

Submission to the Inspector-General of Water Compliance

ACT Government response to the Regulatory Policy Discussion Paper

Introduction

The legislated role of the Inspector-General of Water Compliance (IGWC) is a historic milestone in the water reform journey in the Murray-Darling Basin. It reaffirms the Australian Government's commitment to the Murray-Darling *Basin Plan 2012* (the Basin Plan), but also provides a proportionate response to the challenges that have preceded its establishment in implementing the Basin Plan. The independence of the IGWC is a critical feature for building public confidence in delivering the remaining elements of the Basin Plan and realising the objects of the *Water Act 2007* (the Act).

The ACT Government supports the role and function of the IGWC. The timely and full implementation of water reforms in the Murray-Darling Basin, with the trust and confidence of communities, can only be achieved with effective accountability measures and transparency. The comments provided below aim to seek clarification in the responsibilities of the IGWC, invite further consideration of regulatory activities, including performance audits, to strengthen transparency and accountability for Basin Plan implementation, and highlight opportunities for building a culture of collaboration as a precursor to enforcement.

The IGWC is requested to develop a program of activity to improve public confidence in the reporting of water availability and use within the Basin, including take for consumptive and environmental water use. Additional comments are provided below on this matter.

Context: Water resource management issues within the upper Murrumbidgee region

Maintaining the water security of the ACT and achieving the Basin Plan's outcomes within the region is dependent upon the water and land management pressures occurring outside of its territorial borders. Pressures impacting the regional water security include climate change, regional population growth and land development, and hydro-energy production.

Case studies presented in the ACT's annual Basin Plan reporting^{1,2} and findings of the ACT State of Environment report (2019)³ highlight a concerning trend in Murrumbidgee River health that is epitomised by the Murrumbidgee River ceasing to flow at Tharwa township in 2019, declining native fish populations and water quality entering the ACT that does not meet human health guidelines.

Responding to the external pressures impacting water security and environmental sustainability is dependent on effective implementation of the Act and Basin Plan.

Response to questions raised in the Discussion Paper

The following responses align with relevant sections of the Discussion Paper and associated questions presented for stakeholder feedback.

¹ [ACT Basin Plan report 2020-21- Case study upper Murrumbidgee River issues](#)

² [ACT Basin Plan report 2021-22 - Case study Water quality issues in the Upper Murrumbidgee](#)

³ [State of the Environment report 2019 – Office for the Commissioner for Sustainability and the Environment, ACT](#)

Institutional context.

Primary responsibilities for water management within the ACT include:

- Water policy and planning delegated to the Environment, Planning and Sustainability Directorate (EPSDD), Office of Water. This includes monitoring the state of the resource, conducting water resource assessments and environmental flow planning.
- Compliance and enforcement of water resource regulations is conducted by the ACT Environment Protection Authority (EPA). The EPA advises on issuing of water entitlement and licences, monitors and reports on water take and regulates polluting activities under the *Environment Protection Act 1997* (ACT).
- Icon Water is the Territory's urban water utility and operator of the water supply network.

The Murray-Darling communities package brought forward the concept of the IGWC as a priority response to rebuild public trust and confidence in the Murray Darling Basin water reforms. The novel regulatory responsibilities as described in the Discussion Paper recognise the shared responsibilities for implementing the Basin Plan across all governments. The equitable application of the regulatory functions of the IGWC must therefore apply across all responsible agencies.

The Regulatory Leaders Forum established by the IGWC is a welcomed initiative to build a culture of collaboration between agencies with responsibility for compliance and enforcement. This has been reinforced with the Memorandum of Understanding that has been supported by the ACT Government.

Proactively addressing issues through collaboration minimises instances of non-compliance and aligns with the regulatory practice principles described in the later parts of the Discussion Paper. To this effect, establishing avenues for engagement between the IGWC and agencies with planning/policy responsibilities is encouraged. Collaboration may identify areas of alignment for the development of guidelines and standards, invite insights or points of inquiry by the IGWC, and allow early rectification of issues prior to formal escalation. The ACT Office of Water welcomes engagement with the IGWC for supporting continuous improvement and addressing issues of shared interest.

An anomaly of the Act and the Basin Plan is the exclusion of the operation of Snowy Hydro Limited. Snowy Hydro operations influence the availability of water within the Basin. The operation of Tantangara Dam diverts over 90% of the Murrumbidgee River flow, impacting the achievement of Basin Plan outcomes and effecting water security of downstream communities and the environment. The operations do not appear to be subject to equivalent requirements for transparency and accountability as other water infrastructure operators across the Basin. The Discussion Paper identifies Snowy Hydro Limited as a relevant Commonwealth agency for regulation however only to the extent of its compliance with the Basin Plan and trading rules.

The IGWC is asked to consider the extent of its role and regulatory powers as it could apply to the operation of Snowy Hydro, with respect to improving transparency and accountability in water management, and impacts of their operations on the objects of the Act and the Basin Plan.

Legislative context

The objects of the Act provide useful contextualisation for the regulatory functions and powers as they may be applied by the IGWC.

The clarification that is provided by setting the functions and powers of the IGWC within the context of the legislation's objectives is supported as it sets a clear framing for inquiry insights, audits and the development of guidelines and standards.

However, it is important to note that the objects reflect the implementation of the Act in its entirety, not all of which may be applicable to the role of the IGWC. Without limiting the function of the IGWC, the Regulatory Policy could further examine how these objectives may guide its exercise of powers.

The Act encourages the management of Basin water resources to take into account broader natural resource management; the Basin Plan provides evidence of this, such as in the principles to be applied in environmental watering (Chapter 8, Part 4) and the setting of water quality targets (Chapter 9, Part 4). Part 2, section 10 of the Act addresses matters that may not be dealt with by the Basin Plan that includes land use planning, the management of natural resources (other than water) or the control of pollution. Extending the regulatory interests of the IGWC to all water effecting activities, as implied in the Discussion Paper, is considered an over-reach of responsibilities. The role that the IGWC could take on in this matter requires some further consideration.

Management of Basin water resources under the Act

Clarification is required on the interpreted responsibility of the IGWC for monitoring and oversight, in its interaction between statutory instruments and with intergovernmental agreements.

There appears inconsistency between exclusions listed within the Act and inclusions through the Basin Plan and the National Water Initiative. Section 215C of the Act establishes the statutory role of the IGWC, including specifying exclusion such as Critical Human Water Needs (Part 2A) and water charge and water market rules (Parts 4 and 4A). For example, while the Basin Plan and water resource plans give effect to critical human water needs, the primacy of the Act would imply that the stated exclusions would also apply to responsibilities that may be exercised by the IGWC across all instruments (refer to Discussion Paper, pp17-18). As the IGWC is established under the Act, these exclusions could also be interpreted as applicable in its oversight of inter-governmental agreements.

The Regulatory Policy should examine the effect of legislated exclusions on the function of the IGWC for providing oversight of the Basin Plan, water resource plans and intergovernmental agreements. Ensuring the appropriateness of regulatory scope for the IGWC may require further legislative amendment and/or more clarification through the policy for the avoidance of doubt.

Regulatory Functions and Powers

The scope of regulatory powers, as presented in the Discussion Paper, does not appear to support the function of the IGWC to the extent of its legislative context.

For example, the IGWC may conduct inquiries into agency performance as relevant under the Act or intergovernmental agreements. However, it is not clear whether this inquiry function could extend to activities that may be consistent with state water plans and licence conditions but inconsistent with supporting an objective of the Act such as water security or providing environmental outcomes within the national interest; for example, the operation of the NSW Snowy Water Licence. Powers of inquiry and audits, including the use of performance audits, could be broadened to enable the IGWC to provide insights that may be used to inform policy refinement and adaptive planning.

Testing the breadth of regulatory powers across a range of current and future challenges could support refinement of the Regulatory Policy. Specifically, the IGWC is encouraged to consider how its powers would be exercised to strengthen accountability for implementation of projects under the

SDL Adjustment Mechanism (for example Constraint projects), auditing the effective volume of water reported as being used by environmental water holders, assessing the application of restrictions on inter-state trade, and conducting an inquiry of the impact of Snowy Hydro operations within the upper Murrumbidgee River.

Regulatory practice

The regulatory principles presented broadly reflect those of the ACT's regulatory agency (EPA). Under the ACT's Accountability Commitment, the EPA exercise activities and decisions to be:

- Risk-based
- Proportionate
- Effective
- Constructive
- Accountable
- Transparent, and
- Timely.

The ACT Government is encouraged by the increasing collaborative approach being conducted by the IGWC. Further defining the process of escalation and identifying the opportunity for early non-regulatory intervention to address issues, could alleviate tension that may arise from the uncertainty in how the IGWC would enact its oversight role of relevant agencies.

Risk-based regulation is acknowledged as a principle guiding the practice of the IGWC. Further, applying this principle should be set within the context of the broader objectives of the Act, particularly efficient and effective water management. For example, the Compliance Compact was created in response to a critical event and has had the result of significantly up-lifting regulatory practices across the Basin. However, oversight of the Compact's implementation has focused on the notion of achieving consistency and an ability to compare compliance activities between basin states without due regard to cost effectiveness. As an example, telemetered water metering is a critically important tool for regulators in regions of the basin where access is inhibited and the volume of take exposes a considerable risk. Applying the same requirement for telemetry to a meter within or at the outskirts of Canberra city, for a licence less than 0.5ML, is not a proportionate response or cost-effective.

Reporting metrics on the delivery of the Compliance Compact and application of water metering standards is necessary for monitoring progress of program delivery, however, we encourage the IGWC to transition towards reporting metrics and that convey the effectiveness of measures for achieving the objectives of the Act. This would be consistent with the higher-order principles of focusing on water extraction trends over time, and collectively managing Basin water resources in the national interest. A reduced focus on metrics providing cross-jurisdictional comparisons and an increased consideration of water take outcomes would align reporting with basin-wide environmental targets.

One specific opportunity to improve reporting is for the IGWC to increase its proposed focus on regulatory outcomes related to 'water extraction trends over time' and the Act's objectives around ensuring sustainable water take.

Additional comments – Improving water information reporting and public assurance

Credible and reliable water information reporting underpins transparency, accountability and will be foundational for public support in future Basin water reforms.

Concerns in the scope of water information reported and its quality assurance has repeatedly been raised in investigations by the MDBA, the Interim IGWC, Productivity Commission, Australian Competition and Consumer Commission, and the Senate Select Committee on the Multi-Jurisdictional Management and Execution of the Murray-Darling Basin Plan.

While there have been efforts by government agencies to improve the reporting of water information, stakeholder information needs appear to remain unmet; specifically, the scope of information, transparency in the methods for deriving information and public assurance processes.

Responsibility for reporting water resource information is shared across all Basin governments, and often multiple agencies within each jurisdiction and the Australian Government. Information on water use and availability can be inconsistent, contributing to misunderstanding and public frustration. For example, in the 2018-19 year, the amount of water reported as used in the Basin by four different Commonwealth Government agencies ranged from 4,176 GL to 7,484 GL; notwithstanding the different methods and reporting context used by each agency.

Exercising the functions of the IGWC will require consistent, quality assured information on water resource management. For this purpose, the IGWC is encouraged to develop guidelines and an audit process for water information that is reported the basis for demonstrating the management of water resources and compliance with the Act.

Conclusion

The Discussion Paper provides clarity of interpretation of the powers and functions of the IGWC. This is important for setting expectations, building public confidence in the final stage of Basin Plan implementation, and identifying opportunities for stakeholder and government collaboration with the IGWC.

Significant challenges remain in delivering water management arrangements that deliver on the objectives of the Act and outcomes of the Basin Plan. The IGWC has a critical role in addressing these challenges.

The ACT Government thanks the IGWC for the opportunity to provide a submission on the Discussion Paper, noting the importance of this paper ahead of the Water Act review, the review of the IGWC and the Productivity Inquiry into the effectiveness of the implementation of the Basin Plan and water resource plans.