

Reporting framework for significant water management decisions involving discretion

**To address Murray–Darling Basin Compliance Compact
priority action 1.2 a)**

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More information

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Introduction

The purpose of this reporting framework

The Murray-Darling Basin Compliance Compact (the Compact) is a collaborative, joint commitment by the Australian Government and Basin States that aims to restore public confidence in water resource management in the Basin. The Compact provides a comprehensive response to various reviews into compliance and the integrity of Basin water management, including the Murray–Darling Basin Water Compliance Review (November 2017) and the interim and final reports of the independent investigation into NSW water management and compliance by Ken Matthews, AO, (September and November 2017).

The Compact sets priorities for action and commits the Australian Government and Basin States to work plans that will be reported on regularly and publicly. The Compact states that transparency and accountability are essential elements of a successful compliance culture. Regulatory transparency and accountability build public confidence in both the legitimacy and fairness of water sharing and extraction arrangements, and the consistent application of those arrangements.

One of the Compact's priority actions, action 1.2 a), states:

'Each Basin State will publish a reporting framework for identified significant water management decisions involving discretion (e.g. the granting of exemptions to water take rules and retrospective approvals for unlicensed illegal works) and commence reporting in accordance with this framework. Decisions made should be published in an easy to access, searchable format (e.g. on a register) and in a timely manner as per timeframes in reporting frameworks.'¹

This framework document describes how NSW will address priority action 1.2 a) by reporting significant water management decisions involving discretion.

Roles and responsibilities for water compliance in NSW

The NSW Department of Industry (the department), WaterNSW, and the Natural Resources Access Regulator (NRAR) are the three organisations with responsibility for water management decision-making, along with the Minister for Regional Water.

- The department is responsible for surface and groundwater management, including ensuring water security for NSW. Through planning, policy and regulation, the department provides for the equitable sharing of surface and groundwater resources to support environmental, social cultural and economic needs and values, and ensures that water entitlements and allocations are secure and tradeable.
- WaterNSW is a state-owned corporation established under the *Water NSW Act 2014* (NSW) and is NSW's bulk water supplier and system operator for NSW's surface water and groundwater resources. WaterNSW also plans, develops, owns and operates infrastructure solutions for water supply security and reliability and conducts customer-facing functions such as the issuing of licences, approvals, delivery of water and billing.
- The NRAR has been established under the *Natural Resources Access Regulator Act 2017* (NSW) to manage compliance and enforcement under the *Water Management Act 2000* (NSW) (the WM Act) and *Water Act 1912* (NSW). The NRAR has powers for investigations and other strategies as part of providing effective and efficient regulation, and determines when to commence prosecutions or use other enforcement tools in the event of non-compliance. The NRAR monitors compliance with water licence conditions and also monitors the compliance of works which could degrade a water source or impact other water users. The NRAR also issues licences to major utilities and issues approvals for activities that are carried out in, on, or beside rivers, lakes and estuaries.

¹ Murray–Darling Basin Compliance Compact; www.mdba.gov.au/sites/default/files/Basin-Compliance-Compact-180702-D18-31184.pdf

Significant water management decisions involving discretion

This framework sets out how the NSW Government will report on “...significant water management decisions involving discretion...” As identified by the Compact, this could include water management decisions taken by the department (for example, the granting of exemptions to water take rules) and licensing and approval decisions taken by WaterNSW and the NRAR (including reviewing previously unlicensed or approved works).

The WM Act is the governing legislation for water management in NSW and is the governing legislation for water management in NSW. The WM Act was reviewed to determine which decisions taken by the three organisations could be considered to be significant decisions involving discretion.

General exemptions to water take rules are granted through the *Water Management (General) Regulation 2018*. The NRAR and WaterNSW can impose discretionary conditions on a licence, but consider that these discretionary conditions are not equivalent to the granting of an exemption. They have therefore not been included in this framework.

The review determined that the following decisions involving discretion, specific to each of the organisations, are significant and should be reported on a published register, unless the decision is already available on a readily searchable and well-established public location (such as the NSW Legislation website).

This framework captures and will include relevant decisions that are made by the Minister for Regional Water (or the minister’s delegate).

NSW Department of Industry

The Minister for Regional Water and the department (under delegated authority) make a range of decisions and orders that have broad implications for water users and water resource management across the state or across a water source.

- The making, amendment or repeal of regulations, ministers’ plans, or similar decisions are published as made on the [NSW Legislation website](#).
- Harvestable rights orders, access licence dealings principles or similar enduring instruments are published in the [NSW Government Gazette](#) and are also be published on the [department’s website](#).
- Available water determinations are published as made on the [department’s website](#) on an established register.
- Controlled allocation orders will be published on the [department’s website](#) as made.
- Temporary water restrictions, suspension or reactivation of management plans or plan provisions; and major decisions relating to trade or similar decisions that have immediate but temporary impacts on the rules that govern the management, take, or use of water resources; will be published as made in a new register on the department’s website.

WaterNSW and the NRAR

- WaterNSW and the NRAR will report the granting of licences and approvals to existing activities and works that are unlicensed or unapproved (see below) in a new register on the department’s website.
- WaterNSW publishes supplementary water orders on its website as made.
- The NRAR will publish other relevant decisions and determinations, such as significant enforcement decisions, on its website.

Existing activities and works that are unlicensed or unapproved

After a licence or approval application is made for an existing activity or work that is unlicensed or unapproved (and should have been licenced or approved in accordance with legislation), and after any relevant compliance notification and enforcement measures have been considered, a licence or approval is granted from the date at which an assessment is made that the application and works meet the legislative requirements for issuing the approval. The same procedures and criteria for assessment are applied to the approval application as for any other application for approval or licence.²

For licences and approvals that are the responsibility of WaterNSW, WaterNSW will notify the NRAR where it is determined that a licence or approval should have been but was not in place. If an alleged breach is detected by the NRAR (including by notification from WaterNSW), the NRAR will examine the circumstances of the alleged breach. NRAR policy and procedure requires that all alleged breaches of legislation are recorded and addressed through its alleged breach notification process.

Once it is established that a breach of the legislation has occurred, the NRAR will employ a graduated and proportionate approach to the breach, based on its severity (its impact on the environment and potential harm to people or property) and the regulated entity's culpability, cooperation and approach to the breach.

Every breach that is detected requires a decision on what response to take. In the case of unlawful activities associated with a licence under NRAR's jurisdiction, the enforcement action taken to address the breach would be addressed before any consideration of the granting of a variation to a licence is given.

The majority of approvals issued by the NRAR are for controlled activities, which the WM Act defines as activities that are carried out in, on, or beside rivers, lakes and estuaries.

Procedures and guidelines are in place to ensure that NRAR officers consistently process approval applications in accordance with NRAR policy.

The NRAR may issue an approval for an existing unlicensed work, but must first ensure that the matter has been dealt with in accordance with the NRAR Alleged Breach Notification procedure. Licensing in these circumstances will only occur in conjunction with an appropriate enforcement investigation, which may result in enforcement action and require associated remediation activities.

Register of significant water management decisions involving discretion

Where a record of the relevant decision is not readily available through an existing and searchable public platform (such as the NSW Legislation website), the department will publish a register of significant water management decisions involving discretion on its website.

The register will include:

- the date of the decision
- decision type
- decision circumstances and brief description
- if the matter has been notified to, or identified by, NRAR (if applicable).

² A reference to existing activity or works that are unlicensed or unapproved does not involve structures that were legal under the rules of the day when they were built but, due to subsequent changes to legislation, may now require a formal approval process if they were to be built today. Some water users voluntarily may take the option of having these pre-existing structures assessed against the new rules.

The department and the NRAR will commence reporting in accordance with this framework in the last quarter of 2018. The register will be updated quarterly except where there are real-time operational implications such as temporary water restrictions.

WaterNSW processes a significantly higher number of licence applications and will therefore need more time to prepare systems and processes to allow reporting. WaterNSW will commence reporting in accordance with this framework from 1 July 2020 for decisions made during the previous water year of 1 July 2019 to 30 June 2020. The register will be updated annually at the end of each subsequent water year.