



Australian Government



Inspector-
General of
Water
Compliance

Inspector-General of Water Compliance – Submission

Review of Murray-Darling
Water Compliance

October 2023



Foreword

I note the Australian Government's announcement on 14 September 2023 of an independent review of the Inspector-General for Water Compliance's powers, the *Review of Murray-Darling Water Compliance*.

I welcome this review and your appointment as the independent reviewer. This review provides an opportunity to ensure I, as Inspector-General for Water Compliance, have the powers needed to uphold Basin rules and restore confidence amongst those living and working in the Basin.

I welcome an independent evidence-based assessment of performance, capability and maturity and a conversation about efficiency and effectiveness which avoids duplication with other regulators. Further, I welcome a conversation regarding the evolution of Commonwealth integrity agencies as a current matter of Government priority and public concern.

I consider it fundamental to integrity and good governance that this review is conducted independently of any government agencies which are regulated by me, as the Inspector-General for Water Compliance.

Thank you for your consultation on the draft review scope and also your consideration of my feedback.

I note much has been achieved in the first two years of this newly established integrity role. I am pleased with the contribution my team has been able to make to Basin plan outcomes. I note the many and varied activities and outcomes documented in my first two annual reports and I look forward to continuing our strategic plan focus on ensuring it's lawful, ensuring it's visible, doing it better and making it better.

This submission provides practical experience of issues identified in my first two years of establishment which are relevant to your terms of reference and provide an opportunity to deliver on government's election commitments to strengthen the independent Inspector-General of Water Compliance.

Further to this submission, I note the terms of reference indicate an intention to assess regulatory maturity using the Modern Regulator Improvement Tool (MRIT) developed by the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT). I note the MRIT was developed as a self-assessment tool and can provide useful insights into a regulator's maturity. I welcome this assessment and look forward to working with you to complete this assessment. I see this assessment as an important part of your review that will highlight a range of matters for your consideration on structure, governance, independence, capacity, capability and associated drivers such as resourcing.

I look forward to engaging with you more on these matters throughout the review.

I strongly encourage you, as you go through the review, to also engage with other Commonwealth integrity agencies and compliance regulators.

Yours sincerely,



Hon. Troy Grant

Inspector-General of Water Compliance



Introduction

The effective management of Murray-Darling Basin (Basin) water resources is highly important to the health of Basin ecosystems, communities, economies, and cultures. The *Water Act 2007* (the *Water Act*) was established to address over-extraction of water from the Basin in the national interest, by setting enforceable sustainable diversion limits. The *Water Act*, therefore, underpins a national regulatory regime enacted through Commonwealth law and given effect by relevant state and territory governments (collectively, the Basin States).

The Inspector-General of Water Compliance was established following over a decade of experience with the challenges around the collective management of Basin water resources by multiple governments, and within a complex array of government agencies at all levels. Importantly, the Inspector-General was established in a period of significant dissatisfaction and lack of confidence in governments and agencies' management of Basin water resources in the public interest.

The Inspector-General performs a valued role in water governance in the Basin for both Basin governments and the broader Australian community. Relevantly, the Inspector-General is intended to improve trust and confidence in the management of Basin water resources by providing assurance that the letter and intent of the *Water Act* is being complied with. However, in practice, the effectiveness of their role is highly dependent on the adequacy of their regulatory powers and their ability to exercise those powers independently in the performance of functions.

The *Review of Murray-Darling Water Compliance* (the review) provides a timely opportunity to reflect on the nature of the Inspector-General, what the Inspector-General was established to do, and whether delivery of this intention is supported by the Inspector-General's current arrangements. The review will consider the effectiveness of the Inspector-General's powers and level of independence, and provide advice to the Commonwealth Government on potential enhancements.

The review will also consider the Inspector-General's regulatory maturity. However, this is outside the scope of this submission and the Inspector-General will provide relevant information separately.

Based on practical operational experience since August 2021, the Inspector-General considers that reform is required to support the performance of regulatory functions in a way that effectively manages risks to the health of Basin ecosystems, communities, economies, and cultures. The following sets out the reasons for this conclusion and proposed areas of consideration.

Context & Establishment

As part of establishing a new agency, the Inspector-General has recently finalised a number of key strategy and planning documents which provide critical context to the role, and the review.



Documents are published on the IGWC website.

The Inspector-General has a range of strategies, plans, policies, procedures, protocols, guides, delegations, forms, templates, tools, analysis, advice and other artifacts which may be of relevance to the independent review. The Inspector-General welcomes requests from the independent reviewer to access relevant documents.

Further, the Inspector-General has an active work program with a number of active projects, audits and investigations underway. This body of work may inform the considerations of the independent reviewer. The Inspector-General welcomes requests from the independent reviewer to discuss this work where appropriate.

Inspector-General of Water Compliance's experience

The Inspector-General performs a key role in the national water governance arrangements in ensuring Basin water resources are managed in the national interest. In this role, the Inspector-General is responsible for ensuring the Commonwealth's water laws are complied with and providing assurance that commitments in intergovernmental agreements that support the operation of those water laws are implemented.

However, the effectiveness of the Inspector-General's activities is tempered by:

- Matters affecting independence
- Function and jurisdiction, and
- Scope of regulatory powers.

Practical experience relating to independence

The level of independence for regulators falls along a scale from being subject to government direction in the performance of their functions (not independent) to being at arm's length from government (independent). The best practice governance principle is that a regulator's level of independence should reflect the risks to the regulator's integrity in the performance of their functions arising from government influence.

The Inspector-General has a key role in providing accountability for compliance with the letter and intent of the Water Act, which is applied by, and applies to, government agencies. To be effective, the Inspector-General needs sufficient independence from regulated entities, parties to relevant intergovernmental agreements, and political influence (at both state and federal level). The Inspector-General's role and the identity of regulated parties warrants a high degree of independence.

The Inspector-General is a Commonwealth integrity agency, identified in the *National Anti-Corruption Commission Act 2022*. This underscores the need for the Inspector-General to have the capacity to independently determine how they will perform their functions and exercise their powers, and support the rigour of the Commonwealth's integrity ecosystem.

However, in practice the Inspector-General's independence in the performance of their functions is lessened due to:

- Constraints on their resourcing and access to services, particularly in comparison with other integrity agencies, compliance regulators and inspectors-general
- Not having control over employment arrangements for staff assisting the Inspector-General
- The governance structure of the Inspector-General depends on the number of senior executive level staff made available by the Department of Climate Change, Energy, the Environment and Water (DCCEEW) and not by their independently determined needs
- Lack of practical and legal independence from a department (DCCEEW) that the Inspector-General regulates.

As such, the Inspector-General's level of independence appears inconsistent with the risks to their integrity as a regulator. This lack of independence has implications for the adequacy of the water governance arrangements in the Basin and, therefore, to the integrity of the regulatory frameworks established through the Water Act. It also has the potential to undermine the efficacy of the Commonwealth's integrity frameworks.

Operational experience relating to powers

Regulator's powers are generally developed to reflect the nature of their regulatory functions and duties under relevant laws. From a best practice regulatory design perspective, powers need to be suitable and adequate to deliver outcomes intended by policy-makers. Importantly, those powers should be capable of managing the risks and harms the legislative framework they were established under is intended to ameliorate.

In practice, there are limitations around the scope and nature of the Inspector-General's powers that hinder the effective performance of functions under the Water Act. These limitations, therefore, have broader implications for:

- The effectiveness of the Water Act and the regulatory frameworks established under it
- Outcomes for Basin ecosystems, communities, economies and cultures
- The integrity, and therefore, legitimacy, of the arrangements established by the Commonwealth Government, including operation of intergovernmental agreements with Basin State governments, to manage Basin water resources in the national interest.

While the Inspector-General works closely with relevant government agencies to collectively drive improvements in water compliance and performance in the Basin, these relationships can only be relied on to a certain extent. Beyond this, the Inspector-General needs to have access to adequate and suitable powers to perform their various functions.

The Inspector-General's operational experience since establishment in late 2021 has identified the following issues for consideration:

- Limitations in the Inspector-General's audit powers mean they are unable to use the audit power to ensure the performance of obligations under the Water Act delivers intended outcomes
- There are limited statutory powers open to the Inspector-General to use to enforce government agency compliance with the Water Act
- The Inspector-General is unable to issue infringement notices for contraventions of civil penalty provisions, limiting the Inspector-General's capacity to escalate enforcement actions in line with risk-based regulation
- The drafting of compliance monitoring powers means the Inspector-General may be constrained in their consideration of all matters relevant to compliance with the Water Act
- Inquiries powers have limitations that could affect the Inspector-General's capacity to conduct an inquiry when necessary and provide assurances the Inspector-General's inquiry would be informed by all relevant information
- The scope of the Inspector-General's guideline powers is narrow, noting a broader power could potentially support building regulated entities' confidence in, and contribution to improving the integrity of, the national regulatory frameworks
- The Inspector-General's standard-making powers are limited and could be strengthened to drive step-change improvements in outcomes from the regulatory frameworks
- The Inspector-General's audit powers do not currently extend to being able to interrogate whether regulated entities are performing the actions they have identified in response to a recommendation in an audit report
- There have been developments around requests for provision of compellable information under the Water Act that could usefully extend to the Inspector-General's equivalent powers
- The Inspector-General's inquiry powers do not currently maximise public transparency around matters relating to the management of Basin water resources and nor do these support the performance of the Inspector-General's public engagement function

- The Inspector-General's administrative powers are broadly appropriate but should be revisited in future reforms to water governance arrangements, and the reviewer's further considerations around drivers of capability / regulatory maturity as part of the review.

The nature of the oversight role combined with limitations around the Inspector-General's enforcement powers, necessitates the Inspector-General having more robust oversight powers to deliver intended policy outcomes.

Experience relating to the establishment and delivery of new functions

The Inspector-General does not have jurisdiction over all matters or all entities which significantly affect the management of Basin water resources. For example, there are gaps in the Inspector-General's jurisdiction with respect to the Basin Officials Committee (BOC), Murray-Darling Basin Ministerial Council (MinCo) and the *Murray-Darling Basin Agreement*. These gaps have implications for transparency and accountability in the management of Basin water resources and the effective performance of the Inspector-General's functions.

The drafting of the *Basin Plan 2012* (the Basin Plan) also creates challenges in the effective performance of the Inspector-General's functions due to ambiguities in who or how obligations are imposed. This has significant impact on accountability, transparency and enforceability. The *Water Amendment (Restoring our Rivers) Bill 2023* aims to address the consequences of this in respect to the Inspector-General's sustainable diversion limit compliance role. However, similar issues remain across the broader regulatory framework set out in the Basin Plan.

The Inspector-General has observed challenges around the operation of accredited water resource plans. Relevantly, there are limited triggers for Commonwealth-driven improvements in water resource plans to manage issues or risks identified in the performance of the Inspector-General's functions. This undermines the intent of integrated, adaptive management of Basin water resources under the national regulatory regime.

The current alignment of roles and responsibilities between the Murray-Darling Basin Authority (MDBA) and the Inspector-General under the Water Act potentially creates inefficiencies in the regulatory framework. There are also implications for the Inspector-General's ability to perform their functions independently from the MDBA.

Policy and reform processes are run by the DCCEEW, as the department with portfolio responsibility for the Water Act, or the MDBA, who, under the Water Act, has certain roles in relation to the maintenance of the Basin Plan and accreditation of water resource plans. These processes have the potential to significantly affect the performance of the Inspector-General's functions, including with respect to the enforceability of the Basin Plan and/ or water resource plans. However, there is no formal obligation to consult with the Inspector-General on policy reforms. This means the Inspector-General depends on DCCEEW and/ or MDBA (both agencies the Inspector-General regulates) proactive engagement as a mechanism through which to provide insights into the operation of the current regulatory framework and/ or implications for the Inspector-General in regulatory reforms.

Key issues for consideration

In light of the above experience, the following issues are highlighted for consideration in the review. The Inspector-General recognises that a number of these matters complement or support each other and, as such, the Inspector-General encourages the reviewer to adopt a holistic approach in considering options to strengthen the Inspector-General's role, independence and powers.

Independence

The Inspector-General proposes the following as key issues for consideration by the review to strengthen independence:

- The Inspector-General is adequately resourced to efficiently and effectively perform functions with arrangements in place to guarantee independent resourcing over the long term
- The staffing arrangements and decision-making structure for the Inspector-General manages the risks associated with performing their regulatory roles and responsibilities
- The Inspector-General's degree of independence from government is commensurate with the risk to their integrity and the integrity of the regulatory frameworks.

It is considered critical that the level of resources necessary for the performance of functions is determined based on need and comparator agencies rather than current or historical levels of funding.

The Inspector-General's current structure is impacting on their capacity to independently perform their regulatory functions and make decisions on complex and highly contentious matters. The Inspector-General proposes that the review consider the governance structure, including the need for sufficient senior executive level staff, to effectively manage governance, regulatory, legal and performance risks.

It is proposed that the reviewer consider options for increasing the real and perceived level of independence of the Inspector-General and not just address gaps through administrative arrangements. Relevant considerations may include:

- Employment arrangements for staff supporting the Inspector-General, including the establishment of a statutory office of the Inspector-General of Water Compliance under the Water Act
- The Inspector-General to be an accountable authority for the purpose of financial law and not an official of DCCEE
- Portfolio arrangements that reflect the Inspector-General's role as a Commonwealth integrity agency to avoid conflicts of interest associated with their roles with respect to other Commonwealth water agencies.

Powers

The Inspector-General proposes the following as key issues to maximise accountability and transparency by ensuring:

- The range of regulatory and administrative powers open to the Inspector-General is both adequate and suitable for the nature of the functions performed by the Inspector-General
- The Inspector-General's jurisdiction and role with respect to entities and matters affecting the management of Basin water resources is clear
- The Inspector-General's experience from the performance of their functions is considered by the relevant decision-makers in water policy and regulatory reforms, where relevant.

The Inspector-General proposes the following for consideration by the reviewer to strengthen existing powers:

- **Audit powers**

- The audit powers be extended to include audits of those elements of the Water Act for which the Inspector-General is the appropriate enforcement agency
- The audit powers be extended to include audits into performance-related matters:
 - Performance of functions and exercise of powers by agencies of the Commonwealth
 - Other agencies' and persons' performance of obligations under the Water Act and regulatory frameworks established through the Water Act
- Audit powers could be strengthened by extending the powers to enable these to be used with respect to implementation of actions regulated entities identify in response to audit report findings

- **Enforcement powers**

- The Inspector-General have the power to issue compliance notices with respect to contraventions of matters for which the Inspector-General is the appropriate enforcement agency
- The Inspector-General have the power to issue infringement notices with respect to civil penalty provisions for which the Inspector-General is the appropriate enforcement agency

- **Compliance powers**

- The Inspector-General's powers to compel the provision of information for compliance purposes extend to performance-related matters
- The administration of requests for provision of compellable information could be clarified in line with the ACCC's new compulsion powers in the Water Amendment (Restoring our Rivers) Bill 2023

- **Inquiry powers**

- The ability for individuals to avoid answering questions, give information or provide a document in an inquiry is revised to ensure this is not a barrier to the Inspector-General having access to necessary information
- The Inspector-General is able to appoint someone, in writing, to do certain things on the Inspector-General's behalf in an inquiry
- The Inspector-General's inquiry powers extend to the power to hold public hearings to maximise transparency and support the performance of their public engagement function
- Removal of limitations around the Inspector-General's recommendations in relation to implementation of commitments in intergovernmental agreements

- **Guidelines and standards powers**

- The Inspector-General's guidelines powers are extended to matters relating to exercise of powers as a complementary measure to the above amendments
- The Inspector-General's standard making powers are extended to making standards with respect to matters prescribed through a regulation made by the Minister for that purpose.

New powers are discussed further below in the context of addressing specific issues.

Functions and jurisdiction

As a new entity, the Inspector-General has undertaken a significant piece of work to clarify the role, functions and jurisdiction as per the current law. This is publicly articulated in the IGWC Regulatory Policy.

The Inspector-General welcomes further consider of function and jurisdiction where it enhances accountability, transparency or enforceability of the Water Act, the Basin Plan, and/or Water Resource Plans. This may include consideration of:

- Increasing accountability by extending the Inspector-General's oversight to include all intergovernmental agreements relevant to the Water Act, Basin Plan and Water Resource Plans
- Increasing accountability by clarifying who responsibilities are imposed on in legislation.

It is important to consider the practical implications from the current split in roles and responsibilities under the Water Act and Basin Plan. The Inspector-General recognises this may be better considered through broader water governance reviews and reforms, but, in the interim, there remains a need to have arrangements that ensure:

- The national regulatory framework supports the performance of the Inspector-General's functions
- The Inspector-General has access to information that is relevant to the performance of their functions.

There is an absence in legislation of a formal role for the Inspector-General, along with other water agencies, to inform policy design, implementation and reforms, which has implications for the effectiveness of the regulatory frameworks. It is open to the reviewer to consider potential reforms to the Water Act and Basin Plan, where appropriate, to require the Inspector-General to be consulted on reforms and amendments that are relevant to or affect the performance of their functions.

