

## Office of the Chief Executive

Ref: EC23-000231

The Hon. Troy Grant  
Inspector-General of Water Compliance  
Department of Climate Change, Energy, the Environment and Water  
GPO Box 3090  
CANBERRA ACT 2601

Dear Mr Grant

Thank you for your correspondence to Murray—Darling Basin Authority (MDBA) Chair Air Chief Marshal Sir Angus Houston AK, AFC (Ret'd) dated 24 March 2023 inviting a submission on the Regulatory Policy Discussion Paper published 31 March 2023.

The MDBA's response to the paper is attached.

I understand the purpose of the discussion paper is to set out your preferred approach to applying the regulatory framework established in the *Water Act 2007* (Cth) and the principles you intend to use to guide the performance of your functions and powers.

There are important direct linkages between the functions of the MDBA and you, as Inspector General of Water Compliance (IGWC). Together, our functions seek to ensure the sustainable use of Basin water resources in way that supports communities, the environment and industry.

I look forward to continuing to work with you and the Office of the IGWC as you finalise and implement your Regulatory Policy.

Yours sincerely



Andrew McConville

2 May 2023

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Attachment: *Murray-Darling Basin Authority submission on Regulatory Policy Discussion Paper*

### **Submission on Regulatory Policy Discussion Paper (March 2023)**

Thank you for the opportunity to provide feedback on the 'Regulatory Policy Discussion Paper' (March 2023) (the **Discussion Paper**), understanding this consultation is intended to support development of the Inspector-General of Water Compliance's (**IGWC**) regulatory policy.

The Murray-Darling Basin Authority (the **MDBA**) is pleased to provide views on a range of matters including:

- current governance arrangements, in particular:
  - the role and functions of the MDBA and whether these are accurately described;
  - the regulatory role of the IGWC and whether this is expressed in sufficiently clear terms;
- clarity of the IGWC's regulatory powers; and
- opportunities to clarify the principles supporting the IGWC's regulatory approach.

Our perspectives on these matters are outlined below. We would be happy to explore these issues further, particularly where they relate to areas of shared interest or responsibility.

The MDBA has not commented substantively on the IGWC's legislative context or enabling environment. On balance, the MDBA understands that these are matters on which the Office of the IGWC would be likely to seek independent advice, particularly as they relate to:

- interpreting and applying the objects of the *Water Act 2007* (Cth) (the **Water Act**) to the extent they are relevant to the IGWC's regulatory capacities and policy;
- the efficacy of the *Water Act* and *Basin Plan 2012* (Cth) (**Basin Plan**) insofar as they enable the IGWC's functions and compliance powers; and
- whether and to what extent the IGWC has the capacity to engage with certain acts, omissions or issues in a regulatory capacity.

The MDBA has similarly refrained from commenting on regulatory and compliance arrangements as they existed prior to the establishment of the IGWC in 2021, and the operation or effect of state and territory law (including discussion relating to state referrals).

### Role and functions of the MDBA

The MDBA is a Commonwealth statutory authority established by the Water Act. It is an expertise-based institution responsible for overseeing the management of the Basin's water resources in the national interest. The MDBA is part of the Climate Change, Energy, the Environment and Water portfolio, and reports to the Minister for Environment and Water, the Hon. Tanya Plibersek MP (the **Minister**).

Managing water resources across the Basin is complex. The MDBA seeks to take a Basin-wide, collaborative approach to overseeing implementation of the Basin Plan, and to operating the River Murray system on behalf of the Basin governments.

There are several key functions involved delivering these responsibilities, including:

- preparing, implementing and reviewing an integrated plan for the sustainable use of the Basin's water resources (the Basin Plan);
- operating the River Murray system and supporting the efficient delivery of water to users on behalf of partner governments;
- measuring, monitoring and recording the quality and quantity of the Basin's water resources;
- supporting, encouraging and conducting research and investigations about the Basin's water resources and dependent ecosystems;
- working with states to assist in the preparation of water resource plans (**WRP**), assessing those plans and ultimately providing an accreditation recommendation to the Minister; and
- engaging and educating the Australian community about the Basin's water resources.

The sustainable management of the Basin's water resources requires the efforts of the Commonwealth and Basin state and territory governments (referred to in this submission as **Basin states**), government agencies within Basin state jurisdictions and stakeholders in communities, in industry, agriculture, First Nations and environmental spheres.

The MDBA works with governments and stakeholders to ensure the resources of the Basin are managed in an integrated and sustainable way that supports communities, the environment and industry.

The MDBA's river operations activities are delivered in accordance with the Murray-Darling Basin Agreement (the **MDB Agreement**) and are jointly funded by the Commonwealth and Basin jurisdictions (New South Wales, Queensland, South Australia, Victoria and the

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Australian Capital Territory). The MDB Agreement is set out in Schedule 1 of the Water Act and informs the MDBA statutory functions in important ways. Under the Agreement, the MDBA operates the River Murray system and oversee asset management (Dartmouth and Hume Dam, Lake Victoria, Lower Lake barrages, weirs and locks) with state partners.

The MDBA is responsible for overseeing the implementation of the Basin Plan by the Basin governments. Additional information is provided below on the MDBA's roles, particularly with respect to WRP assessment and water accounting, recognising that these are, for different reasons and in different ways, areas of particular and shared interest for both the MDBA and the IGWC.

The MDBA is working closely with Basin states to provide assurance and accurate information relating to the Sustainable Diversion Adjustment Mechanism (**SDLAM**) progress in preparation for the conduct of the SDLAM Reconciliation.

### **Monitoring, reporting and evaluation**

Monitoring, reporting and evaluation are key elements of the Basin Plan. The MDBA is responsible for leading Basin scale monitoring, and for evaluating the effectiveness of the Basin Plan. The MDBA also has multiple roles in connection with the Schedule 12 reporting, as a reporter of content, a recipient of reports and having an obligation to ensure the publication of material in accordance with Chapter 13.

The MDBA is conscious of the public interest in ensuring that information is communicated transparently, and publication requirements are met in a timely way.

The emphasis placed on transparent and public reporting in the Discussion Paper is fully supported. The MDBA will continue to work collaboratively with Basin states and the IGWC to conduct Basin Plan evaluation and reporting on implementation progress.

### **Water resource plans**

The Water Act establishes the purpose of the Basin Plan and general basis upon which it was to be developed.<sup>1</sup> The Water Act also prescribes mandatory content for the Basin Plan which was required to include the '*...requirements that a water resource plan for a water resource plan area must comply with for it to be accredited or adopted...*'<sup>2</sup> These requirements are set out in Chapter 10 of the Basin Plan. They cannot be unilaterally changed by the MDBA, to do so would require an amendment of the Basin Plan.

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<sup>1</sup> Sections 20 and 21 of the Water Act.

<sup>2</sup> Section 22(1) Item 11, section 22(3), section 22(6A) and s22(6B) of the Water Act.

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The role of the MDBA with respect to water resource plans includes:

- Assisting Basin states: the MDBA's role includes assisting Basin states in preparing their water resource plans (or amendments).<sup>3</sup> The MDBA provides this support at appropriate points, primarily through consultation and the review of draft materials. The object of this assistance is to support the preparation of water resource plans that correctly respond to the requirements of the Basin Plan.
- Preparing a recommendation to the Minister on whether a proposed water resource plan should be accredited: the MDBA assesses water resource plans that are submitted by Basin states to determine whether they are consistent with the Basin Plan. This includes seeking and considering advice from relevant Indigenous organisations on the requirements of Part 14 of Chapter 10 of the Basin Plan.
- As indicated in the Discussion Paper the task of assessment is contextual, in that regard must be had to the legislative framework within which the water resource plan operates.<sup>4</sup>

Where a water resource plan is assessed as consistent with Basin Plan requirements, the Authority recommends to the Minister that it be accredited. Where a water resource plan is assessed as inconsistent with Basin Plan requirements, the Authority:

- writes to the relevant Basin state setting out the terms of the inconsistencies and providing the Basin state with the opportunity to provide submissions;
- considers the submissions provided by the Basin State; and
- provides a recommendation either for, or against, accreditation as appropriate.

The MDBA recognises the important role of accredited Water Resource Plans in informing the IGWC's compliance and enforcement role and in interacting with sustainable diversion limit (**SDL**) compliance matters. The MDBA supports commentary indicating that the IGWC will adopt a risk based approach to its interaction with Water Resource Plan in a compliance and enforcement frame.

### **SDL accounting**

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<sup>3</sup> Section 67 of the Water Act.

<sup>4</sup> Section 55(3) of the Water Act.

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The Water Act requires the Basin Plan to set out limits of how much water, on average, can be used in the Basin by towns and communities, farmers and industries annually (sustainable diversion limit (SDL)).

The MDBA acknowledges that water accounting is a shared space, requiring close coordination and consultation on the distinct but related elements of the water accounting framework.

Relevantly:

- the MDBA is responsible for reviewing and validating Baseline Diversion Limit estimates and maintaining the registers of take;
- the IGWC has visibility of the annual water accounting reporting provided by Basin states under section 71 of the Water Act;
- the IGWC and the MDBA receive relevant information directly from Basin states where reasonable excuse is claimed (reporting on reasons for excess and steps to make good);
- the IGWC assesses claims for reasonable excuse and SDL compliance, independently engaging in a regulatory capacity.

These settings are supported by administrative arrangements relating to consultation and assurance.

The MDBA remains committed to working with the IGWC and Basin states collaboratively, with an ongoing focus on supporting improvements in accounting frameworks and realising the benefits of modelling uplift across the Basin.

### **Clarity of the IGWC's regulatory role**

The MDBA believes that the IGWC's regulatory role is clearly stated in the Discussion Paper, noting that the IGWC's compliance priorities are communicated transparently through the development and publication of the IGWC annual workplan.

However, there may be value in exploring whether:

- in connection with SDL accounting: roles and responsibilities could be further clarified through the development of water accounting framework document similar to the MDBA's 'Sustainable Diversion Limit Accounting and Reporting Framework (August 2022);<sup>5</sup>

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<sup>5</sup> <https://www.mdba.gov.au/sites/default/files/pubs/sdl-accounting-and-reporting-framework-2022.pdf>

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- in connection with sensitive water market information: best practice guidance could be developed to support Basin state and Commonwealth agency practice in the current environment;
- in connection with the MDB Agreement and matters arising under it: the IGWC could be explicit about whether this is viewed as being within the IGWC's mandate; and
- in connection with the 'Basin agreements' which are identified in section s215C(3): there is scope to revisit the statutory listing, noting that the Basin Plan Implementation Agreement expired in November 2022.<sup>6</sup>

### **Opportunities to clarify principles supporting the IGWC's regulatory approach**

The complexity of the regulatory environment means that prioritising information sharing, education and capacity building will continue to be important.

The principles proposed on page 6 and from page 30 of the Discussion Paper and those called out in connection with the responsibilities falling between Commonwealth and Basin state regulators are broadly supported by the MDBA.

On behalf of the MDBA I thank you for the opportunity to comment on the Discussion Paper and look forward to working with the IGWC as the policy position resolve.

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<sup>6</sup> Per clause 10.1 of that agreement.