

Response to submissions

Regulatory Policy Discussion Paper

July 2023

Table of Contents

- Introduction..... 1**
- Importance of Inspector-General 1**
- Role clarity 1**
 - Jurisdiction in relation to non-water government agencies 2
 - Jurisdiction over Snowy Hydro Limited..... 3
 - Limitations around Inspector-General’s jurisdiction 3
 - Jurisdiction over expired agreements..... 4
- Principles behind regulatory approach..... 4**
 - Outcomes-based approach 5
 - Risk-based approach..... 5
- Link to legislated objectives..... 6**
- Content of Regulatory Policy 6**
- Collaboration and engagement 7**
- Quality of water information 7**
- Review of Regulatory Policy..... 8**
- Negative outcomes 8**

Introduction

The Inspector-General of Water Compliance published their *Regulatory Policy Discussion Paper* on 31 March 2023. The Inspector-General would like to thank those stakeholders who made submissions. All the submissions added value to the Inspector-General's consideration of matters for inclusion in their draft Regulatory Policy.

This document sets out the Inspector-General's response to stakeholders' submissions. These responses include identifying other projects, where these are more appropriate for addressing the issues raised in submissions, compared to the Regulatory Policy.

Importance of Inspector-General

All submissions received indicated stakeholders firmly supported the role of the Inspector-General in overseeing compliance with the national frameworks applying to the management of Murray-Darling Basin water resources; namely, the *Water Act 2007* (Cth) (Water Act), the *Basin Plan 2012* (Basin Plan) and water resource plans.

The ACT Government and Department for Environment and Water (SA Government) submissions, in particular, emphasised the importance of the roles and functions of the Inspector-General in providing accountability and transparency around the management of Basin water resources. The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) submission strongly supported the Inspector-General's emphasis on truth-telling, integrity, transparency, and accountability in the management of water in the Basin.

The Inspector-General welcomes this feedback and agrees that it is a critical element of their role under the national frameworks and as an integrity agency. The Inspector-General's role in providing truth, transparency and accountability in the management of Basin water resources underpins all of their work and will be reflected in their Regulatory Policy.

The Australian Competition and Consumer Commission (ACCC) submission supported the Inspector-General's role to '*improve the public's trust in, and visibility and accountability around, the institutions with responsibility for managing Basin water resources*'. The ACCC emphasised the importance of the Inspector-General's independence and being empowered and resourced adequately to make robust decisions. The ACCC noted this is needed to support the delivery of the Basin water market reforms currently under development by the Commonwealth Government.

The Inspector-General recognises the relevance of the ACCC's comments for the water market arrangements that are part of upcoming legislative reform processes. The Inspector-General considers these comments align with good institutional design and, as such, underpin the integrity and effectiveness of regulatory design.

The Inspector-General will adopt a principles-based approach aligning with good institutional design and the ACCC's submission to inform their submissions to upcoming legislation reforms and reviews, when relevant. Of specific relevance is the imminent review of the Inspector-General's powers that was an incoming Government election commitment, provide appropriate opportunities to provide feedback and inform amendments relating to the Inspector-General's functions, powers and portfolio arrangements.

Role clarity

All submissions supported the Inspector-General taking steps through their Regulatory Policy to provide clarity around their roles and responsibilities. The ACCC submission noted the complexity of governance arrangements and institutional responsibilities makes it challenging to set out the Inspector-General's role in a clear and simple way.

The submissions made by Basin State governments pointed to the need to provide clarity around the Inspector-General's role with respect to them and other Commonwealth agencies. The ACT Government and ACCC submissions noted the importance of role clarity for managing tensions in relations between the Inspector-General and other regulatory agencies.

The Inspector-General supports providing greater clarity around their role compared to other Commonwealth agencies and with respect to Basin State agencies in their Regulatory Policy. The Inspector-General notes the Department of Planning and Environment (NSW Government) suggested a diagrammatic representation of Commonwealth agencies similar to NSW water management agencies and considers this would be a useful communication tool. The Inspector-General considers a similar representation could aid in understanding the Inspector-General's role in the Commonwealth context.

The Department of Regional Development, Manufacturing and Water (Qld Government) and Department of Energy, Environment and Climate Change (Vic Government) pointed to the need for the Regulatory Policy to expressly commit to the Inspector-General avoiding duplication of activities with Basin States. The ACCC submission flagged the importance of clarity and avoidance of duplication of roles for the effectiveness of legislative frameworks.

The Inspector-General supports being clearer on their role and responsibilities compared to Basin State agencies in their Regulatory Policy. The Inspector-General also considers the Regulatory Policy could, relevantly, provide guidance around triggers for the performance of relevant regulatory activities, such as pursuing water take offences under the Water Act.

The Inspector-General notes the importance of simply communicating through the Regulatory Policy the distinction between Basin States' and the Inspector-General's jurisdictions where:

- Basin State agencies are responsible for administering and enforcing relevant state or territory water laws
- The Inspector-General is responsible for ensuring the Basin State agencies do so consistently with the national framework, relevantly the Water Act, Basin Plan and relevant water resource plans.

The Memorandum of Understanding with Basin State compliance regulators is the appropriate process through which to explore how the Inspector-General and Basin State compliance agencies will work together in a practical sense. The Inspector-General considers this is consistent with the collaborative approach welcomed in the NSW Government, Qld Government and Vic Government submissions.

The NSW Government submission noted the importance of consistent advice being provided across Commonwealth agencies and recommended the Regulatory Policy clarify how consistent advice and approaches can be provided across the Commonwealth with respect to Basin states and their management of Basin water resources.

The Inspector-General notes that the Regulatory Policy only applies in how the Inspector-General performs their regulatory functions. As such, the Inspector-General will provide high level guidance around how they engage with other Commonwealth agencies on matters that cut across multiple agencies' roles and responsibilities in the Regulatory Policy.

However, the Inspector-General recognises the need to maintain the independence of Commonwealth agencies, including the Inspector-General's own independence. Committing to the provision of consistent advice from all Commonwealth agencies, particularly where differences may arise due to distinctions in the nature, role and responsibilities of different agencies, would therefore be inappropriate.

Jurisdiction in relation to non-water government agencies

With respect to non-water government agencies, the ACT Government submission warned against being too expansive in the use of the Inspector-General's powers. The ACT

Government cautioned this may be an over-reach of responsibilities in a way that is not supported by the legislation.

The Inspector-General notes the concerns raised by the ACT Government and agrees their role, particularly in respect to non-water government agencies, requires refinement. Relevantly, the Inspector-General considers their role with respect to non-water government agencies is limited to where the non-water agency performs activities that detrimentally affect Basin water resources. In this context, the Inspector-General may make findings and recommendations relating to the performance of those activities, but the activities themselves are not subject to the Inspector-General's jurisdiction.

Jurisdiction over Snowy Hydro Limited

The Snowy Hydro Limited submission clarified its operations and licensing arrangements, with flow-through implications for the application of the Inspector-General's functions and powers. The ACT Government submission requested the Inspector-General consider the extent of their role and powers with respect to Snowy Hydro Limited.

The Inspector-General Snowy Hydro Limited is both an agency of the Commonwealth for the purposes of the Water Act and a holder of a water access right, being the licence issued under Part 5 of the *Snowy Hydro Corporatisation Act 1997* (NSW). As an agency of the Commonwealth, Snowy Hydro Limited has functions conferred under the Water Act, including functions conferred in relation to acting consistently with the Basin Plan and/ or water resource plans. The Water Act applies to Snowy Hydro Limited as a holder of a water access entitlement, and this application is in addition to the functions conferred under the Water Act.

The Inspector-General recognises that the performance of their functions and exercise of their powers with respect to Snowy Hydro Limited will therefore be informed by the matters relevant to the specific occasion and, as such, is not suitable for clarifying in their Regulatory Policy.

Limitations around Inspector-General's jurisdiction

The ACT Government raised the importance of the Inspector-General having appropriate regulatory scope to perform their functions and noted there may be unintended effects from legislated exclusions for the effectiveness of those functions. The Murray-Darling Basin Authority (MDBA) submission also flagged the value in clarifying the Inspector-General's jurisdiction with respect to the Murray-Darling Basin Agreement.

With respect to the implications of legislated exclusions, the Inspector-General notes that these reflect decisions of policy-makers and legislators and the Inspector-General does not have the discretion to amend or vary what is included in the legislation. In line with the Commonwealth's stewardship model, the Inspector-General will bring the implications of those exclusions to relevant decision-makers' attention, where appropriate, for example:

- Through legislative reform processes
- During reviews, such as the imminent review of the Inspector-General's powers
- In correspondence with the Commonwealth Water Minister
- In discussions with the Murray-Darling Basin Ministerial Council.

In relation to the Murray-Darling Basin Agreement, the Inspector-General notes it is referenced in the substantive Water Act and the Agreement itself is set out as a schedule to the Water Act. This means the Agreement is, itself, not under the Inspector-General's jurisdiction, but does, in part, inform the legislative construct the Inspector-General regulates and applies. This creates some complexity around the Inspector-General's jurisdiction with respect to the Agreement, which the Inspector-General will raise through appropriate processes and forums, along with other legislated exclusions and relevant intergovernmental agreements.

Jurisdiction over expired agreements

The MDBA submission noted that expired agreements are listed in the Water Act as being subject to the Inspector-General's oversight. The MDBA considered there may be scope to revisit the inclusion of expired agreements.

The Inspector-General notes that this is something that could be pursued by the MDBA through relevant reform processes. From the Inspector-General's perspective, whether an intergovernmental agreement remains relevant to the performance of their functions is a more important consideration than the agreement being expired.

For example, where the implementation of commitments in those agreements underpin the operation of the national framework or affect the delivery of intended outcomes from the national framework, they remain relevant to the Inspector-General's functions. This is because those agreements form part of the broader arrangements supporting the integrated management of Basin water resources under the national framework. As such, it is relevant for the Inspector-General to consider whether commitments have been implemented or not, and, where they have been, whether this has been done in a way that delivers intended outcomes set out in those agreements and enables the effective operation of the Water Act, Basin Plan and water resource plans.

With respect to those agreements relating to federal financial relations, the Inspector-General notes that, while an agreement may be superseded, the new agreements may be made under the initial head agreement. This means those subsequent agreements come within the Inspector-General's oversight function.

The Inspector-General is open to exploring opportunities to provide clarity around relevant intergovernmental agreements, where possible. This includes seeking amendments to the *Water Regulations 2008* (Cth) to list other intergovernmental agreements, as necessary, and providing advice on the scope of the Inspector-General's jurisdiction over agreements in the forthcoming review of the Inspector-General's powers.

Principles behind regulatory approach

Submissions were generally supportive of the principles-based approach set out in the *Discussion Paper*. The ACCC's submission noted that establishing principles in the Regulatory Policy will help improve coordination between agencies, build role clarity and increase transparency and trust in the Basin. MLDRIN's submission supported the principles-based approach as a way of driving innovation and improvement in the management of Basin water resources in the national interest.

The NSW Government submission noted the scope and application of the principles associated with this split in responsibilities that are relevant to the Inspector-General's role could be clarified and, in particular, around reconciliation of a situation where Basin-wide outcomes are identified as being different to the national interest. Similarly, the Vic Government indicated concern about the links between the principles and the performance of regulatory responsibilities by the Inspector-General.

The principles articulated in the *Discussion Paper* are intended to inform the development of the Regulatory Policy and, as such, the Inspector-General considers the feedback provided will aid in the clarification of principles they apply in the prioritisation and performance of particular responsibilities.

The Inspector-General notes their jurisdiction under the national framework relates to the geographic region of the Basin and that this should be represented in their Regulatory Policy. As such, Basin-wide and national interests are balanced through the legislative design rather than by the Inspector-General in performing their regulatory responsibilities.

Outcomes-based approach

The ACT Government noted the outcomes-based approach reflected a transition from activity-based metric reporting. The ACT Government encouraged the Inspector-General, as part of this outcomes-based approach, to shift towards reporting metrics that convey the effectiveness of measures for achieving the objectives of the Water Act. An opportunity identified by the ACT Government was to increase the Inspector-General's proposed focus on regulatory outcomes related to 'water extraction trends over time' and the Water Act's objectives around ensuring sustainable water take.

The MDBA also recognised the importance of water accounting and that responsibilities for accounting were shared among a range of agencies. The MDBA noted this requires the close coordination and consultation on distinct but related elements of the water accounting framework.

The Inspector-General considers that reporting on outcomes will provide transparency around matters relevant to the effective management of Basin water resources. The Inspector-General notes work has been conducted with Basin States to develop a compliance performance reporting framework that will progressively focus on outcome-based reporting. The Inspector-General's metering report card complements this work by showing a snapshot of each Basin State's ability to accurately monitor water take in the Basin, as a key input into compliance and enforcement activities and in reporting on water take.

With respect to the Inspector-General's role in sustainable diversion limit compliance and water resource plan compliance, the Inspector-General will provide more clarity about the principles they will use in prioritising and performing these roles in their Regulatory Policy. While this will be at a high level, the Inspector-General is also currently working on a range of projects that are focused on providing assurance around those elements of the national frameworks that support the delivery of its objectives, covering:

- Sustainable Diversion Limit Compliance Framework
- Water Resource Plan Compliance and Enforcement Framework
- Metering Standard and Guideline.

Risk-based approach

While submissions generally supported a risk-based approach, the Qld Government submission requested the provision of a clearer explanation and examples regarding who, how and when these will be applied and what risk factors will guide these decisions and planned priorities in the Regulatory Policy. The Inspector-General agrees there is value in providing clarity around their risk-based approach, including what this means for prioritising and performing regulatory responsibilities, in their Regulatory Policy.

The Inspector-General notes MLDRIN's submission indicated the importance of setting out what a risk-based approach means in a practical and applied sense. The Inspector-General intends to provide clarity around their approach through the Regulatory Policy.

However, this needs to be set at a high enough level to provide transparency across the full range of the Inspector-General's functions and responsibilities. As such, the Inspector-General intends to provide further, more practical, explanation of what their risk-based approach means in the context of their specific responsibilities including through the:

- Sustainable Diversion Limit Compliance Framework
- Water Resource Plan Compliance and Enforcement Framework.

Link to legislated objectives

Grounding the Inspector-General's regulatory approach in the legislated objectives was generally supported in submissions. However, the ACT Government recommended further examining how these objectives may guide the Inspector-General's exercise of powers.

In terms of scope, the Qld Government recommended the areas of focus the principles associated with this split in responsibilities could be expanded to include all of the legislated objectives. In contrast, the ACT Government noted that not all of the objectives may be relevant to the Inspector-General's functions, given they do not administer all of the Water Act.

The Inspector-General intends to clarify how they prioritise and perform specific regulatory responsibilities, having regard to the application of relevant objectives in that particular context. This will ameliorate the need to determine what objectives are relevant to the Inspector-General, which is a matter more appropriately considered as part of legislative design.

Content of Regulatory Policy

The ACCC submission noted that an accessible and public regulatory policy will help the Inspector-General deliver on their functions and improve public understanding of their role, including by clarifying when the Inspector-General can and will take action. The regulatory policy does this by:

- Explaining the Inspector-General's role
- Explaining how they support the wider regulatory framework in the Basin.

The Inspector-General agrees the Regulatory Policy is an important foundational document that will aid in improving understanding about their role. The Inspector-General will consider the matters raised in the ACCC's submission through the development of their Regulatory Policy.

The MLDRIN submission noted the opportunity the Inspector-General has in preparing and upholding an innovative Regulatory Policy that is based on an inclusive approach to interpreting and applying the national framework. The Inspector-General intends to reflect concepts of inclusivity and innovation, along with accountability, transparency and truth-telling throughout their Regulatory Policy.

The MLDRIN submission noted the significance of water resource plans within the national framework for addressing First Nations rights and interests. The Inspector-General has started work on developing a Water Resource Plan Compliance and Enforcement Framework, which will provide detail about the Inspector-General's approach to water resource plan compliance. Compliance with triggered management obligations covering, among other things, indigenous values and uses of water, will also be referred to in the Inspector-General's Regulatory Policy.

The MLDRIN submission also referenced the implementation of and compliance with relevant international agreements, particularly with respect to all relevant components relating to First Nations and relevant decisions and directives of the Conference of the Parties. The Inspector-General notes they do not have a role in the implementation of and compliance with international agreements. However, the matters covered in relevant international agreements, including those elements relating to First Nations, informs how the Inspector-General interprets and applies the national frameworks in performing their functions under the Water Act. These matters may also be relevant to the Inspector-General in setting up and/ or conducting inquiries in the future and would, therefore, be considered in that context rather than in the Regulatory Policy.

The ACCC and MDBA submissions both referenced annual work plans and priorities. The Inspector-General notes they have a legal obligation to publish annual work plans, which set out their priorities for the financial year. As such, the Inspector-General will not include annually created matters in their Regulatory Policy.

The Qld Government submission requested that the Regulatory Policy provide clarity or commitments for the process for continued collaboration and consultation. The Inspector-General adopts a collegiate approach with other regulatory agencies and notes the ongoing participation of the Qld Government, along with other Basin State compliance regulators, in the Regulatory Leaders Forum. The Inspector-General intends to continue this collegiate approach and notes the work on schedules to Memorandum of Understanding they have with compliance regulators provides an opportunity to establish agreed procedures and ways of working together.

Collaboration and engagement

Basin State submissions noted they welcomed working collaboratively with the Inspector-General, including through the Regulatory Leaders Forum and the Memorandum of Understanding between compliance regulators. The MDBA submission emphasised the importance of effective working relationships and collaboration. The ACT Government submission identified potentially expanding on this for further engagement between the Inspector-General and agencies with planning and policy responsibilities to proactively address issues through collaboration.

The Inspector-General welcomes opportunities for collaboration and will seek to establish a collegiate relationship with the Basin Officials Committee. The Inspector-General further intends to reflect the roles of, and their approach to engagement with, the Murray-Darling Basin Ministerial Council and the Basin Officials Committee in their Regulatory Policy.

Quality of water information

The ACT Government, MDBA and ACCC submissions all pointed to the importance of accurate and high-quality information as critical for building trust and confidence in the management of Basin water resources. The ACT Government and ACCC submissions noted the consistency, accessibility and relevance of information has been raised as concerns in multiple reviews over the last five years.

The Inspector-General prioritises transparency and accountability, including through the publication of compliance information. The Inspector-General will maintain a transparent and public-focused reporting approach in their Regulatory Policy, noting the MDBA strongly supported this emphasis in its submission.

The Inspector-General recognises that collecting regulatory information from a range of reliable sources provides a level of assurance that regulatory objectives are being met. Further, access to high-quality information, that is information that is accurate, complete, consistent, reliable and up to date, underpins effective outcomes and risk-based approaches to regulation.

The quality of water and compliance information is a long-term priority of the Inspector-General. There are a number of existing processes through which the Inspector-General is seeking to drive improvements, including:

- Sustainable Diversion Limit Compliance Framework
- Water Resource Plan Compliance and Enforcement Framework
- Annual reporting on water resource plan compliance under the Basin Plan (i.e., Matter 19 in Schedule 12)

- Annual metering report card
- Annual reporting on water compliance performance
- Metering Standard and Metering Guideline
- Updating Memorandum of Understanding between the Inspector-General and the MDBA
- Legislative reform processes
- Annual work planning.

The Inspector-General also notes it is possible to explore opportunities to improve the quality of information through collaborative processes, such as the Regulatory Leaders Forum and Basin Officials Committee.

Review of Regulatory Policy

The Qld Government and ACT Government submissions both indicated the need for future reviews of the Regulatory Policy to reflect and refine the Inspector-General's approach based on experience, particularly in testing the breadth of their powers. The Inspector-General agrees with these proposals and notes that their Regulatory Policy will also need to be maintained to reflect reforms to the legislative frameworks under which they operate.

The ACCC submission referred to the water market legislative reforms currently being progressed by the Commonwealth Government and the implications for the Inspector-General's role. The Inspector-General considers their Regulatory Policy will need to be reviewed and, where necessary, updated to reflect their roles and responsibilities, once legislated. However, it would be premature to consider those matters in the current version of the Regulatory Policy.

The uncertainty around future roles and responsibilities relating to the water markets mean the Inspector-General has not engaged with market-related matters raised in submissions in detail through their Regulatory Policy development process. This extends to the MDBA's recommendation for the Inspector-General to provide sensitive water market information guidance to support Basin State and Commonwealth agency practices.

Negative outcomes

The ACT Government submission raised issues around the health of the Murrumbidgee River. The Inspector-General notes the matters raised in the submission are indicators of issues around the effective management of the relevant water resources, which the Inspector-General will include in the risks they monitor across the Basin.

The Inspector-General encourages other stakeholders to bring other issues around the outcomes from water management in the Basin to their attention. Details on how to contact the Inspector-General can be found on their website (<https://www.igwc.gov.au/contact>).