan that identifies "why the consultation is needed, the audiences and groups to be consulted and the methods and information that will be used". It defines a stakeholder as:

> *An individual or group who has a direct interest in or can directly affect or be affected by the actions of the department with respect to a specific issue. The department needs to engage with a different mix of stakeholders on different issues.*

Since the re-release of the policy, the DPIE has established a dedicated water relationships team to support the implementation of the policy. The DPIE website has also incorporated a stakeholder engagement section that lists stakeholder engagement activities.

While these reforms are a step in the right direction, they are not adequate to prevent the exclusivity associated with the IRG. For example, the policy still allows the DPIE to:

> *…use a targeted approach to engagement on issues which have relevance to limited audiences, or where consultation with specific groups who hold detailed knowledge will result in better public policy outcomes.*

The policy also permits two-way consultation and sharing of information between DPIE and key stakeholders "for specific-purpose engagement or to meet a genuine need for participants". In short, such requirements still allow the DPIE to convene an IRG-type group, if such a group were deemed to have detailed knowledge or a genuine need, without any additional probity controls.

The Commission acknowledges that the DPIE requires some flexibility in determining how it engages with stakeholders to ensure adequate consultation while also

achieving its policy objectives. However, unless there is a compelling case for a limited form of consultation, broad consultation should be the DPIE's default position. To help ensure transparency around consultation practices, including decisions to adopt a targeted consultation approach, stakeholder and community engagement plans should be made public.

The Commission also believes it is necessary to support the implementation of the DPIE's "Water stakeholder and community engagement policy". Currently, there is a real risk that the policy will fail given the irrigator-focused approach adopted by water agencies in the past and the powerful representations made by organised commercial interests. The deep divisions between interest groups provides an additional reason for enhancing stakeholder confidence in the DPIE through the provision of scrutiny over the policy's implementation.

The DPIE should introduce an independent level of assurance to support the implementation of its policy. This could be achieved by establishing a program of recurring reviews into the policy's implementation and effectiveness. There are several suitable third parties who could undertake this independent verification role, including a subject matter expert, an existing oversight agency or an external consultancy.

The DPIE did not oppose the making of recommendations 8, 9 and 10 by the Commission, however, submissions made on the department's behalf noted that the implementation of these recommendations are likely to be resource-intensive.

RECOMMENDATION 8

That the DPIE publishes all stakeholder and community engagement plans concerning water management when they are complete.

RECOMMENDATION 9

That the DPIE tasks an appropriately qualified and experienced independent reviewer to conduct, on a recurrent basis, reviews of the steps taken to implement its "Water stakeholder and community engagement policy" and the policy's effectiveness. The independent reviewer should have the function of making such recommendations as they think necessary to ensure that all water stakeholders have their interests heard in a fair, balanced and transparent way.

Recording and making public information about external consultation

The public sector core value of accountability, as set out in Part 2 of the *Government Sector Employment Act 2013*, requires transparency to enable public scrutiny. This includes accurate recordkeeping of consultation and decision-making processes. Poor recordkeeping is often linked to weak governance as it diminishes transparency and accountability.

Mr Hanlon gave evidence that no formal minutes were taken at the IRG meetings, nor were records kept. Mr Hanlon agreed that, in terms of public administration, the need to keep and maintain records was relevant to ensure accountability. He also conceded that it was a mistake for him not to ensure that records would be created and kept.

Following the airing of "Pumped" on *Four Corners*, the DOI acknowledged that there had been a failing concerning recordkeeping. With the benefit of hindsight, Mr Hansen also acknowledged that he did have concerns about the level of recordkeeping in relation to some aspects of the department's engagement with stakeholders. Mr Hansen articulated what he considered the better practice way of using a special reference group such as the IRG, which included the creation of business records documenting the actions of public officials, and not sharing information that provided an advantage to those in the room over others who were not invited.

The DPIE's "Water stakeholder and community engagement policy" suggests that relevant information gathered during the engagement activity will be recorded in its internal document management system.

The DPIE now also records some meeting summaries for key stakeholder engagements on its website. In the interests of transparency and accountability, it should record minutes of all meetings with external water stakeholders and make the identity of those consulted, and the nature of those consultations, public on its website, along with the rationale for including/excluding some stakeholders. By recording meeting minutes, and making consultation details public and readily accessible, biased consultation becomes obvious and more difficult to perpetrate.

RECOMMENDATION 10

That the DPIE develops a model procedure concerning the conduct of meetings with external stakeholders in respect of water management issues that includes requirements to:

- **make records of these meetings**
- **publish meeting details including attendees, organisations represented and meeting agendas, on the water area of the DPIE's website at least monthly.**

Consultation with OEH

The department's unbalanced approach to consultation extended beyond its preferential treatment of irrigator groups and its sidelining of external groups that did not represent irrigator interests. The department also sidelined OEH, the main agency representing environmental interests.

Senior staff within OEH expressed unease at the department's unbalanced approach to consultation. A senior team leader at OEH told the Commission that the department adopted a targeted approach to stakeholder consultation over its last few years (when Mr Hanlon was in charge), with the department selecting the stakeholders with whom it consulted. This team leader identified the selected group as largely representing irrigator interests as opposed to all relevant stakeholders. She also believed that the department consulted less with OEH compared to the irrigation industry.

The OEH's director of consultation programs also informed the Commission that the information his agency received from the department became more restricted and OEH was afforded minimal opportunity for input into key decisions under Mr Hanlon's leadership. For example, requests to receive water-modelling information prior to attending external meetings with the department were denied, despite it being evident that irrigator representatives and external consultants had been given, or were provided briefings on, modelling results prior to these meetings. This practice created a perception that the department had not provided equal information to all stakeholders.

OEH relied on the department's water-modelling information to evaluate proposed changes to water sharing rules and make recommendations to its minister about the proposed changes. While the department typically provided modelling information to OEH in these circumstances, the supporting information needed to interpret and verify the information was withheld.

Similarly, the evidence available to the Commission indicates that the department did not afford OEH the opportunity to have input into the NSW Government's response to the Northern Basin Review (NBR), despite OEH's interest in its outcome. OEH officials were put in the difficult position of being asked to agree with the department's response to the NBR, without having been involved in the background work. Although major policy positions of the NSW Government required approval by the cabinet or the premier, OEH believed it could not provide an informed evaluation of the department's modelling, support its position, or present alternative approaches.

An OEH attendee of the Northern Basin Intergovernmental Working Group meetings from 2014 to 2016, told the Commission that OEH was "largely ignored" by the departmental representative. After a period, the MDBA ceased inviting OEH representatives to the meetings. Ms Morona conceded that it was "possible" that she had instructed her staff to stop inviting OEH representatives to these meetings.

Ms Morona confirmed that she believed the department should be the single agency representing the NSW Government's position on most water issues and that she explicitly excluded OEH from intergovernmental committees and discussions. Ms Morona also stated:

> *…in some instances I had requested that the MDBA restrict their email list to New South Wales members and then the intention was for my team to then disseminate from there to be able to better coordinate.*

In explaining her conduct, Ms Morona noted that, previously, different NSW agencies were represented on intergovernmental committees and "depending on the meeting, fighting it out, and in some cases quite literally". While the Commission accepts that articulating a clear state position is a legitimate aim, the pursuit of this outcome led to environmental agencies being ignored. However, considering the prevailing culture at the department and the absence of any formal guidelines or protocol regarding communication with other government stakeholders, the Commission makes no criticism of Ms Morona's conduct in this regard.

The Matthews investigation recommended that the DOI seek to foster more constructive relationships with stakeholders elsewhere within the NSW Government, including OEH. While the department published its "Water stakeholder and community engagement policy" in response to this recommendation, the policy "does not apply to engagement with other government agencies". This would include the Environment, Energy and Science Group (the predecessor of OEH), which is now part of the DPIE.

Submissions made on behalf of the department submitted that recommendation 11 is unwarranted, arguing that the Commission should consider the strength of its internal relationships at the current point in time. It was also submitted that the Commission's submission about the department's poor relationship with OEH was based on anecdotal evidence. In opposing recommendation 11, it was argued on behalf of the department that it has undergone a significant cultural change since the Matthews investigation, resulting in improved engagement with the Office of Environment, Energy and Science.

The submission on behalf of the department about its cultural transformation supports, rather than undermines,

the Commission's conclusions about the nature of the department's relationship with OEH. Moreover, while it is accepted that collaboration between the environment and industry sections of the DPIE has improved, the Commission believes this relationship ought to be formalised to help protect against any future breakdown.

For the above reasons, the Commission is satisfied that recommendation 11 should be made.

RECOMMENDATION 11

That the DPIE formalises communication, information-sharing and consultation protocols with officers performing the functions of the Environment, Energy and Science Group (formerly the Office of Environment and Heritage).

Safeguarding sensitive and confidential information

The open-release of information goes together with the principle of broad consultation, with the exception that confidential, market-sensitive information should be protected.

The release of sensitive and confidential information to the IRG reinforced perceptions that its members received preferential treatment and this had the potential to undermine the department's reputation and credibility. In releasing the information, Mr Hanlon and Ms Morona placed the department in a position where it had lost control over sensitive information in its possession, creating a risk that such information could be used for improper purposes.

In December 2018 and May 2020, DPI and the DPIE provided training to its staff on managing information in the government context, which covered market-sensitive information and the cabinet-in-confidence convention. The Commission believes such training should be conducted on an ongoing basis.

RECOMMENDATION 12

That the DPIE ensures that its staff are properly inducted and receive ongoing training regarding the responsibilities of public officers in respect of the classification and handling of confidential and sensitive information.

Structural and personnel changes within the water portfolio

The water portfolio was continually restructured over many years. This frequent and ongoing organisational change resulted in poor staff morale and the loss of valuable corporate knowledge that undermined the achievement of environmental outcomes. The relocation of the water portfolio to the industry cluster in 2011 was also indicative of the NSW Government's pro-industry focus. These factors weakened the effectiveness of water management and regulation in NSW.

The location of the water portfolio

Water management in NSW has been influenced by multiple and extensive restructures within the executive branch of government. A NSW Ombudsman progress report, published in November 2017, outlines the various restructures over the last two decades. The report observes that, due to the administrative changes to the water portfolio during this time, the functions associated with water management and regulation have moved between different government agencies close to 20 times. At least eight of these changes were major restructures, resulting in significant staff relocations and retrenchments, and the carving-up of functions. The report concluded that "the impact of these changes on staff, loss of expertise and corporate knowledge, disruptions to systems and strategy, and continuity of service delivery, have been devastating".

This alarming history of departmental restructures has clearly been a destructive force in water management in NSW. It reflects badly on past governmental decision-making over many years in the management of the community's key resource – water.

The backdrop to the Commission's investigation was provided by the 2011 restructure involving the removal of the department, then NOW, from the environment cluster to the industry cluster. This administrative restructure placed a greater focus on the needs of industry than the interests of the environment. As mentioned earlier, in mid-2015, NOW was renamed DPI-W.

The Hon Kevin Humphries confirmed that moving the water portfolio into the industry cluster was a "significant change", resulting in "some changes to policy direction as a result". He also observed that the relocation of the department changed the perception of the portfolio "from one of an environmental focus, to one of a production focus". Mr Humphries believed the change had a positive effect:

> *Moving the water portfolio into the industry portfolio, resulted in a much broader range of views going into water policy, rather than just environmental views. This improved the balance. It was much more inclusive, particularly for the communities. The communities had much greater access to the Minister after the change, no doubt.*

Mr Humphries also expressed the view that, when the water portfolio was in the environment cluster, the security of water for regional towns lacked sufficient focus. Additionally, he believed that the 2011 restructure assisted in securing Commonwealth funding for the water portfolio.

Jeremy Corke, a long-term NSW public official with extensive experience in the area of natural resource management, agreed that administrative changes to the water portfolio were often driven by political views about where the water portfolio should sit, and whether the portfolio should have more of an environmental, natural resources, or an industry focus. He observed that, each time the portfolio moved it, caused significant change and confusion.

Mr Hansen believed that the 2011 administrative changes consolidated the relevant agencies required for regional growth and development. He acknowledged, however, that the 2011 changes adversely affected staff engagement and created cultural problems because the water portfolio had been subject to so many transformations over the previous decade. Mr Hansen also observed that cultural challenges arose when the water portfolio moved to the industry cluster because many staff members had commenced in their roles by joining what was then an environmental department.

While there was a widespread view in the evidence before the Commission that the 2011 administrative restructure created staff morale problems and caused much disruption, there were differing opinions in evidence over whether the placement of the water portfolio within DPI resulted in a degree of conflict in regards to the achievement of environmental objectives. Mr Hansen did not think that there was an inherent conflict in the industry cluster taking the lead regarding the Basin Plan's implementation. He stated that the industry cluster's:

> *strategic prioritisation of enabling job creation and opportunities for economic growth, which mentions maximising productive use of water, would be translated into programs that enhance economic growth through innovation that improve resilience, productivity and drought preparedness.*

On the other hand, Mr Smith, who was accountable for DPI-W as part of his departmental portfolio, believed there was conflict in terms of roles and objectives when the water portfolio was placed into the industry cluster. He observed that it was harder for the state to be the natural steward of water, in line with its legislative obligations, while it was a sub-agency of industry. Mr Smith told the Commission that DPI-W "saw itself very much as the friend of the water user, rather than an impartial administrator of the legislation" and that the 2011 restructure created a risk of "putting the use of water for irrigation above other water use objectives that had equal or higher priority". Such an outcome was problematic, given that the avoidance of environmental damage took first priority in the hierarchy of uses under the WMA.

Mr Smith also expressed the view that:

> *…just as it is structurally sound to have separate ministers for Water and Environment, I thought it would be better to have water administration clearly distinguished structurally and led by someone who was a peer of administration of agriculture rather than reporting to the lead for agriculture.*

NOW lost its financial independence as a result of the 2011 restructure. Prior to this time, NOW reported administratively to the director general of the environment cluster, but was responsible for its own budget and reported to a separate minister. In his statement to the Commission, David Harriss, former Commissioner of NSW Water, observed that pre-2011 arrangements meant NOW was one step removed from the other agencies that were part of the broader environmental department. Additionally, the water portfolio ceased to have a Commissioner for Water as its head a few years after the 2011 restructure; instead, a deputy director general led it, which, according to Mr Hansen, "made external stakeholders and internal staff feel that they had lost some form of their independence".

Personnel changes of 2014 and 2015

During 2014 and 2015, personnel changes within the water portfolio further impacted on its effectiveness.

In April 2014, Mr Humphries took over the regional water portfolio. In 2014, the position of Commissioner for Water, which Mr Harriss had held since 2009, was subsequently abolished, resulting in Mr Harriss leaving the department. Following his departure, the changes continued, and, in early 2015, Mr Hanlon was appointed to the newly created role of deputy director general.

Several witnesses advised the Commission that they noticed a cultural change in the department after Mr Harriss' departure. Various departmental staff members expressed the view that the cultural shift at the department resulted in "brown" instead of "green" views being given priority. The view that a cultural shift occurred was also shared by a senior OEH official.

From an external perspective, Karen Hutchinson, water user representative, observed that Mr Hanlon saw himself as being supportive of irrigators:

> *Q:* *Did you ever hear Gavin Hanlon addressing a meeting of irrigators along the lines of, "I'm here to deliver for you"?*

Ms Hutchinson: *I don't recall specifically, but that – it sounds consistent with Gavin.*

Q: *When you say that sounds consistent, is that how he approached his role or how you understood him to approach his role?*

Ms Hutchinson: *Yes.*

Despite this, several irrigators observed that access to information became more restricted during Mr Hanlon's tenure. This can largely be attributed to a loss of key personnel, which is discussed below.

Internal DPI-W restructure

After his appointment in January 2015, Mr Hanlon implemented an internal restructure, with assistance from human resources staff who were in a division that reported directly to Mr Smith. Mr Hansen described Mr Hanlon as being the "architect" of the overall change management plan; however, the restructure was prompted by an executive remuneration review across the government sector that required all senior positions to be re-evaluated using a new methodology that substantially reduced total remuneration for many positions. The earlier decision to abolish the Commissioner for Water position within NOW also informed the restructure. The restructure was authorised by Mr Hansen, Mr Smith and the head of the human resources function.

The restructure resulted in almost all senior managers and executive directors within DPI-W either accepting redundancies or being made redundant. There were also fewer available senior executive positions within the DOI, as targets or quotas were set for each area including DPI-W. New executive directors were appointed from outside of DPI-W. In total, 22 senior officers were made redundant or accepted redundancies, and nine or 10 new executive directors (mostly outside DPI-W) were recruited. DPI-W staff were unimpressed by the restructure and a certain level of cynicism prevailed over whether top appointments were merit-based at DPI-W.

As secretary of the DOI, Mr Smith was ultimately the most senior officer who authorised the DPI-W restructure. He told the Commission that concerns about Mr Hanlon's attitude towards the water portfolio were brought to his attention after the internal restructure, although these views were not expressed to Mr Hanlon at the time. In relation to these concerns, Mr Smith stated:

> *… These were views that he* [Mr Hanlon] *was creating an unbalanced organisation, as too much knowledge and experience was going out the door and that this resulted in an organisation that was not standing up for all of the water use categories as outlined in the legislation. In retrospect, this feedback was probably right. At the time it was made by people who had been made redundant. Redundancy can lead to bitterness, and the feeling of being unjustly removed. I think I was trying to balance that with the content of the feedback and gave Mr Hanlon the benefit of the doubt.*

Administrative changes from 2016

As detailed in chapter 8, in 2016, the department's compliance function was moved to the newly created WaterNSW, which created the potential for a conflict of responsibilities by placing water regulation in the area responsible for advancing water use and assisting irrigators.

In late 2017 and early 2018, following the release of Mr Matthews' interim and final reports, what remained of the water portfolio within DPI-W was moved again. It was relocated into a Crown lands and water division, within the industry cluster. A separate Natural Resources Access Regulator (NRAR) was also established as part of this division. Following the 1 July 2019 machinery of government changes, NRAR now sits in the planning, industry and environment cluster. In April 2020, the DPI was moved from this cluster to the newly created Department of Regional NSW. The water portfolio, however, remains in the planning, industry and environment cluster.

Commission observations

The water portfolio was adversely impacted by numerous administrative restructures. Significant concerns arising from the restructures included:

- the pro-industry focus of the water portfolio after NOW was transferred to the industry cluster
- disruption to systems resulting from constant change, undermining the continuity of the department's responses to stakeholders and weakening enforcement systems
- substantial loss of corporate knowledge arising from key personnel changes
- internal cynicism and low staff morale caused by change fatigue
- momentum for change dissipating due to constant restructuring.

The continual administrative restructuring of the water portfolio over a long period compounded any disruption caused by specific restructures. Ultimately, the relocation of the portfolio and the sidelining of OEH, combined with the poorly executed restructure resulting in the loss of skills/acumen, created a risk of "capture" by industry groups.

The placement of the water portfolio within the industry cluster was an intentional move designed to provide a greater focus on the interests of industry. Although there is some dispute among witnesses concerning whether this shift in focus compromised the portfolio's effectiveness, the numerous weaknesses in the management of water identified by the Commission's investigation and various external reports, make it clear that the department's transfer to the industry cluster diminished the state's ability to fulfil and implement its environmental obligations. The lack of regard given to environmental obligations undermined public faith in the proper functioning of government.

Given the widespread disruption experienced in the portfolio over the last two decades, the Commission is reluctant to recommend that the agencies responsible for water management in NSW be relocated again.

Nevertheless, having regard in particular to the now lengthy history of failure in giving proper and full effect to the objects of the WMA (and to the water management principles and the water sharing principles prescribed by the WMA), the 2019 machinery of government changes (resulting in the absorption of the environment portfolio into the DPIE) once again is a cause for concern.

Specifically, the incorporation of OEH into a mega department has the potential to limit the capacity for environmental issues to have a strong and independent voice within the NSW Government's administrative arrangements, particularly given the order of portfolios within the DPIE. The legislative scheme established by the WMA, on any analysis, requires a specialist capacity, as well as skilled personnel and a governance structure, that is capable of driving both the legislative intention behind and the terms of the WMA.

A further issue arises as to whether the personnel changes at the department brought a different attitude to public administration that was reflective of a deeper transformation across the public sector. An emerging trend in the public service is the transition to making government services more customer-focused. This approach has seen a shift away from the traditional form of public administration to a more diffused form of public management and networked governance, which is marked by decentralisation with public officials having greater discretion to meet entrepreneurial goals. Although such transformation may carry some benefits, including the development of innovative approaches, the integrity of public sector administration will be undermined if new recruits are not aware of public sector values. Public officials should continue to be guided by legislation, ethical frameworks, professional norms and a broad notion of the public interest that extends beyond the interests of one particular group of stakeholders.

The DOI undertook a cluster-wide ethical transformation initiative after the allegations of improper conduct were aired on the *Four Corners* program. The initiative included ethics training and the provision of an external whistleblowing service for employees and community members to report allegations of fraud, misconduct and corruption. The DOI also scoped a "behaving ethically" framework to connect the ethics activities undertaken to date with any additional activities that may be identified.

The Matthews investigation also recommended that the DOI consider a range of additional ethics measures, including the need to explain to new staff the ethical obligations of the public sector. The Commission supports this recommendation and understands that DPIE has taken steps to implement it. The issue of ensuring the DPIE meets its legislative mandate has been partly addressed in recommendation 1.

The permanent recruitment of Ms Morona to the director of intergovernmental strategic stakeholder relations (DISSR) role

Ms Morona's DISSR position was originally created as part of the departmental restructure. As outlined in chapter 11, Ms Morona's permanent appointment to this role was problematic in several respects; undermining perceptions that the recruitment was based on merit.

The recruitment of public sector senior executives is subject to the NSW Government Sector Employment (General) Rules 2014 ("the GSE Rules") concerning merit-based employment. Recruitment processes demonstrate merit through ensuring decisions are based on an assessment of the capabilities, experience and knowledge of a candidate against pre-established standards. Merit is also established through ensuring a process is impartial, which is demonstrated through the adoption of an open and robust approach that guards against any pre-existing biases.

While the decision to engage a candidate for the DISSR role from a political background with links to the irrigation industry was not in itself improper, it was crucial that the recruitment process be conducted in an accountable and transparent manner to counter any perceptions of bias. Similarly, given that Mr Hanlon selected Ms Morona as a contractor for the DISSR role prior to her permanent appointment, and that he had approached her directly, it was important that the integrity of the recruitment process was maintained to ensure that an incumbent was not favoured.

Mr Hanlon controlled the recruitment process for the permanent DISSR role. He culled the applicants with

minimal, if any input, from the other two members of the selection panel. This was concerning, as it was the only exercise that involved assessing multiple candidates. When asked whether it would have been prudent to interview more than one candidate, Mr Hanlon response suggested a preference for incumbents:

> *Well, it depends from what perspective. If it's from the perspective of someone's in the job, doing a great job, times are tough, we advertised already, we only had a small number of candidates and only one other that may have been worth interviewing. It was put to me as a general rule in the public service by one of my senior colleagues that any, if you're going to replace an incumbent, the new person has to be at least 20 to 30 per cent better than the incumbent because it takes time for them to get up to speed and all the rest of it. There was no one there that even came close to Monica let alone being ahead of Monica.*

Mr Hanlon's culling exercise was also not based on clear standards or ratings but adopted a poor differentiation methodology that did not score candidates. Consequently, the exercise lacked consistency.

Moreover, the option to re-advertise and/or redefine the position was not considered, despite the selection of only one candidate for interview. This was an available choice to consider given the position was only advertised for eight days, which was a short period, given its seniority.

An additional concern was the red-flag raised by the Futurestep consultancy report into Ms Morona's appointment, suggesting she was a limited fit for the role. While the Commission makes no criticism of Ms Morona's capacity to perform the DISSR role, the report provided a chance for the department to take a step back and consider whether the decision to appoint Ms Morona was sound or at least to pursue the issues raised with her referees. Instead, the selection panel's report failed to address the negative aspects of the assessment. Although Mr Smith did, initially raise concerns regarding Ms Morona's appointment, partly as a result of the Futurestep assessment, the consultancy report represented a missed opportunity for the department.

Mr Hanlon acknowledged to the Commission that some people could have perceived Ms Morona's appointment as a forgone conclusion:

> *Q: Do you think some people could see it as a matter of you working backwards from a forgone conclusion that she would get the job and— -?*
>
> *Mr Hanlon: Well, some people could certainly see it as that but as I said, I was half expecting, giving the Secretary questioned a lot of things I did, I was expecting him to say, "No."*

The weaknesses in the recruitment exercise undermined the integrity of the process. The flawed process, coupled with Ms Morona's known links to the irrigation industry and her pre-existing relationship with Mr Hanlon prior to commencing at the department, which he neglected to formally declare, left the department open to the perception that her appointment was a result of partiality.

The NSW Public Service Commission publishes a range of tools to provide guidance on better practice public sector recruitment. This information provides advice, in the form of digital content, about the appropriate use of psychometric assessments, pre-screening candidates, developing shortlists and scoring assessments.

It was submitted on behalf of the department that the recruitment process for Ms Morona was procedurally correct. The submissions acknowledged, however, that the department's recruitment processes and procedures are being continually refined to include best practice. The DPIE is also currently developing a hiring manager guide and requiring a recruiter to lead hiring managers through recruitment processes.

RECOMMENDATION 13

That the DPIE reviews its recruitment policies and procedures to ensure that they are consistent with the Government Sector Employment (General) Rules 2014 rules and best-practice guidance provided by the Public Service Commission. Particular attention should be given to ensuring that:

- **job advertisements run for enough time to allow the market to be tested**
- **hiring managers undertake the Public Service Commission's recruitment training**
- **more than one member of a selection panel participates in the cull of candidates, unless exceptional circumstances exist**
- **clear guidance is provided about the relevance of any independent reports assessing the suitability of candidates.**

Regulatory failure in compliance and enforcement

All markets require regulation. At its most basic, regulation is needed to establish property rights, and the framework to enforce them. In the water market, regulation is needed to prevent resource overuse and to facilitate trade.

The water market is a "cap and trade" system, whereby water use is capped to protect the environment and water users are allocated a percentage share of the remainder. Licence-holders can trade their allocated water rights to other licence-holders via the market, subject to various restrictions usually intended to minimise impact on other users and the environment. Such a market system requires consistent and significant government oversight to operate effectively.

Water market regulation is critical to provide assurance, and therefore confidence, that water allocations are being adhered to and, consequently, that the resource is being properly managed. Without this assurance, there is no incentive to trade, since water users could illegally exceed their allocations more cheaply than buying water via the market. Where water users can exceed their allocations, the resource also risks unsustainable depletion.

In order to ensure compliance with allocations and extraction rules, the water market fundamentally requires:

- accurate measurement of extractions (that is, effective water meters)
- a compliance and enforcement regime to ensure market participants adhere to extraction rules and limits.

The Commission's investigation revealed significant concerns about the effectiveness of regulation in the state's water market. These are discussed below.

Metering

Although accurate and functioning water meters are essential for the measurement of water take, the evidence available to the Commission suggests that water users in NSW generally did not have meters installed that met required metering standards, particularly in the Northern Basin. In the Barwon-Darling, water meters were widely acknowledged to have been non-existent, broken or tampered with, or otherwise inaccurate. While most large water users had "time and event" meters installed, these were outdated and recorded only pumping duration (not the volume pumped) and could be easily tampered with. Such meters also had to be read manually, which government agencies undertook biannually. With long periods between meter readings, many were frequently suspected of not recording extractions.

Since 2007, the NSW Ombudsman has four times investigated compliance and enforcement failures in the water portfolio. The latest 2018 summary report found that the department had failed to ensure that water meters met minimum metering standards, which undermined compliance efforts. In one matter, allegations that a water user extracted far in excess of their allocation could not be substantiated since water meters were not operating properly; likely due to meter tampering and manipulation. The MDBA's 2017 compliance review noted that, in NSW, "water compliance is bedevilled by patchy metering, the challenges of unmetered take and the lack of real-time, accurate water accounts".

To effectively regulate the water market, Australian-standard meters must be installed on licensed pumps across the state; this is presently underway. In 2018, in response to the Matthews investigation, the NSW Government passed "no meter, no pump" legislation, requiring water users to have a working meter as a prerequisite for extractions. Such meters are required to be telemetered (remotely monitored), thereby overcoming the need for manual inspection. NRAR is currently using telemetry, satellite imagery and drones to improve its capability to detect breaches of water rules.

While implementation of these measures is not straightforward and will take some time to complete (it is presently envisaged that complete metering rollout will be completed by 2023), they are essential to prevent water theft and restore public confidence in the water market. The Commission fully supports these initiatives.

An inadequate compliance and enforcement regime

An effective compliance and enforcement regime is also vital to ensuring water users adhere to their allocations. A compliance and enforcement regime is a coercive system designed to ensure users comply with market rules. For the water market, this involves monitoring extractions to ensure they comply with allocations, as well as other extraction rules (such as cease-to-pump heights or embargos) and imposing penalties to discourage non-compliance.

NSW lacked an effective compliance and enforcement regime for almost two decades, with the effect that, even when detected, serious breaches of water law, went unpunished. The first two of the four investigations that the NSW Ombudsman conducted into water management spanned the periods from 2006 to 2009 and 2011 to 2013 respectively, and found that the state's compliance function was in disarray. For much of these periods, and likely for some time beforehand, the relevant agency lacked even basic systems for managing its compliance activities. There were no policies, no monitoring of compliance, no system for logging and responding to alleged breach reports, no compliance strategy, poor recordkeeping, a lack of qualified or experienced staff, and deficient management oversight. These failures caused severe delays in investigating and taking enforcement actions, leading the NSW Ombudsman to conclude that they "potentially affected the integrity and reputation of the

Department and undermined public confidence in the water regulation system".

In its most recent investigation into the department and WaterNSW (2016–2018), the NSW Ombudsman found similar evidence of poor decision-making, failure to follow policy and legislation, poor recordkeeping, unreasonably slow investigations, and a lack of will by senior staff to undertake enforcement action despite repeated breaches.

In 2017, the Matthews investigation also found that the overall standard of compliance and enforcement in NSW was weak and ineffectual. Additionally, the investigation obtained evidence of a culture that ignored unethical behaviour and prioritised expedience over proper process. As a result, a number of allegations of serious non-compliance had been left unresolved for too long. This was particularly problematic since the WMA imposes a three-year limitation period on prosecutions.

The MDBA also found NSW to be deficient in its compliance activities. Despite having the greatest number of licences (over 21,000) and the highest licensed volume of extractions (5,700 GL) spread over the greatest geographical area, NSW conducted relatively little enforcement activity. For example, in 2016–17, NSW issued far fewer warning letters and notices (44) compared to South Australia (355) or Victoria (562).

Explaining the failures: change, cost and commitment

The water regulatory system in NSW, and indeed the Commonwealth, is exceptionally complex. Not only are the relevant state and Commonwealth water Acts and Regulations long, detailed and interdependent, there are many different WSPs, each with unique and contingent rule settings and historical precedents. Monitoring and enforcing compliance with market rules is therefore a significant challenge. Offences are often difficult to investigate, and harder to prove. As the limitation period for prosecutions is only three years, compliance and enforcement regimes must be highly efficient to commence prosecutions in time.

A dedicated water compliance and enforcement function was established in NSW in 2004 following commencement of the WMA. Prior to this, the then Department of Land, Water and Conservation had few regulatory responsibilities and saw itself more as a facilitator for industry rather than a regulator of water. The change meant the department had to develop a strong regulatory capacity for a new and complex market from scratch, while attempting to fundamentally change its pro-industry culture/approach to water management.

NSW's compliance and enforcement functions have also endured a significant amount of organisational change. As discussed earlier, in the past two decades, responsibilities for managing the state's water resources have been restructured (specifically, moved between agencies) many times. There have also been numerous internal restructures over this period. Such frequent and significant change has seriously undermined the NSW Government's ability to manage its water resources; in particular via effective regulation.

Compliance and enforcement have also been chronically underfunded by the NSW Government for over a decade. In its series of investigations, the NSW Ombudsman repeatedly found serious under-resourcing of compliance and enforcement functions. For example, between 2011 and 2016, expenditure on compliance and enforcement was almost $10 million (30%) less than recommended by the Independent Pricing and Regulatory Tribunal of NSW (IPART). In comparing states, the MDBA's 2017 compliance review reported that NSW had a comparatively low level of compliance resourcing, compared with other Basin States (except Queensland), despite having the greatest number of licences and the highest licensed volume of extractions spread over the greatest geographical area.

Despite repeated warnings, NSW's underfunding of compliance and enforcement demonstrated a lack of commitment to effectively regulating water take. This was particularly evident in the department's failure to fund the Strategic Investigations Unit, the team of specialist compliance officers whose focus was investigating and enforcing serious breaches of water laws. It was also evident in the transfer of most of the department's compliance functions to WaterNSW, which led to a 72% drop in total enforcement actions taken by both agencies compared to the 12 months immediately prior. As the MDBA noted:

> *Without a commitment to the function, compliance has no voice in an organisation's budget debate; the work does not attract the interest and attention of management; and the necessary systems and transparency are not developed.*

In response to a long history of failures in the state's regulatory regime, the Matthews investigation recommended the creation of a dedicated, independent water regulator to take over all water regulation responsibilities from both WaterNSW and the department. The NSW Government established NRAR in response to the Matthews investigation and it commenced operations on 30 April 2018. Although it has been in place for a relatively short time, its effect has been positive with a marked increase in compliance action, including prosecutions.

The DPIE informed the Commission that the NSW Government has been supplementing NRAR's regulated price revenues with consolidated funding allocations since its inception. The supplementary funding was necessary, as NRAR adopted a more active approach to compliance management than was forecast by the NSW Government during the last IPART review in 2016. IPART is due to complete the next review of NRAR's compliance activities in June 2021.

Although the NSW Government has supported the robust establishment of NRAR through supplementing price revenues in recent years, the Commission has residual concerns that NRAR will not remain properly funded in the longer-term, given the historical lack of expenditure on water compliance activities.

RECOMMENDATION 14

That the NSW Government guarantees NRAR's funding, at least to a level equivalent to IPART recommendations, over the long term.

A need for greater transparency

Transparency is not only a natural antidote to corruption, but also to perceptions thereof. Perceptions that the government is colluding with industry can be assuaged where compliance action is published. Moreover, where the distinction between compliance and non-compliance is clear and transparent, the public can have greater confidence that violations will be identified and action taken.

Periodically publishing the number and type of compliance activities undertaken is one method of keeping regulatory agencies accountable. It also provides assurance to the public that the compliance and enforcement regime is working to penalise breaches. Such an approach has been in place in South Australia since 2014, and was recommended for NSW in Mr Matthews' interim and final reports. NRAR is now publishing data on its compliance activities, including prosecutions, on its website. The Commission supports this initiative.

Transparency and accountability would be further improved if non-compliance were more easily identified. Presently, it is not possible for members of the public to determine whether water is being, or has been, extracted from a water source legally because water account information, including water entitlements and account balances, are not publicly available. The Matthews investigation recommended making such water account information publicly available so the public could easily determine whether water was being used legally. However, a review commissioned by the DPIE into this recommendation found that, while doing so would make identifying illegal water use easier, it was not a workable solution because:

- it would expose commercially sensitive information, such as water use, trade strategies, and individuals' need for water, and therefore impair the market operation
- implementing systems to enable real-time reporting of water account holdings and use would be expensive with costs unlikely to exceed benefits
- other states and territories do not have such "full disclosure" measures in place and neither do other comparable trading markets
- the link between full disclosure and public confidence in the market is not clear and may fall if complaints are not quickly and transparently followed up.

Instead, the review recommended that aggregated water account-holding information be made publicly available with individual-level information only available to NRAR. Given that this approach would increase the transparency of water account information, and therefore aid detection of illegal water use, but also protect commercially sensitive information, the Commission supports the review recommendation.

The DPIE, WaterNSW and NRAR have taken steps to implement the review recommendation, including:

- the publication of telemetry specifications, which allow meters to transmit data directly to the NSW Government, and the introduction of a metering regulation and policy in December 2018, providing for more robust metering requirements
- the introduction of a data acquisition service to collect and store water data
- negotiating a data-access agreement between the DPIE-Water, WaterNSW and NRAR to set out NRAR's access to data from telemetered meters
- amending WaterNSW's operating licence to allow NRAR to access metering data
- commencing the development of a one-stop-shop to provide access to de-identified information on water entitlements and take.

RECOMMENDATION 15

That the DPIE periodically publishes aggregated water account information on its website and makes individual-level data available to NRAR.

These recommendations are made pursuant to s 13(3)(b) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") and, as required by s 111E of the ICAC Act, will be furnished to the DPIE, NSW Government and the responsible minister.

As required by s 111E(2) of the ICAC Act, the DPIE and NSW Government must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations, whether they propose to implement any plan of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, the DPIE and NSW Government are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website at www.icac.nsw.gov.au.

Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption that had been revealed in, inter alia, various parts of the public sector, causing a consequent downturn in community confidence in the integrity of the public sector. It is recognised that corruption in the public sector not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The Commission's functions are set out in s 13, s 13A and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

i. corrupt conduct (as defined by the ICAC Act), or

ii. conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

iii. conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur.

The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Electoral Act 2017*, the *Electoral Funding Act 2018* or the *Lobbying of Government Officials Act 2011*, where such conduct has been referred by the NSW Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, where appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in serious corrupt conduct.

The role of the Commission is to act as an agent for changing the situation that has been revealed. Through its work, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within

the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and *the Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

Appendix 3: Summary of responses to adverse findings

Section 79(A)(1) of the ICAC Act provides that the Commission is not authorised to include an adverse finding against a person in a report under s 74 unless the Commission:

- has first given the person a reasonable opportunity to respond to the proposed finding, and
- includes in the report a summary of the person's response that disputes the adverse finding, if the person requests the Commission to do so within the time specified by the Commission.

Counsel Assisting the Commission made written submissions setting out, among other matters, what adverse findings it was contended were open to the Commission to make against relevant persons and entities.

These were provided to relevant parties on 27 March 2020.

The Commission received written submissions in response from nine parties between 22 April and 18 June 2020.

The Commission considers that all relevant parties had a reasonable opportunity to respond to proposed adverse findings.

Where adverse findings have been made in the body of this report, submissions made in response by individual parties to that finding have been included, if requested by the party or if the Commission determined it was otherwise necessary or appropriate to do so.

I·C·A·C

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AGAINST CORRUPTION

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