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General of
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Compliance

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Inspector-General of Water Compliance
GPO Box 3090 Canberra ACT 2601

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Acknowledgement of the Traditional Owners of the Murray-Darling Basin

The Author pays respect to the Traditional Owners and their Nations of the Murray–Darling Basin. We acknowledge their deep cultural, social, environmental, spiritual and economic connection to their lands and waters.

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Introduction

The Inspector-General of Water Compliance is developing a Regulatory Policy. This Regulatory Policy will provide guidance and clarity to stakeholders around the Inspector-General's general approach to performing his regulatory responsibilities.

This Discussion Paper aims to establish a framework and principles to guide the development of the Regulatory Policy. Submissions in response to this discussion paper are intended to inform and refine the Inspector-General's Regulatory Policy.

Background

The Inspector-General of Water Compliance is a statutory office holder established under the *Water Act 2007 (Cth) (the Act)*.¹ The Act was amended to establish the Inspector-General in August 2021 as part of the Murray-Darling communities package.²

The package focus is on putting communities into the centre of the regulation of Murray-Darling Basin (Basin) water resources. In this context, the stated intention of the role of the Inspector-General is to improve the public's trust in, and visibility and accountability around the institutions with responsibility for managing Basin water resources. Rebuilding this trust is underpinned by, among other things, ensuring that approaches to enforcing compliance with relevant laws are transparent, independent and of the highest standards.³

The Inspector-General has novel regulatory responsibilities and powers for a Commonwealth regulator. The Inspector-General brings together both the oversight of government agencies role of other inspectors-general, along with an enforcement role.

This paper sets out how the 2021 reforms and the current legislative frameworks and institutional arrangements for the management of Basin water resources are expected to inform and guide the Inspector-General's general approach to performing these functions, which will be set out in his regulatory policy.

Please note, this paper sets out the intention behind the regulatory frameworks and should not be taken to infer a legal interpretation or position. This paper has therefore been provided on a no-prejudice basis to inform feedback from interested and affected stakeholders.

Importance of the Basin

The Basin region is defined by the catchment areas of the Murray and Darling rivers and their many tributaries. It is Australia's most significant geographic region (refer to Figure 1: Importance of Murray-Darling Basin); covering over 1 million square kilometres (14 percent of mainland Australia) and being home to about 10 percent of Australia's population (2.3 million people).⁴

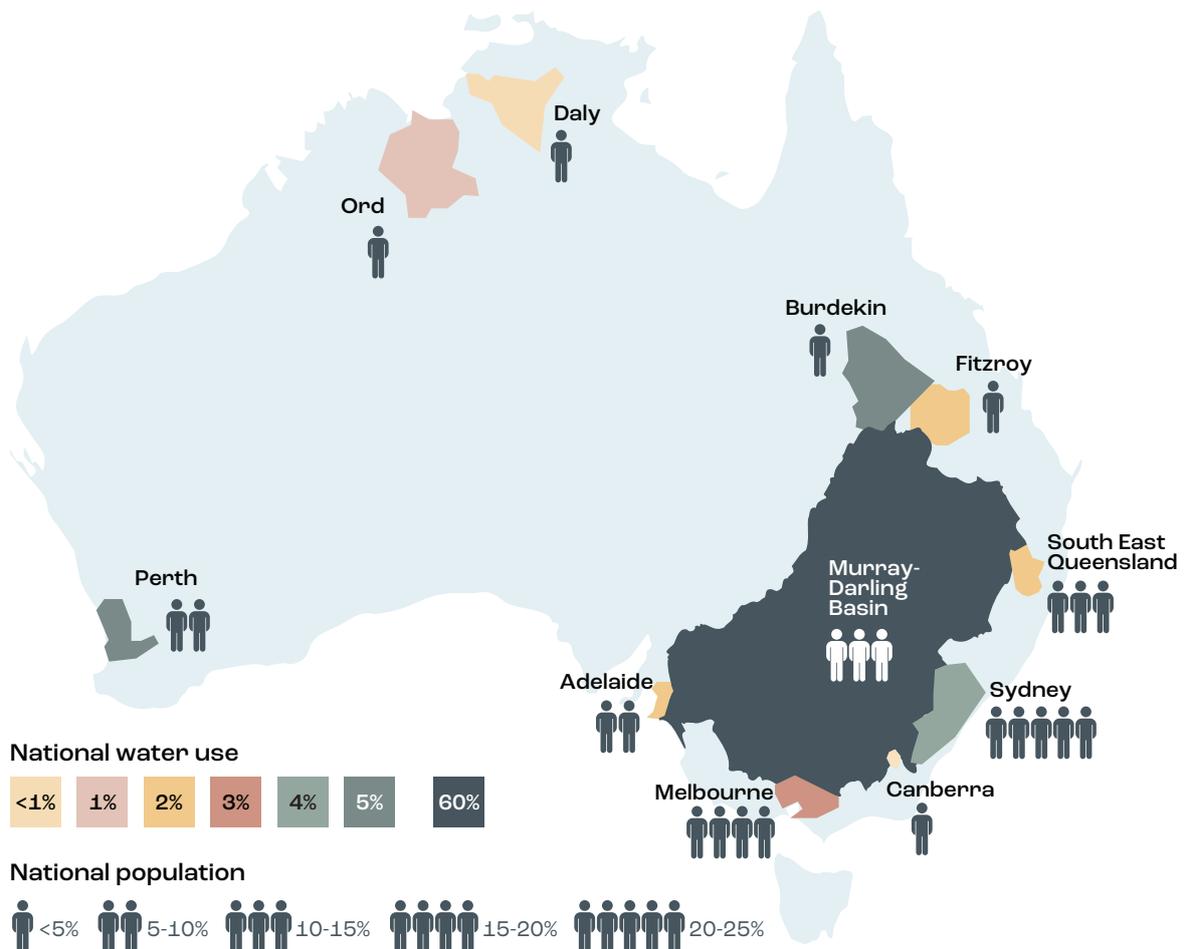
The Basin is one of the more productive agricultural regions in Australia containing 40 percent of all Australian farms by number. The Basin makes up 70 percent of Australia's irrigated land area, accounts for 55 percent of Australia's water use, produces \$22 billion worth of food and fibre and \$11 billion dollars are spent on tourism in the Basin annually.⁵

The Basin contains over 30,000 wetlands, including 16 Ramsar listed wetlands, which are wetlands classified in accordance with the *Convention on Wetlands of International Importance* (see *Objective: Giving effect to relevant international agreements* for further details).⁶ The region also contains over 100 wetlands of national importance, as listed in the *Directory of Important Wetlands in Australia*.⁷ Many of these sites are also significant to Aboriginal and other local communities.⁸

Today there are over 40 First Nations within the Basin, who are Traditional Custodians of its lands and waters. There are at least 10 thousand known First Nations sites, indicating the deep physical, economic, and spiritual dependence of First Nations peoples on its rivers, creeks, lakes, and wetlands.⁹

The water resources in the Basin are highly developed. On average, more than 40 percent of the total surface water runoff in the region is diverted for consumptive or environmental management purposes. In addition, approximately 1.8 million mega litres of the region's groundwater resources are extracted each year from a small number of large aquifers, mainly for agricultural use.¹⁰

Figure 1: Importance of Murray-Darling Basin



Source: Bureau of Meteorology, *National Water Account 2021*, <http://www.bom.gov.au/water/nwa/2021/> (accessed 29 November 2022).

Matters for inclusion in regulatory policy

The statutory role of the Inspector-General was established to deliver trust and transparency around the management of Basin water resources. The Inspector-General considers that his role ensures the highest standards of accountability in the national interest for all involved in the use and management of Basin water resources.¹¹ The Inspector-General intends to reflect this in his regulatory policy.

Specifically, the Inspector-General's regulatory policy will set out his broad approach to performing functions, using powers and other regulatory actions. The Inspector-General's regulatory policy will be underpinned by relevant legislative frameworks and clearly articulated principles, which are detailed in this discussion paper.

The Inspector-General intends for this paper and his regulatory policy to provide clarity around how the legislative frameworks will be applied by the Inspector-General and staff supporting the Inspector-General. It is further intended that the regulatory policy will provide clarity around when the Inspector-General's regulatory powers will be used and what factors will be considered through the use of those powers. The Inspector-General will also consider, as part of developing his regulatory policy, whether additional material may be required.

Nothing in this paper on the regulatory policy should be taken to infer restrictions on how and when the Inspector-General performs his functions or exercises his powers under the Act.

Matters for feedback on this paper

Areas where the Inspector-General is seeking specific feedback will be included in text boxes, such as this one.



Institutional context

The Inspector-General of Water Compliance brings together the government oversight role of the interim inspector-generals (see below) with the compliance functions previously performed by the Murray-Darling Basin Authority (MDBA). This is a novel arrangement for an Australian Government regulator, which has implications for the Inspector-General's role and responsibilities.

In the Commonwealth context, inspectors-general typically oversee government agencies and provide transparency and accountability around agency conduct. Among other things, inspectors-general provide oversight of actions and make recommendations to decision-makers regarding government agencies. Inspectors-general may also make recommendations to decision-makers about improvements to regulatory systems and processes to better deliver their intended operation. In combination, this is aimed at preventing or identifying and addressing ineffective or unlawful operations by relevant agencies.

Other Commonwealth inspectors-general include the Inspector-General of Taxation, the Inspector-General of Intelligence and Security, the Inspector-General of Biosecurity and the Inspector-General of Live Animal Exports.

Prior to the commencement of legislation formally establishing the Inspector-General of Water Compliance, oversight of the management of Basin water resources was subject to the Northern Basin Commissioner and interim Inspector-General of Murray-Darling Basin Water Resources, roles performed by Mick Keelty AO, and the interim Inspector-General of Water Compliance, with the Honourable Troy Grant appointed in this role.

Similarly, prior to the establishment of the Inspector-General of Water Compliance, the MDBA was responsible under the Act for the enforcement of the Act in relation to:

- The management of Basin water resources
- Critical human water needs
- Powers of investigation and enforcement.

Through the above roles, the MDBA was a regulator of Basin State regulators and other relevant government agencies, Commonwealth agencies (excluding the Australian Competition and Consumer Commission (ACCC) and Productivity Commission) and persons who trade or affect the trade of water in the Basin. On 5 August 2021, this role transitioned to the Inspector-General with enhanced enforcement powers relating to taking water when not permitted and contraventions of water trading rules.

The Inspector-General, therefore, is one of a number of agencies responsible for aspects of the management of Basin water resources in the national interest. In addition, the Inspector-General is responsible for the integrity of the Murray-Darling Basin Plan.

Governance of Basin water resources

Basin water resources are collectively managed by Commonwealth and Basin State governments. This reflects the interconnected nature of Basin water resources, where the management of water in any one state or territory can affect the management of water in up to four other states or territories, and the national importance of the Basin and its water resources.

This collective management is, in turn, reflected in a range of intergovernmental agreements that set out commitments of relevant governments. These agreements include, but are not limited to, the *National Water Initiative*, the *Murray-Darling Basin Agreement*, the *Murray-Darling*

Basin Plan 2012 Implementation Agreement, the Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin, and the Murray-Darling Basin Compliance Compact. Other intergovernmental agreements relate to the provision of funding for the delivery of certain commitments on projects as an alternative to water recovery.

Water management is also supported by relevant legislative frameworks. Relevantly, Commonwealth legislation includes the Act, the *Basin Plan 2012*¹² (the Plan) and legislation to accredit water resource plans developed by Basin States¹³ (see section on *Management of Basin water resources under the Act* section below for implications of this legislation for the Inspector-General). This Commonwealth legislation is national legislation that applies equally in all Australian states and territories, although it only has practical effect in the Murray-Darling Basin.

Under this legislation, the Commonwealth is responsible for:

- Setting a limit on the amount of water that may be taken from Basin water resources as a wholeⁱ
- Setting a limit on the amount of water that may be taken from individual Basin water catchments, called water resource plan areas, or part of catchments, called sustainable diversion limit resource unitsⁱⁱ
- Determining matters to be included in water resource plans that are relevant to the sustainable use and management of water in that water resource plan area
- Enforcing compliance with Commonwealth laws.

Each Basin State also has its own legislative arrangements relating to the management of water resources in that state or territory. Apart from the Australian Capital Territory, which is fully within the Basin, these arrangements apply to all water resources of the relevant state and not just those in the Basin. As such, there are differences in the way water resources are managed between the Basin States and the institutional arrangements to undertake this management (see *Regulated Basin State agencies* for guidance around the relevant institutions).

Under their legislative frameworks, Basin States are responsible for:

- Authorising persons to take water from water resources with relevant terms and conditions by issuing licences
- Allocations of available water within their borders
- Enforcing compliance with Basin State laws
- Accounting for water taken from Basin water resources (annually)
- Reporting on management of Basin water resources (annually).

Basin States have also referred powers to the Commonwealth to regulate critical human water needs in the Basin, as part of the broader management of Basin water needs. See section on *Critical human water needs* below.

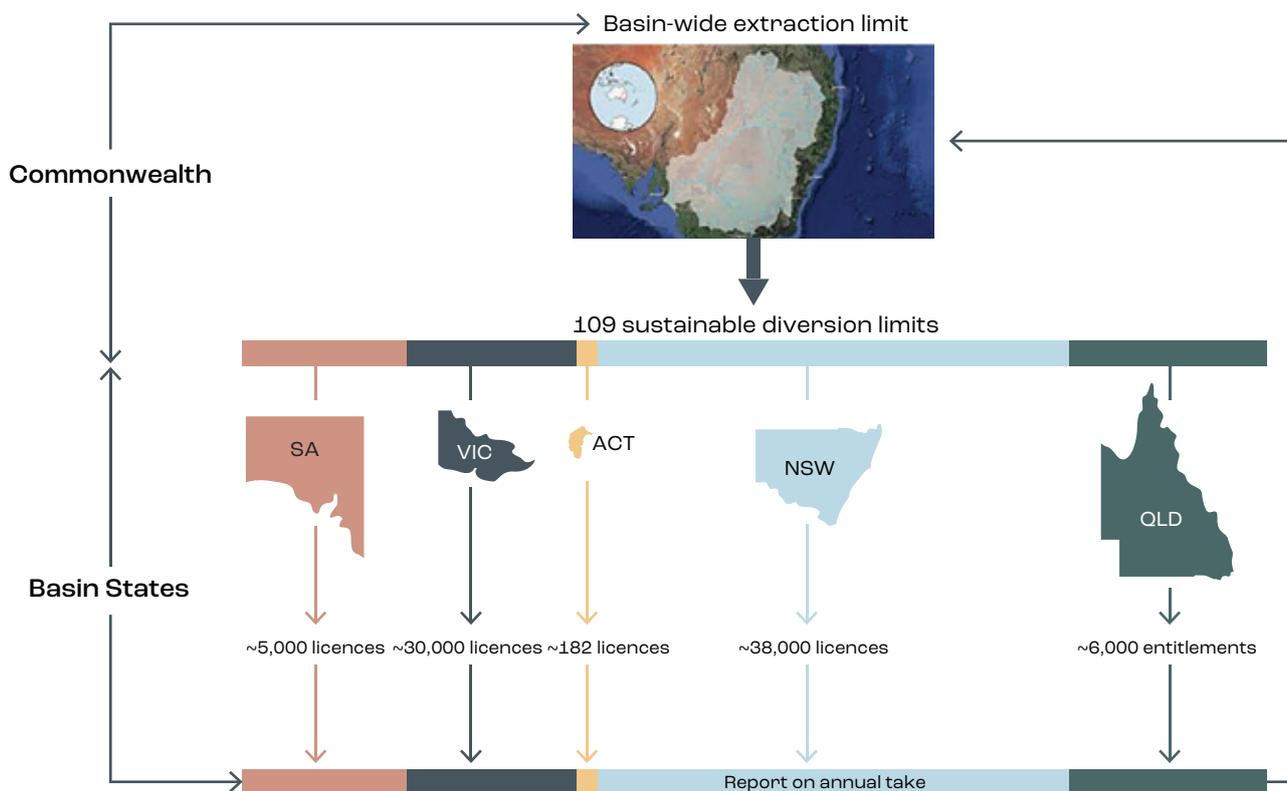
It is the combination of the Commonwealth's top-down, Basin-wide focus and the Basin States' bottom-up, jurisdictional focus that underpins the effectiveness of the management of Basin water resources in the national interest.

While the Commonwealth and Basin States have their own areas of responsibility, the nature of Australia's federation means that both Commonwealth and state agencies are subject to Commonwealth law, while state law applies only in the relevant jurisdiction. This means that Commonwealth agencies must comply with the Act, while Basin State agencies must comply with obligations set out in the Act and relevant state laws.

ⁱ Item 6 of the table in subsection 22(1) of the Act.

ⁱⁱ Sustainable diversion limit resource unit is a term for a 'part of water resources' in a water resource plan area and there are 109 sustainable diversion limit resource units compared to 33 water resource plan areas in the Basin

Figure 2: Governance of water resources in the Murray-Darling Basin



Implications for Inspector-General’s regulatory policy

The Inspector-General’s regulatory policy is expected to be informed by this split in roles and responsibilities between the Commonwealth and Basin States. Relevantly, this will reflect how the actions of all governments, collectively, lead to the effective and sustainable management of Basin water resources in the national interest.

Principles associated with this split in responsibilities that are relevant to the Inspector-General’s role include:

1. Focus on Basin-wide and national outcomes
2. Equitable treatment of regulated entities and in different locations across the Basin
3. General focus on water extraction trends over time
4. Prioritisation of actions to collectively manage Basin water resources in the national interest.

The Inspector-General is not the responsible for setting the legislative frameworks, as this is the role of policy makers. The Inspector-General’s regulatory policy will be informed by policy-makers’ intentions around the design and operation of the Act in his regulatory policy.

Request for feedback

Noting the collective responsibility for the management of Basin water resources, is it clear from the above the focus of the Inspector-General’s roles and responsibilities?

Are the principles above appropriate to inform the Inspector-General’s Regulatory Policy?

Regulated Commonwealth agencies

The Act sets out various roles and responsibilities for persons or agencies that come within the definition of ‘agency of the Commonwealth’. This definition applies to policy-makers, agencies established under the Act, agencies with functions or powers set out in the Act and agencies that must comply with the Act. Table 1 provides a breakdown of Commonwealth agencies with responsibilities or who are regulated under the Act.

Table 1: Relevant Commonwealth agencies

‘Agency’	Primary role(s) under Act
Commonwealth Water Minister	<ul style="list-style-type: none"> • Portfolio responsibility for water • Using powers under the Act to make the Plan and accredit water resource plans
Commonwealth Water Department ⁱⁱⁱ	<ul style="list-style-type: none"> • Water policy • Portfolio responsibility for maintaining Act
Murray-Darling Basin Authority	<ul style="list-style-type: none"> • Planning, managing, operating and reporting on the Basin and its water resources • Advising Minister on the Plan and water resource plans
Australian Competition and Consumer Commission	<ul style="list-style-type: none"> • Administering and enforcing water market roles and water cap rules • Economic regulation of irrigation infrastructure operators (where not returned to state regulator)
Bureau of Meteorology	<ul style="list-style-type: none"> • Collects, analyses and reports on water information • Issuing National Water Information Standards
Productivity Commission	<ul style="list-style-type: none"> • Conducts inquiries into the Plan and water resource plans • Conducts inquiries into National Water Initiative
Commonwealth Environmental Water Holder	<ul style="list-style-type: none"> • Environmental water management
Snowy Hydro Limited	<ul style="list-style-type: none"> • Environmental water management • Wholesale water delivery • Water infrastructure operations

Sources: *Water Act 2007* and *Bureau of Meteorology, National Water Account 2020; Murray-Darling Basin Region Description*, <http://www.bom.gov.au/water/nwa/2020/mbd/regiondescription/geographicinformation.shtml> (accessed 29 November 2022).

In general, the Inspector-General monitors and oversees the following to determine whether they have acted in a way that is lawful and effective:

- The Commonwealth Water Minister and Commonwealth Water Department, in supporting the Water Minister, performance of functions relating to the Plan and water resource plans under the Act
- The MDBA’s management of Basin water resources under the Act, activities in relation to the Plan and water resource plans and monitoring and reporting on outcomes from the Plan
- The Commonwealth Environmental Water Holder and Snowy Hydro Limited’s compliance with the Plan and the water trading rules.

ⁱⁱⁱ Currently this is the Department of Climate Change, Energy, the Environment and Water.

Australian Competition & Consumer Commission and Productivity Commission

The Inspector-General's monitoring and oversight functions, along with his compliance and enforcement role, do not extend to the ACCC or Productivity Commission. Relevantly, the Act states the Inspector-General does not have the functions of:

- Overseeing advice provided by the ACCC in relation to the water trading rules or fees the MDBA may charge for its services
- Overseeing inquiries conducted by the Productivity Commission into the Plan, water resource plans or the National Water Initiative.^{iv}

Bureau of Meteorology

The Bureau has functions and powers in relation to water information^v under Part 7 of the Act (in addition to functions and powers under other Commonwealth laws). This Part is not subject to the Inspector-General's jurisdiction and, consequently, neither is the Bureau. However, the Bureau's powers complement the Inspector-General's, where the Bureau has responsibility for collecting, collating, analysing and communicating water information^{vi}, while the Inspector-General's responsibility relates to the management of Basin water resources.

As such, the activities performed, and information managed, by the Bureau may inform the Inspector-General and vice versa.

Regulated Basin State agencies

As noted previously, Basin State governments have different approaches to regulating water resources in their jurisdiction. These approaches are generally a result of historical policy and legislative design decisions and have resulted in different governance and institutional arrangements in each state.

Persons or agencies with the following roles are covered as 'agencies of a State' under the Act, noting this only extends to the person or agency's role in the management of Basin water resources:

- Ministers with portfolio responsibility for water
- Agencies responsible for water policy and maintaining relevant laws
- Agencies responsible for administering relevant laws and licencing water take
- Agencies responsible for enforcement of relevant laws
- Persons or agencies responsible for environmental water management
- Agencies responsible for the administration and processing of trades in water entitlements
- Agencies or councils responsible for wholesale water delivery and water infrastructure operations
- Persons or agencies responsible for water extraction and use approvals.

For illustration purposes, the functions performed by relevant persons and agencies include, but may not be limited to:

- Ministers with responsibility for water policy and relevant legislation who are accountable for water management in their state or territory
- Water departments or other agencies with water portfolios

^{iv} See section 215C(2) of the Act.

^v Defined in section 4 of the Act.

^{vi} Defined in section 125 of the Act.

- Agencies, corporations and other state government entities with responsibility for:
 - Licencing
 - Enforcement
 - Environmental water management
 - Administration and processing of trades
 - Wholesale water delivery and water infrastructure operations
 - Water extraction and use approvals.

In general, the Inspector-General monitors and oversees the above agencies to determine whether they have acted in a way that is lawful and effective in relation to the performance of their obligations under the Act. In addition, the Inspector-General determines whether they comply, where relevant, with the water trading and other relevant rules.

Implications for Inspector-General’s regulatory policy

The Inspector-General intends to apply a consistent approach to performing his functions with respect to Commonwealth and Basin State agencies to the extent practicable. However, the Inspector-General recognises there are some differences in the way the Act operates with respect to Commonwealth and Basin State agencies, and these differences therefore require a different approach, at times.

Matters relevant to both Commonwealth and Basin State agencies

The Inspector-General’s regulatory policy will be informed by his regulatory role in respect to relevant Commonwealth and Basin State agencies who may be either or both:

- Persons or agencies who are required to do something, or not do something, under the Act or Plan
- Persons or agencies who have responsibility for the implementation of commitments in relevant intergovernmental agreements.

The Inspector-General is also responsible for enforcing compliance with certain parts of the Act. As noted above, in reflection of Australia’s system of government, the Inspector-General recognises government decision-makers and agencies generally seek to be compliant with all relevant laws. This will inform the Inspector-General’s regulatory policy, where relevant principles include:

- Maximising the capacity of persons and agencies to understand and comply with their legal obligations under the Act
- Maximising the effectiveness of the management of Basin water resources where, relevantly, this is underpinned by compliance with legal obligations
- Providing transparency around activities to promote trust and confidence that government agencies are being held to the same standard as other persons or entities
- Looking for opportunities to collaborate to ensure the best outcome from a Basin-wide perspective
- Pursuing proportionate regulatory remedies where appropriate and necessary.

Matters of relevance to Commonwealth agencies

The Inspector-General’s regulatory policy will also be informed by the nature of Commonwealth agencies’ roles and responsibilities under the Act. For example, whether this relates to performing functions or exercising powers under the Act or working collectively with other government agencies to collectively improve the effectiveness of each’s discrete areas of responsibility.

Matters of relevance to Basin State agencies

The Act imposes certain obligations on Basin State agencies (for further detail see *Management of Basin water resources under the Act* section below). The Basin State agencies include the persons and other parties of the type listed in *Regulated Basin State agencies*. In limited circumstances, the Inspector-General's oversight function may extend to other agencies or persons, but only to the extent that their roles and responsibilities relate to Basin water resources and, in those cases, to the degree those matters are relevant to the Act and Plan.

Request for feedback

Noting the complexity of governance arrangements associated with the management of Basin water resources, what, if anything, would aid in clarifying those governance arrangements? Further, is it clear the unique role performed by the Inspector-General within and to support those arrangements?

For government agencies, the Inspector-General welcomes insights into how to characterise your various roles to ensure his regulatory policy will be relevant despite differences in individual government arrangements.

The Inspector-General is also seeking feedback on whether the above provides sufficient clarity around his regulation of relevant government agencies under the Act.

Legislative context

The Act is the principal Commonwealth law applying to the management of Basin water resources. As such, the objectives of the Act, its structure and the legislation it enables provides necessary context to the Inspector-General's functions and powers and guidance around how these are to be used.

The outcomes intended to be delivered through the Act are set out in section 3. These objects are drafted in ways that reflects the multiple purposes of water management to meet the various needs set out in the *Importance of the Basin* section above.

The *Acts Interpretation Act 1901* (Cth)^{vii} requires Commonwealth laws to be interpreted in a way that would best achieve the purpose or object of the Act and this interpretation is preferred to any other interpretation.¹⁴ The following sections describe the objects of the Act and sets out how these will inform the Inspector-General's regulatory policy.

Managing Basin water resources in national interest

It is an objective of the Act to:

“[E]nable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest...”^{viii}

This objective has three elements:

- It sets out the responsibility for the Commonwealth and Commonwealth agencies in the management of Basin water resources
- It recognises that the Commonwealth does this concurrently with Basin States managing Basin water resources in their jurisdiction
- It couches the purpose of the Commonwealth and Basin State management of Basin water resources, collectively, as being in the national interest.

Implications for Inspector-General's regulatory policy

The Inspector-General considers that this objective informs his regulatory role and approach in several ways. Firstly, it guides how the Inspector-General understands the roles of Commonwealth agencies under the Act. Secondly, it informs the Inspector-General that a responsibility under the Act may be allocated to a Commonwealth agency, a Basin State agency or both. Thirdly, it directs the Inspector-General to consider how performing his functions or exercising his powers would best be in the 'national interest'. And finally, it provides a 'national interest' benchmark for the performance of Commonwealth agency functions, powers and obligations along with Basin States performance of obligations under the Act.

The Inspector-General intends for this national interest focus to be reflected in his regulatory approach. The Inspector-General recognises that the concept of national interest may be one that has ambiguities and considers that, for the purpose of his regulatory policy, this should be informed by the legislation he administers and relevant intergovernmental agreements and include:

- All authorities, whether they are Commonwealth or state governments or private individuals or companies, are subject to, and constrained by, relevant laws, in this case the Act

vii Section 15AA of the *Acts Interpretation Act 1901*.

viii Paragraph (3)(a) of the Act.

- Water resources of the Basin are part of Australia’s natural capital, serving a number of important productive, environmental and social objectives¹⁵
- Governments have an obligation to manage Basin water resources for current and future generations¹⁶
- 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 sustainable¹⁷
- Governments aim to provide greater certainty for investment and the environment, and underpin the capacity of Australia’s water management regimes to deal with change responsively and fairly¹⁸
- Governments continually improve the management of water resources in the Basin by providing transparency and accountability of surface and groundwater management and regulation¹⁹
- Governments promote the conservation of nationally important wetlands.²⁰

Giving effect to relevant international agreements

It is an objective of the Act to:

“[G]ive 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, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources...”^{ix}

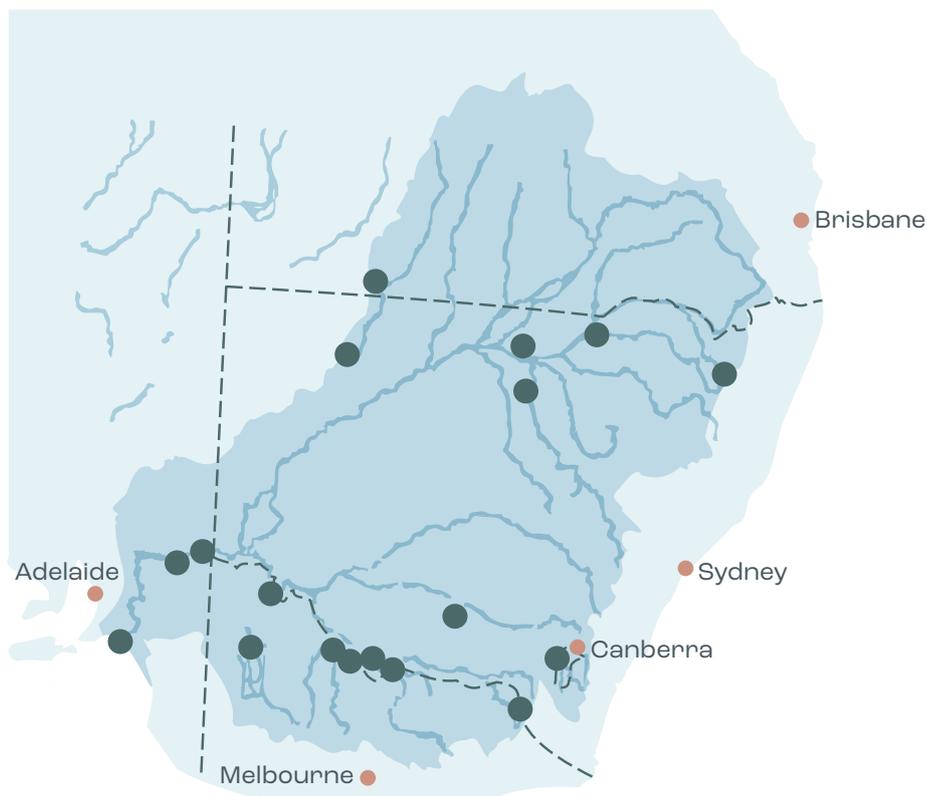
One of the principal agreements relating to the management of Basin water resources is the *Convention on Wetlands of International Importance*, known as the Ramsar Convention. The Ramsar Convention aims to halt the worldwide loss of wetlands and to conserve, through wise use and management, those that remain.²¹ Australia became a signatory to the Ramsar Convention in 1975 and currently has 66 wetlands that are classified as Ramsar wetlands, 16 of which are in the Basin (see Figure 3: Ramsar wetlands across the Murray-Darling Basin).

Under the Ramsar Convention, Australia has committed to do certain things with respect to Ramsar wetlands. Relevantly, this covers the promotion of the conservation of the wetlands. In doing so, Australia recognises the interdependence of humans and the environment and that the wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable.¹⁵

^{ix} Paragraph (3)(b) of the Act.



Figure 3: Ramsar wetlands across the Murray-Darling Basin



Source: Department of Climate Change, Energy, the Environment and Water, <http://www.environment.gov.au/water/topics/wetlands/database/maps/pubs/ramsar-sites-australia.pdf> (accessed 30 November 2022).

The effective management of water in the catchments feeding these Ramsar wetlands is crucial to their long-term health and Australia’s ability to comply with its international commitments. Relevantly, activities affecting the quantity of the water flowing into these wetlands from upstream catchments that are subject to the sustainable diversion limits set out in the Plan come within the Inspector-General’s jurisdiction under the Act.

Other relevant agreements are:

- *Convention on Biological Diversity*, which has three main goals: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits arising from genetic resources
- *Convention to combat desertification*, a legally binding framework to address desertification and the effects of drought and commitment to mitigate the impact of land degradation
- *Convention on the Conservation of Migratory Species of Wild Animals*, which has the goal of the conservation and sustainable use of migratory animals and their habitats
- *Convention on Climate Change*, a multilateral agreement on global climate action and support
- *China–Australia Migratory Bird Agreement*, a bilateral agreement between China and Australia that aims to protect migratory birds and their environment between the two countries
- *Japan–Australia Migratory Bird Agreement*, a bilateral agreement between Australia and Japan to minimise harm to the major areas used by birds which migrate between the two countries
- *Republic of Korea–Australia Migratory Bird Agreement*, a bilateral agreement to conserve migratory birds of the East Asian – Australasian Flyway.

The Inspector-General recognises that it is open to the Australian Government to enter into other international agreements, which may have implications for his functions.

Implications for Inspector-General’s regulatory policy

The Basin’s Ramsar wetlands are located across the Basin. The Commonwealth’s commitment through the Ramsar Convention to the promotion of the conservation of those wetlands means the Commonwealth’s jurisdiction applies in relation to the quantities and quality of water resources in and flowing to those wetlands. Similarly, the Commonwealth’s jurisdiction extends to waterways that are subject to the other international agreements.

For the Inspector-General, this means his jurisdiction extends to activities undertaken by Commonwealth and Basin State agencies under or in compliance with the Act that may or are likely to affect the conservation of the Ramsar wetlands or other waterways that are subject to international agreements in the Basin. Relevantly, this covers water management within relevant states and territories, as well as management across those jurisdictions and in the national interest, which are reflected in the following:

- Commonwealth or Basin State agency actions promote the conservation of Basin water resources in line with international agreements, including the Ramsar listed wetlands
- Commonwealth and Basin State agencies recognise the health of Ramsar listed and other nationally significant wetlands and waterways subject to international agreements depends on effective management of Basin water resources outside of those wetlands
- Compliance with Commonwealth and Basin State water laws supports the health of Ramsar listed and other nationally significant wetlands and waterways subject to international agreements and the broader social, cultural, ecological and economic value of the wetlands.

Optimised use and management of Basin water resources

It is an objective of the Act to:

“[P]romote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes...” in giving effect to the relevant international agreements referred to in paragraph (3)(b) of the Act^x

This objective reflects that access to water and healthy water dependent ecosystems underpins economic, social and environmental outcomes. This reflects that each of these outcomes is dependent on the others and cannot be read in isolation.

Implications for Inspector-General’s regulatory policy

The Inspector-General recognises the above details different types of regulatory outcomes that are intended to be delivered under the Act. As such, the Inspector-General intends to monitor and provide insights into these outcomes as part of performing his regulatory responsibilities.

Improve water security

It is an objective of the Act to:

“[I]mprove water security for all uses of Basin water resources...”^{xi}

This objective reflects that Australia is subject to significant periods of drought and floods that have consequences for the availability and quality of water resources in the Basin. This variability was recognised by Basin governments as being likely to be exacerbated by climate change going forward.^{xii}

x Paragraph (3)(c) of the Act.

xi Paragraph (3)(e) of the Act.

xii Preamble to the *Agreement on Murray-Darling Basin Reform (2008)*.

Implications for Inspector-General's regulatory policy

The Inspector-General's regulatory policy will be informed by the importance of effective compliance with relevant rules and regulations for water security for all uses of Basin water resources and for current and future generations.

Take into account broader management of natural resources

It is an objective of the Act to:

"[E]nsure that the management of the Basin water resources takes into account the broader management of natural resources in the Murray-Darling Basin..."^{xiii}

This objective reflects the way Basin water resources are managed may have implications for the state and characteristics of other natural resources of the Basin. Relevantly, this objective promotes the integrated management of natural resources such as land, water, soil, plants and animals.

Implications for Inspector-General's regulatory policy

While the Inspector-General's jurisdiction is limited to the Act, other Commonwealth and Basin State agencies consider the broader management of natural resources in the Basin as part of their roles and responsibilities. These agencies may or may not be the agencies identified in *Regulated Commonwealth agencies* section or *Regulated Basin State agencies* sections above.

To the extent these agencies do something that affects the Basin's water resources, they must do so in accordance with the regulation of the management of Basin water resources under the Act. As such, how and when agencies take into account the broader management of natural resources, this may be a matter of relevance to the Inspector-General in the performance of his functions under the Act.

Efficient and effective water management

It is an objective of the Act to:

"[A]chieve efficient and cost effective water management and administrative practices in relation to Basin water resources..."^{xiv}

This objective reflects the various institutions of Commonwealth and Basin State governments may undertake activities with implications for other agencies. As such, this objective relates to efficiency and effectiveness of management and administrative practices, as a whole.

Implications for Inspector-General's regulatory policy

The Inspector-General intends to adopt an approach that aligns with best regulatory practice. Relevantly, the Inspector-General considers that this will likely involve balancing the efficiency and costs associated with regulated entities performing an activity with the value to the Australian public of a thing being done.

The Inspector-General notes that the Australian Government promotes efficient and effective regulatory practice through its *Policy Impact Analysis Framework*²² and *Regulator Performance Guide*²³. The Inspector-General considers that these establish an appropriate framework for considering the impact of his activities on Commonwealth and Basin State agencies that will ensure the Inspector-General is acting consistently with Australian Government policy.

xiii Paragraph (3)(f) of the Act.

xiv Paragraph (3)(g) of the Act.

Information about water resources and the management of water resources

It is an objective of the Act to:

“[P]rovide for the collection, collation, analysis and dissemination of information about (i) Australia’s water resources; and (ii) the use and management of water in Australia.”^{xv}

This objective reflects the need to provide adequate and relevant information on Australia’s water resources and the management of water in Australia for the Australian public to understand what is being done, why it matters and what it has delivered for them. Ultimately, this objective reflects that the social licence to manage water resources is underpinned by transparency and accountability around how governments do this on the public’s behalf.

Implications for Inspector-General’s regulatory policy

The statutory role of the Inspector-General of Water Compliance was established to provide transparency around the management of Basin water resources and to hold relevant government agencies to account. For this latter, this includes holding:

- Commonwealth agencies to account for the way they perform functions and exercise powers
- Basin State agencies to account in performance of their legal obligations.

As such, the Inspector-General considers it is a core responsibility of the Inspector-General and his staff to collect, collate, analyse and disseminate information about Commonwealth and Basin State agencies’:

- Performance of functions and exercise of powers, for relevant Commonwealth agencies, or compliance with legal obligations, for relevant Basin State agencies
- Management of Basin water resources in compliance with the Act
- Outcomes from the performance of functions and exercise of powers, for relevant Commonwealth agencies, or compliance with legal obligations, for relevant Basin State agencies, and management of Basin water resources.

Other objectives

The Act also includes several objectives that provide additional detail to the other objectives listed above. These are to:

“[E]nsure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused...”^{xvi}

“[P]rotect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity)...”^{xvii}

“[M]aximise the net economic returns to the Australian community from the use and management of the Basin water resources...” subject to the above two objectives^{xviii}

xv Paragraph (3)(h) of the Act.

xvi Subparagraph (3)(d)(i) of the Act.

xvii Subparagraph (3)(d)(ii) of the Act.

xviii Subparagraph (3)(d)(iii) of the Act.

Implications for Inspector-General's regulatory policy

The Inspector-General considers these objectives provide additional context that will inform his regulatory approach, when relevant. As such, these objectives will guide the Inspector-General rather than be the primary context for the performance of his function or exercise of his powers under the Act.

Request for feedback

Noting the range of objectives of the Act, is it clear how these relate to the Inspector-General's roles and responsibilities?

Is the Inspector-General's interpretation of this objectives appropriate?

Enabled legislation

Part 2 of the Act enables the Plan and accreditation or adoption of water resource plans (refer to *Appendix I: National water legislative framework*). These instruments are 'enabled' by the Act, that is, made by the Commonwealth Water Minister using powers contained in the Act rather than through Parliament and, as such, are called delegated instruments.

The Plan must contain the matters set out in the Act and is interpreted in a way to best achieve the objects of the Act. The Plan also sets out specific objectives and intended outcomes of the Plan, itself. The Plan must, therefore, also be interpreted in a way to best achieve those objectives, to the extent relevant.

Water resource plans set out how Basin States will give effect to the Plan in the Basin water resource plan areas within their jurisdiction. The water resource plans must contain certain things that are set out in Chapter 10 of the Plan.

Water resource plans are accredited or approved by the Commonwealth Water Minister through a legislative instrument made under the Act. This accreditation or approval instrument 'enlivens' the water resource plan and brings it within the Inspector-General's jurisdiction.

As water resource plans are made to give effect to a subordinate instrument (the Plan), water resource plans must be interpreted in a way to best achieve the objects of the Act, objectives of the Plan as a whole and the objectives of parts of the Plan, as relevant.

Implications for Inspector-General's regulatory policy

The Inspector-General recognises that the legislative structure is complex, and this may create confusion about how the Inspector-General will apply the different laws he administers. The Inspector-General intends to provide clarity around his general approach through his regulatory policy and considers this would follow the legislative structure for the Commonwealth's water laws, where:

- The Act has primacy, the Inspector-General will apply it in a way that will best achieve the objects of the Act when considering:
 - The Inspector-General's performance of functions and exercise of powers under the Act
 - Relevant Commonwealth agencies' performance of functions and exercise of powers under the Act
 - Relevant parties' performance of obligations under the Act

- The Plan is subordinate to the Act and will be applied in a way that will:
 1. Best achieve the objects of the Act
 2. Best achieve the objects of the Plan
 3. Best achieve the intended outcomes from the Plan
- Water resource plans are intended to give effect to the Plan and, as such, will be applied in a way that will:
 1. Best achieve the objects of the Act
 2. Best achieve the objectives of the Plan
 3. Best achieve the intended outcomes from the Plan
 4. Reflect the matters the Plan requires to be set out in water resource plans

The Inspector-General's principal focus, therefore, in performing his functions and exercising his powers will be on ensuring that all the enabled legislation operates and is complied with in a way that delivers the intended outcome from the Act.

Request for feedback

The Inspector-General is requesting feedback on the clarity of the Act and its enabled legislation and, relevantly, how this informs the Inspector-General's roles and responsibilities.

Management of Basin water resources under the Act

Part 2 of the Act regulates the management of Basin water resources in the national interest. It provides the legal foundation for the Plan and water resource plans and sets out the effect of the Plan and water resource plans on Commonwealth and Basin State agencies. The Inspector-General is responsible for overseeing and enforcing compliance with Part 2 of the Act. The Inspector-General may draw on his powers of audit, enforcement, investigation and inquiry in administering Part 2 of the Act.

This section, therefore, sets out how Basin water resources are regulated under Part 2 of the Act and how the Inspector-General intends for this to inform his regulatory policy.

Basin Plan

Under the Act, the primary purpose of the Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of the Act^{xix}. This purpose is then clarified in the context of the outcomes expected to be delivered by implementing the plan, which also link back to the objects of the Act (see discussion on *Legislative context* above):

- 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)
- 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
- Basin-wide environmental objectives for water-dependent ecosystems of the Basin
- Water quality and salinity objectives
- The use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes
- Water to reach its most productive use through the development of an efficient water trading regime across the Basin
- Requirements for water resource plans to meet
- Improved water security for all uses of Basin water resources.

The Plan was developed to meet the requirements of Parts 2 and 2A (see *Critical human water needs* below) of the Act. It is structured to give effect to the policy intention for the Plan to be a strategic plan for water resources in the Basin by setting out the measures required to ensure that those water resources are managed in an integrated and sustainable way.²⁴

Relevantly, the Plan establishes:

- What Basin water resources are and the context for those resources to be used (Chapter 2)
- The water resource plan areas and water accounting periods for each of those areas (Chapter 3)
- A framework for the identification of risks to the condition or continued availability of Basin water resources and strategies to be employed to manage those risks (Chapter 4)
- The management objectives and outcomes to be achieved through the Plan (Chapter 5)
- The sustainable diversion limits and method for determining whether the long-term annual diversion limit has been complied with and extent of failure and steps to be followed for non-compliance (Chapter 6)

^{xix} Section 20 of the Act.

- The power for the MDBA to propose adjustments to the sustainable diversion limits (Chapter 7)
- A constraints management strategy (Chapter 7)
- A plan for the protection and restoration of the wetlands and other environmental assets of the Basin, the protection of biodiversity dependent on Basin water resources and for achieving other environmental outcomes (Chapter 8)
- A water quality and salinity management plan (Chapter 9)
- The mandatory requirements for water management plans to meet to be able to be accredited or approved by the Commonwealth Minister (Chapter 10)
- Arrangements for meeting critical human water needs (Chapter 11)
- The rules applying to trades of relevant water rights (Chapter 12)
- A program for monitoring and evaluating the effectiveness of the Plan (Chapter 13).

It further includes guidance around:

- How to interpret the terms used in the Plan
- The ability for Basin States to enter into agreements with the MDBA on the implementation of their obligations under the Plan as a transitional measure (both Chapter 1).

As a framework to enable the integrated management of Basin water resources, the Plan mainly applies in relation to Commonwealth and Basin State agencies. Relevantly, under the Act, Commonwealth agencies must perform their functions and exercise their powers consistently with and in a way that gives effect to the Plan, where failure to do so may be a contravention of the Act.^{xx} Similarly, other agencies and persons must not act in a way that is inconsistent with the Plan, where acting inconsistently with the Plan is a contravention of the Act.^{xxi}

The water trading rules in the Plan (Chapter 12) have broader application and extend to all persons or agencies who trade relevant water rights, facilitate or manage the trade of relevant water access rights and approve or allow relevant trades.

In 2008, Basin governments affirmed that the Plan has primacy over other Basin water management legislation. Further, governments recognised that the Plan is the single, consistent and integrated plan for the Basin's water resources.²⁵ Both of these elements are necessary for achieving the objective of 'managing Basin water resources in national interest'.

Implications for Inspector-General's regulatory policy

The Inspector-General is responsible for overseeing relevant government agencies' performance of functions or obligations under the Plan. The Inspector-General intends that the purpose of the Plan, as set out in the Act, will therefore inform the performance of these functions.

The Inspector-General also notes Chapter 5 of the Plan sets out the objectives of and outcomes for the Plan as a whole and in relation to particular matters. The Inspector-General considers these objectives and outcomes to be clear legislated benchmarks for performance and intends to reference back to these in performing his functions and making recommendations to relevant government agencies. The Inspector-General further intends that these objectives and outcomes will be used to prioritise activities with the highest level of risk.

xx Sections 34 and 86G of the Act.

xxi Sections 35 and 86H of the Act.



The Inspector-General is also responsible for enforcing compliance with the Plan. In general, the Inspector-General intends to adopt a risk-based approach to enforcement, which will be reflected in his regulatory policy.

The Inspector-General's intended approach to the water trading rules is discussed in more detail below.

Water resource plans

Under the Act, a water resource plan is a plan that provides for the management of the water resource plan area and is either accredited or adopted under the Act. Under the Act, water resource plans must be consistent with the Plan. In determining whether a water resource plan is consistent with the Plan, regard must be had to the legislative framework within which the water resource plan operates.

Under the Act, relevant Commonwealth agencies must perform functions and use powers consistently with the accredited or approved water resource plan and it is a contravention of the Act to do otherwise.^{xxii} Similarly, other agencies and bodies must not act in a way that is inconsistent with a water resource plan, where acting inconsistently with a water resource plan is a contravention of the Act.^{xxiii}

Implications for Inspector-General's regulatory policy

The Inspector-General is responsible for overseeing relevant government agencies' performance of functions or obligations under water resource plans. The Inspector-General intends that the Act, the Plan, and relevant water resource plans will therefore inform the performance of these functions.

The Inspector-General notes water resource plans are accredited or approved having regard to the relevant legislative framework within which the water resource plan operates. As such, the Inspector-General intends to have regard to relevant legislative frameworks in performing his functions, specifically in relation to how those frameworks relate to or affect the management of Basin water resources.

The Inspector-General is also responsible for enforcing compliance with water resource plans. As noted above, the Inspector-General intends to adopt a risk-based approach to enforcement and will reflect this in his regulatory policy.

Water trading rules

Chapter 12 of the Plan sets out the water trading rules. The Basin Plan water trading rules apply alongside Basin State and irrigation infrastructure operator trading rules and the water market and water charge rules administered by the ACCC.

In general, the water trading rules are intended to prevent the imposition of restrictions on the trade of water across the Basin. The water trading rules set out the process to be followed for a restriction of trade or imposition of an exchange rate to be permitted.

The water trading rules also set out requirements relating to the provision of information. Relevantly:

- Irrigation infrastructure operators are required to provide information about water delivery rights and irrigation rights

xxii Section 58 of the Act.

xxiii Section 59 of the Act.

- Basin State authorities who approve the trade of water access rights are required to do certain things prior to authorising trades
- Information relating to access rights, trading rules, and trading prices is required to be published
- Trading of water rights is prohibited before a water announcement is made generally available (insider trading).

In the context of the water trading rules, trade is defined to include transfer of rights between places as well as between water right holders.^{xxiv} As such, the water trading rules apply in relation to Commonwealth and Basin State agencies, irrigation infrastructure operators, persons trading water rights and water rights holders, including environmental water holders. Further, the water trading rules apply to trades of water that occur within state borders as well as trades occurring across state borders.^{xxv}

Implications for Inspector-General’s regulatory policy

The Inspector-General is the appropriate enforcement agency for the water trading rules. This means the Inspector-General enforces the rules in relation to restrictions on trade, the information that must be provided under the rules, and prohibitions around insider trading.

Under the Act, the Inspector-General is also responsible for enforcing offence provisions relating to water trading. Relevantly:

- Failing to give reasons for restricting trade of water delivery right as required under the Plan^{xxvi}
- Failing to report price for trade of water access right as required under the Plan^{xxvii}
- Trading water access right before water announcement made or generally available in contravention with the Plan.^{xxviii}

In line with his general approach to enforcement, the Inspector-General intends to adopt a risk-based approach to enforcement and will provide further details around what this means in the context of his functions in his regulatory policy.

The Inspector-General also is responsible for overseeing relevant government agencies’ performance of functions or obligations under the Plan (see above). The Inspector-General considers the right to trade water access rights free of conditions (section 12.06), the objective of making information about rights available (sections 12.31 and 12.40), and the objective of making approval processes open and transparent (section 12.36) are relevant considerations in performing his oversight roles.

The Inspector-General understands that the Australian Government is currently considering reforms to the water market arrangements. The Inspector-General will consider how these reforms will affect his regulatory role, powers and approach once the legislative reforms are settled.

Critical human water needs

Critical human water needs are the needs for a minimum amount of water required to meet:

- Core human consumption requirements
- Non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.

^{xxiv} Section 12.04 of the Plan.

^{xxv} Section 37 of the Act.

^{xxvi} Section 73F of the Act.

^{xxvii} Section 73G of the Act.

^{xxviii} Section 73H of the Act.

According to this definition, water for critical human water needs includes that required for core human needs (such as drinking, food preparation and hygiene), essential community services (including emergency services, hospitals and schools) and for limited commercial and industrial purposes.²⁶

Basin State governments are responsible for securing and providing water for critical human water needs. However, where those needs can only reasonably be provided from Basin water resources, the Act requires the Plan give these needs the highest priority. It further requires that these needs be prioritised in the delivery of water in the 'River Murray System'.^{xxix}

The Plan sets out arrangements relating to critical human water needs in Chapter 11. Relevantly, the Plan includes measures to help ensure critical human water needs are met during times of drought or other exceptional circumstances that affect water quality or quantity.

For communities dependent on the River Murray system, it also specifies a volume to meet the critical human water needs in New South Wales, Victoria and South Australia, as well as the amount of water required to ensure sufficient flow in the river system to physically deliver water for critical human water needs (called conveyance water). The Plan sets out arrangements to ensure priority is given to conveyance water, including by reserving water to help ensure conveyance water can be provided in the driest of seasons.

The Plan includes the trigger points at which salinity and water quality in the River Murray System becomes unsuitable for critical human water needs. Once the trigger points are reached, the Act requires remedial actions to address the problem.

Under the Act, Basin States have referred certain powers to the Inspector-General with respect to critical human water needs. Relevantly, under the Act Commonwealth agencies must perform their functions and exercise their powers consistently with and in a way that gives effect to the Plan, where failure to do so may be a contravention of the Act.^{xxx} Similarly, other agencies and persons must not act in a way that is inconsistent with the Plan, where acting inconsistently with the Plan is a contravention of the Act.^{xxxi}

Implications for Inspector-General's regulatory policy

The Inspector-General is the appropriate enforcement agency for the critical human water needs arrangements established under the Act and Plan. The Inspector-General may therefore use his enforcement and investigation powers in relation to critical human water needs. As with his other enforcement responsibilities, the Inspector-General intends to adopt a risk-based approach to enforcement and will provide further details around what this means in the context of his functions in his regulatory policy.

Request for feedback

The Inspector-General is requesting feedback on whether his role in the management of Basin water resources is clear from the above. Relevantly, are there any gaps that should be considered in the development of his regulatory policy?

^{xxix} Section 86A of the Act.

^{xxx} Section 86G of the Act.

^{xxxi} Section 86H of the Act.

Inspector-General roles and responsibilities

The Inspector-General's roles and responsibilities are set out in the Act. This section sets out the Inspector-General's functions and powers and how the Inspector-General intends for these to inform his regulatory policy.

Regulatory functions

Section 215B of the Act establishes the statutory role of the Inspector-General and section 215C of the Act sets out his functions. Some of these functions are given effect by additional provisions in the Act that, when read with section 215C, describe the scope of the Inspector-General's authority.

Monitoring and independent oversight of Commonwealth agencies

The Inspector-General has the function of monitoring and providing independent oversight of the performance of functions and exercise of powers by other Commonwealth agencies under:

- The Act, other than:
 - The Murray-Darling Basin Agreement (Part 1A)
 - Critical human water needs (Part 2A)
 - The water charge and water market rules (Parts 4 and 4A)
 - Transitional matters relating to the Murray-Darling Basin Commission (Part 10A)
 - Interaction with state laws (Part 11A)
- Regulations and other instruments made under relevant parts the Act
- The Plan
- Water resource plans.^{xxxii}

For relevant Commonwealth agencies, please refer to *Regulated Commonwealth agencies*.

Monitoring and independent oversight of Basin State agencies

The Inspector-General has the function of monitoring and providing independent oversight of the performance of obligations by Basin State agencies under:

- The Act, other than:
 - The Murray-Darling Basin Agreement (Part 1A)
 - Critical human water needs (Part 2A)
 - The water charge and water market rules (Parts 4 and 4A)
 - Transitional matters relating to the Murray-Darling Basin Commission (Part 10A)
 - Interaction with state laws (Part 11A)
- Regulations and other instruments made under relevant parts the Act
- The Plan
- Water resource plans.^{xxxiii}

For Basin State agencies, please refer to *Regulated Basin State agencies* for guidance around relevant institutions.

^{xxxii} Paragraph 215C(1)(a) of the Act.

^{xxxiii} Paragraph 215C(1)(b) of the Act.

Monitoring and independent oversight of intergovernmental agreement

The Inspector-General has the function of monitoring and providing independent oversight of the implementation by Commonwealth and Basin State agencies of the commitments in certain intergovernmental agreements.^{xxxiv} The listed intergovernmental agreements are:

- The *Murray-Darling Basin Compliance Compact* (2018)¹³
- The *Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin* (2013)²⁷
- The *National Partnership Agreement on Implementing Water Reform in the Murray-Darling Basin* (2014) (the NPA)²⁸
- The *Project Agreement for Murray-Darling Basin Water Infrastructure, New South Wales-Led Efficiency Projects* (2019)²⁹
- The *Project Agreement for Murray-Darling Basin Water Infrastructure, South Australia-Led Efficiency Projects* (2019)³⁰
- The *Project Agreement for Murray-Darling Basin Water Infrastructure, Australian Capital Territory-Led Efficiency Projects* (2019)³¹
- The *Murray-Darling Basin Plan 2012 Implementation Agreement* (2013)³²
- The *Intergovernmental Agreement on Federal Financial Relations* (2011)³³ to the extent that it relates to the NPA and project agreements relating to Basin water resources
- The *Intergovernmental Agreement on a National Water Initiative* (2004),¹¹ to the extent that it relates to Basin water resources
- Any other agreement that is entered into by the MDBA or the Commonwealth Environmental Water Holder, and one or more Basin States and is prescribed in the regulations as a relevant agreement^{xxxv}
- Any other agreement that is entered into by the Commonwealth and one or more Basin States and is prescribed in the regulations as a relevant agreement.^{xxxvi}

Engagement with Australian public on the management of Basin water resources

The Inspector-General has the function of 'to engage with the Australian community in relation to the management of Basin water resources'.^{xxxvii} This role may entail any one or a combination of the following:

- To inform the public about outcomes from the management of Basin water resources
- To interact with the public on the management of Basin water resources
- To educate the public about the management of Basin water resources from a Basin-wide perspective.

The Inspector-General notes that this is not an exclusive role, but rather a role which is exercised in concert with other water management agencies who also have communications and engagement roles.

Functions conferred under Water Act

As noted above, the Inspector-General has functions conferred under parts of the Act. This includes:

- Part 8 (enforcement)
- Part 10AA (special powers)
- Part 10AB (inquiries).

xxxiv Paragraph 215C(1)(c) and section 215C(3) of the Act.

xxxv Noting there are none currently prescribed for this purpose.

xxxvi Noting there are none currently prescribed for this purpose.

xxxvii Paragraph 215C(1)(d).

Enforcement

Part 8 of the Act relates to powers of enforcement. These powers may be used by those agencies identified as appropriate enforcement agencies under section 137. The Inspector-General is identified under section 137 as the appropriate enforcement agency for:

- A designated compliance provision, which section 4 of the Act defines as:
 - Part 2 of the Act (management of Basin water resources)
 - Regulations made for the purpose of Part 2 of the Act³⁴
 - Section 166 of the Water Act (failure to comply with an enforcement notice)
 - Section 222C of the Water Act (obstructing authorised officers)
 - Section 222D of the Water Act (Murray-Darling Basin Authority compulsion of information)
 - Section 237A of the Water Act (obstructing authorised compliance of Officers)
 - Section 238 of the Water Act (Inspector-General compulsion of information).
- A provision of Part 2A (critical human water needs) or a regulation made for the purpose of Part 2A
- A provision of Part 10AB (Inspector-General inquiries).

Part 8 of the Act sets out the powers of enforcement open to the Inspector-General. These powers include power to seek an injunction, declaration or imposition of a civil penalty. The Inspector-General also has powers in relation to issuing enforcement and public warning notices and entering into enforceable undertakings.

Special powers – entry and investigation

Under Part 10AA of the Act, appropriately appointed authorised compliance officers have the power to enter land and premises to monitor compliance with a designated compliance provision or to secure evidence of a contravention of a designated compliance provision. Part 10AA sets out how these powers of entry and investigation are to be validly used.

Section 238 of the Act also sets out the Inspector-General's powers to compel information. These powers may be exercised in relation to:

- An investigation of a designated compliance provision
- An audit into compliance with the Plan and/ or water resource plans
- A matter relevant to the performance of the Inspector-General's functions (other than his oversight functions set out in paragraphs 215C(1)(a)-(c))
- A matter specified in regulations made for this purpose.^{xxxviii}

Inquiries

Under Part 10AB of the Act, the Inspector-General may conduct inquiries at his own initiative or at the direction of the Commonwealth Water Minister. An inquiry may be held in relation to a matter that the Inspector-General has oversight of (that is, one or more of the functions set out in paragraphs 215C(1)(a)-(c)). The Act sets out the Inspector-General's powers in conducting an inquiry and the obligations imposed on the Inspector-General when doing certain things (for example, compelling information, including criticism in reports, etc.).

^{xxxviii} Noting there are none currently prescribed for this purpose.

Other functions conferred under Water Act, Basin Plan or any other legislative instrument made under the Act

Legislative frameworks evolve over time to reflect policy needs. In doing so, these frameworks may include additional responsibilities for relevant government agencies to those set out in the prescribed functions.

For the Inspector-General, currently he has the function of enforcing compliance with Part 2A, as a function conferred by the Basin States.

Anything incidental to or conducive to the performance of the other functions

The full range of government agencies' powers are not necessarily expressly prescribed in legislation. It is well recognised that agencies have the power to carry out activities which are associated with performing their express statutory functions.³⁵

For the Inspector-General, this has been expressed in the Act. In practice, the nature of this function will depend on what it relates to. For example, it may include, among other things conducting or commissioning reviews, publishing reports or statistics, attending hearings, making speeches, etc.

Implications for Inspector-General's regulatory policy

The Inspector-General's functions are clearly defined and reflect the Inspector-General's regulatory role as a Commonwealth integrity agency.³⁶ Under the Commonwealth's integrity framework, integrity agencies:

- Support accountability in the public sector through audit and assurance functions
- Provide oversight of government decisions
- Fulfil a transparency function by providing and promoting public visibility of government decisions and external influence
- Prevent unlawful conduct and provide education about laws and obligations imposed under laws
- Enforce Commonwealth laws.³⁷

Within this framework the Inspector-General is not responsible for making policy or laws or administering those laws. However, the Inspector-General is responsible for determining whether decisions made by persons or agencies who do those things have been made lawfully, in accordance with their commitments and/ or in a way that manages the Basin water resources in the national interest and gives effect to relevant international agreements.

As an integrity agency, the Inspector-General intends to provide transparency around his approach to performing these functions. Relevantly, the Inspector-General considers the following principles are appropriate to apply:

- Assurance—the Inspector-General provides transparency around the management of Basin water resources in a way that is open and equitable
- Integrity—the Inspector-General ensures persons or agencies act lawfully and are seen to act lawfully
- Influence—the Inspector-General builds and maintains trusted relationships with government entities, water users and the Australian public
- Improve—the Inspector-General drives and supports innovation and improvement in the management of Basin water resources in the national interest
- Enforce—the Inspector-General ensures laws are complied with so that Basin water resources are being managed in the national interest.

Under section 33 of the *Acts Interpretation Act 1901 (Cth)*,¹⁰ the Inspector-General is obliged to perform the above integrity functions. This means it is not within the Inspector-General's discretion about which of the above functions may or may not be performed. The Inspector-General does, however, have discretion about how these functions are performed and prioritised, and what regulatory tools may be used to support these functions.

Under the Act, the Inspector-General is broadly responsible for compliance with the relevant frameworks established under the Act, the Plan and water resource plans. In this context, compliance ranges from a general compliance with the intent or intended operation of the law through to enforcement of relevant compliance provisions. The nature of the regulatory powers or other tools used by the Inspector-General in performing these functions will therefore reflect the nature of the compliance activity being performed, where:

- Enforcement tools will be used to give effect to relevant obligations in the Act and address non-compliance within his jurisdiction
- Analytical tools will be used to interrogate the performance of functions or obligations through inquiries or audit compliance with obligations under the Plan and/ or water resource plans
- Non-regulatory tools, such as reviews, reporting, etc., will be used for engaging with the public on matters such as outcomes from compliance actions and trends in water management in the Basin.

These powers are discussed more in the following section.

Request for feedback

The Inspector-General is requesting feedback on what, if anything, stakeholders consider in addition to the above could usefully be clarified around his functions as part of developing his regulatory policy.

Regulatory powers

Regulatory powers are the powers used by relevant agencies to ensure individuals, agencies and industry comply with legislative requirements, and to respond to instances of non-compliance. In the context of the Inspector-General, these powers are divided into two categories—examination powers^{xxxix} and enforcement powers. In between these categories are monitoring powers, which are used to establish evidence of whether an alleged contravention of law has occurred.

Examination powers are used to establish the facts of a matter or to check intended activities, outputs or outcomes from laws are being delivered. Examples of activities associated with the use of examination tools are audits or inquiries. As noted above, other tools that do not require a legislative power to use may also be adopted to support this examination, when appropriate, such as reviews, reporting, etc.

Monitoring powers are used to check whether laws are being complied with. Examples of activities associated with the use of monitoring for compliance powers are audits or investigations.

Enforcement powers are typically used after monitoring powers are used and may include the issuing of infringement notices, applying for civil penalty orders or injunctions, or entering into enforceable undertakings.

^{xxxix} The term examination is used to refer to 'oversight' activities performed by other regulators to avoid confusion with the Inspector-General's oversight functions.

The Act sets out the scope of the Inspector-General's regulatory powers. These powers extend to examination, monitoring and enforcement powers. The following section describes the powers available to the Inspector-General under the Act.

Available regulatory powers

The powers open to the Inspector-General under the Act generally support the different types of functions he performs, where some powers may only be used in the performance of certain functions. The following is intended to summarise the Inspector-General's powers and when they are relevant to be used.

Audits

Under section 73L of the Act, the Inspector-General may conduct (or appoint or engage someone to conduct) an audit into compliance with the Plan and/or water resource plans. The purpose of audits is to form a view, based on the information obtained in conducting the audit, on whether a person or agency:

- Has acted or is acting in accordance with the Plan and/or water resource plans
- Has arrangements that have been established and/or operate in accordance with the Plan and/or water resource plans.

Enforcement

Under Part 8 of the Act, the Inspector-General has powers relating to the enforcement of the Act, including in relation to the management of Basin water resources under the Plan and water resource plans. The purpose of enforcement is to give effect to the obligations contained under the Act by addressing contraventions.

Investigations

Under Part 10AA of the Act, the Inspector-General may appoint authorised compliance officers to use the powers in the Act to enter premises and land for investigating compliance with the Act. Part 10AA also sets out the Inspector-General's powers to compel information for certain compliance-related matters.

The purpose of both the investigations and compulsion of information is to inform the Inspector-General whether laws have been complied with and, where not, to establish an evidence base for the contravention and resultant enforcement actions.

Inquiries

Under Part 10AB of the Act, the Inspector-General has powers to conduct inquiries into government agencies performance of functions, exercise of powers and performance of obligations, as relevant, under the Act or implementation of commitments in relevant intergovernmental agreements. The purpose of inquiries is to understand how those government agencies have undertaken those actions, establish whether this has been done in accordance with the relevant laws or whether these actions have achieved intended outcomes, and, where not, make recommendations to the relevant decision-maker to address deficiencies.

Guidelines

Under section 215V of the Act, the Inspector-General has the power to issue guidelines relating to the Commonwealth and Basin State agencies performance of their water management obligations

under the Act. These guidelines may be issued in relation to reporting requirements, approaches to assessing the effectiveness of regulatory frameworks, anything prescribed by regulations, among other things. Under the Act, Commonwealth and Basin State agencies are required to have regard to these standards in performing their water management obligations.

Standards

Under section 215VA of the Act, the Inspector-General has the power to issue standards relating to the measurement of water taken from Basin water resources and Basin water market data and related information. These standards are legislative instruments and extend the Commonwealth regulatory framework applying to the management of Basin water resources. Under the Act, Commonwealth and Basin State agencies are required to have regard to these standards in performing obligations relating to the management of Basin water resources.

Implications for Inspector-General's regulatory policy

The regulatory powers open to the Inspector-General are indicative of his general role as an integrity agency. The Inspector-General's regulatory policy will reflect the nature of these powers and how they are intended to, collectively, perform his functions as part of his regulatory policy.

The Inspector-General also intends to provide guidance around his general approach to exercising these powers. The Inspector-General considers this will give effect to the regulatory practice principles (see below).

However, the Inspector-General notes there may be value in supplementing this general approach through additional guidance around how he intends to approach the use of the individual powers. The Inspector-General considers this guidance may be developed separately to, but will give effect to, his regulatory policy.

Request for feedback

The Inspector-General is requesting feedback on what, if anything, stakeholders consider in addition to the above could usefully be clarified around his regulatory powers as part of developing his regulatory policy.

Regulatory practice

Regulatory practice relates to how an agency performs its functions and exercises its powers. In addition to guidance provided through the regulatory frameworks the agency is responsible for administering, agencies may be subject to other laws, rules, procedures and policies that guide its regulatory practice.

As an integrity agency, the Inspector-General intends to act as a best practice regulator, by complying with obligations sets out in all relevant laws, rules, procedures and policies and with the intended operation of those laws, rules, procedures and policies.

Regulatory practice principles

The Australian Government's *Regulator Performance Guide* lists three principles of regulator best practice:

1. **Continuous improvement and building trust:** regulators adopt a whole-of-system perspective, continuously improving their performance, capability and culture to build trust and confidence in Australia's regulatory settings

2. **Risk based and data driven:** regulators manage risks proportionately and maintain essential safeguards while minimising regulatory burden, and leveraging data and digital technology to support those they regulate to comply and grow
3. **Collaboration and engagement:** regulators are transparent and responsive communicators, implementing regulations in a modern and collaborative way.³⁸

These principles are extrapolated further in the Organisation for Economic Co-operation and Development's (OECD) eleven principles for promoting compliance with and trust in legislative frameworks:

1. **Evidence-based:** Regulatory activities should be evidence-based and measurement-based; deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly
2. **Selectivity:** Use the appropriate tool to achieve regulatory objectives
3. **Risk focus and proportionality:** Regulatory activities should be risk-based and proportionate; the resources employed by the regulator should be proportional to the level of risk and activities should aim for risk-reduction
4. **Responsive regulation:** Regulatory activities should reflect the risk profile and behaviour of the specific regulated entity or entities
5. **Long-term vision:** Regulatory activities should be underpinned by clear objectives and work towards delivering outcomes over the long-term
6. **Coordination and consolidation:** Avoid duplication and overlaps to ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness
7. **Transparent governance:** Governance arrangements should promote transparency, professionalism, and results-oriented management
8. **Information integration:** Information and communication technologies should maximise risk-focus, coordination and information-sharing, and the optimal use of resources
9. **Clear and fair process:** Regulators provide clarity of rules and processes for regulatory activities and clearly articulate rights and responsibilities of regulated entities
10. **Compliance promotion:** Transparency and compliance should be promoted through the use of administrative tools such as guidance, toolkits and checklists
11. **Professionalism:** Staff working for a regulator maintain at all times professionalism, integrity, consistency and transparency.³⁹

In addition, the Office of Impact Analysis provides guidance around principles that apply in relation to national standard setting bodies:

- Establish the case for government intervention for a clearly articulated problem, and examine a range of genuine and viable options, including non-regulatory options, to address the problem
- The approach offering the greatest net benefit, regardless of whether it is regulatory or non-regulatory, should be progressed
- Consultation with affected stakeholders should be genuine and timely and avoid creating cumulative or overlapping administrative burdens for those stakeholders
- The information on which decisions are made should be, unless otherwise prohibited (e.g., for legal reasons) published at the earliest opportunity
- All regulation should be periodically reviewed to test its continuing relevance.⁴⁰

The Office of Impact Analysis guidance also sets out the principle that all major decisions to regulate must be the subject of a Regulation Impact Statement. As a Commonwealth agency, the Inspector-General is required to test whether his guidelines and standards require a

Regulation Impact Assessment with the Office. As an obligation, this is not appropriate for inclusion as a principle to guide regulatory practice.

Implications for Inspector-General's regulatory policy

The Inspector-General considers the principles set out in the Australian Government's Regulatory Performance Guide provide an appropriate framework for approaching his regulatory practice. The Inspector-General intends for the OECD principles to provide additional guidance around when and how particular tools will be adopted. The Inspector-General further intends to apply the five relevant principles articulated by the Office of Impact Analysis in issuing guidelines and standards, in addition to complying with the obligation to test whether individual proposed guidelines or standards are 'major decisions'.

Request for feedback

The Inspector-General is requesting feedback on what, if anything, stakeholders consider in addition to the above could usefully be clarified around the principles guiding his regulatory approach as part of developing his regulatory policy.



Approach to regulatory policy

The Inspector-General intends to use the framework established through the previous sections to articulate a policy relating to his general regulatory approach. This approach will clarify who, what, when, where, why and how the Inspector-General intends to perform his functions, along with providing clarity around his principle-based exercise of powers and other tools in support of those functions.

Feedback received on this discussion paper will help to draft the Inspector-General's policy and ensure the policy covers matters relevant to affected stakeholders.

Interested stakeholders are requested to provide written submissions that address some or all of the matters raised in the request for feedback text boxes. Other matters may be raised in submissions for consideration by the Inspector-General in developing his regulatory policy and, potentially, other material.

The Inspector-General intends to publish a draft regulatory policy based on this approach and invite affected stakeholders to make further submissions before he finalises his policy. The timing of these steps is set out further below.

Submissions and timing

Submissions in response to this discussion paper may be lodged with igwc@agriculture.gov.au or sent to:

Inspector-General of Water Compliance
Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
Canberra ACT 2601

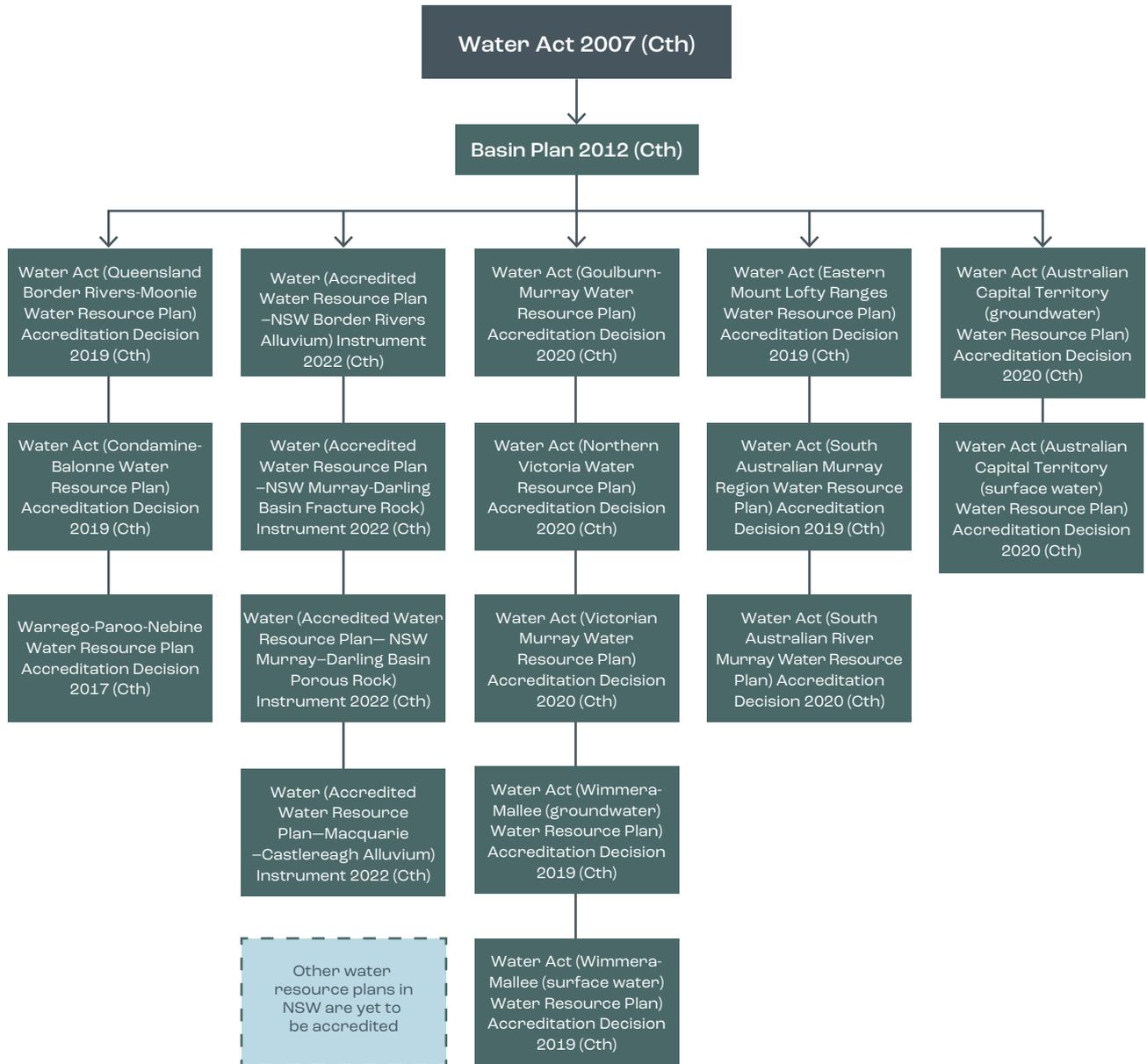
Please provide submissions before close of business 21 April 2023. Submissions received after this date may not be considered.

The Inspector-General is seeking feedback relating to the framework he will apply in developing his regulatory policy. Other feedback may only be considered where relevant to the Inspector-General's regulatory approach.

It is the Inspector-General's intention to publish submissions in full, unless otherwise prevented from doing so.

Once the Inspector-General has considered submissions on this discussion paper, he intends to publish his draft regulatory policy in June 2023 and provide a short opportunity for further submissions by affected stakeholders before publishing his final policy in August 2023.

Appendix I: National water legislative framework



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