



Our ref: PRJ1006629

Ngunnawal
23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

Tel 02 6243 1111
Fax 02 6243 1199

www.accc.gov.au

Contact: David Salisbury
Contact phone: [REDACTED]

28 April 2023

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

By email: troy.grant@igwc.gov.au
CC: daniel.blacker@igwc.gov.au

Dear Inspector-General,

ACCC submission to the Inspector-General of Water Compliance's Regulatory Policy consultation

Thank you for the opportunity to provide a submission to the Inspector-General of Water Compliance's (IGWC) Regulatory Policy consultation.

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies. The ACCC also has a range of functions under industry-specific legislation.

The ACCC's roles under the Water Act

The ACCC has several functions under the *Water Act 2007* (Cth) (Water Act) that contribute to the functioning of water and related markets in the Murray-Darling Basin (the Basin) and to the achievement of the Water Act's overarching objectives.

The ACCC's roles under the Water Act include:

- advising the Murray-Darling Basin Authority (MDBA) on the Basin Plan Water Trading Rules
- advising the Commonwealth Minister on the Water Market Rules 2009 and the Water Charge Rules 2010 (collectively, the water rules):
 - the Water Market Rules 2009 govern the conduct of irrigation infrastructure operators to ensure that the 'transformation' of irrigation rights is not prevented or delayed, and
 - the Water Charge Rules 2010 set a cap on the maximum termination fees levied by infrastructure operators and impose obligations on infrastructure operators to publish information on regulated water charges in a schedule of charges
- monitoring and reporting on regulated water charges, transformation arrangements and compliance with the water rules

- enforcing the water rules.

The Australian Government has also committed to legislate new functions for the ACCC as the water market conduct regulator in the Basin. The new functions will include administering bans on market manipulation, stronger insider trading rules, and a mandatory code of conduct for water market intermediaries.¹ The Government also proposes that the IGWC be given additional responsibilities, including those related to enforcing compliance with data standards.

IGWC oversight

On page 8 of the IGWC consultation discussion paper, the IGWC states that, *'The Inspector-General's monitoring and oversight functions, along with his compliance and enforcement role, do not extend to the ACCC or Productivity Commission'*. We believe that this is appropriate and should continue, as the ACCC does not consider it should be subject to IGWC oversight in carrying out its current or future roles under the Water Act in the Basin.

The ACCC's public credibility is founded in its role as an independent regulator. This independence is accompanied by effective oversight—the ACCC is directly accountable on its water functions to the Minister for Environment and Water, and to the Treasurer for non-water functions. Our existing functions are also subject to scrutiny by the relevant Senate committees.

The IGWCs ability to be an independent regulator

The ACCC supports the IGWC's role to *'improve the public's trust in, and visibility and accountability around, the institutions with responsibility for managing Basin water resources'*.² The ACCC believes that the IGWC can achieve these aims provided it is empowered to make independent and robust decisions and is appropriately resourced. As noted by the OECD:

*'...regulators need to make and implement impartial, objective and evidence-based decisions that will inspire trust in public institutions and encourage investment. Undue influence, whether real or perceived, can undermine a regulator's ability to behave in this way, impinge on its independence, and ultimately, on its performance.'*³

Independent regulation by the IGWC will support the delivery of the Basin water market reforms currently under development.

As noted above, the Australian Government has committed to legislating new roles for the ACCC and the IGWC, as recommended by the independent *Water market reform: final roadmap report* (the Roadmap). These roles aim to improve the functioning, transparency and governance of water markets.⁴ The ACCC considers its independence, and that of the IGWC, in delivering these new functions will be critical to fulfilling the Roadmap objectives to improve trust and accountability in Basin water markets.

While it is not unusual to have regulators sitting within departments, we consider that the IGWC's functions place it in a position where it may need to critically assess the actions or performance of the Commonwealth Department of Climate Change, Energy, the Environment and Water (the Department). This potentially gives rise to actual or perceived conflicts of interest, given the Department is responsible for developing bids for new functions, funding and resources for the IGWC.

¹ ACCC welcomes new role regulating water market conduct, <https://www.accc.gov.au/media-release/accc-welcomes-new-role-regulating-water-market-conduct>, 14 October 2022.

² Inspector-General of Water Compliance 2023, *Regulatory Policy Discussion Paper*, the Australian Government, Canberra, March 2023 (page 1).

³ *Creating a culture of independence: Practical guidance against undue influence*, <https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf>

⁴ *Water market reform roadmap*, <https://www.dcceew.gov.au/water/policy/markets/reform>, 22 October 2022.

It is also inconsistent with the original recommendation of the Productivity Commission for the role to be performed by an independent regulator.⁵

Education and enforcement to build public trust in Basin governance

In response to the consultation document's request for feedback (at page 10) on what, if anything, would aid in clarifying the complexity of governance arrangements associated with the management of Basin water resources, the ACCC supports enhanced communication of, and education on, the IGWC's current oversight role, among other actions. We consider that this would be consistent with the Roadmap recommendation to increase community awareness and understanding of Basin water markets.

Over many years, inquiries and reviews, including the ACCC's 2021 *Murray-Darling Basin water markets inquiry: Final Report*⁶, have repeatedly emphasised the importance of high-quality information, education programs and engagement in building stakeholder trust and understanding in the arrangements and institutions that govern Basin water resources.

The ACCC considers that the IGWC's oversight role has been clearly described in key documents—for example, in the explanatory memorandum that accompanied the *Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021*. Describing the functions and powers of the IGWC, the explanatory memorandum notes, '...that one of the Inspector-General's functions is to monitor and provide independent oversight of the implementation by Commonwealth agencies and Basin State agencies of the commitments in the agreements in subsection 215C(3) [of the Water Act].'⁷

We recognise that complexity of the governance arrangements and responsibilities held by both the Commonwealth and Basin States can make it challenging to set out the full effect of IGWC's oversight role in a clear and simple way. Developing an accessible and public regulatory policy will help the IGWC deliver on its functions and improve public understanding of the IGWC's role, including by clarifying when the IGWC can and will take action. A regulatory policy that not only explains the IGWC's role but explains how it supports the wider regulatory framework in the Basin, will develop the public's understanding of the institutions with responsibility for managing Basin water resources. As noted by the Productivity Commission in its 2018 *Murray-Darling Basin Plan: Five-year assessment, 'Role clarity supports clear expectations and accountabilities among collaborating institutions by ensuring that each understands its own roles as well as the roles and responsibilities of its partner institutions'*.⁸ The ACCC believes that the effectiveness and efficiency of a regulatory system depends on the extent to which potential duplication and gaps between regulators are anticipated and avoided.

For the IGWC, a regulatory policy that sets out the principles underpinning its approach will help improve coordination between agencies, build role clarity and increase transparency and trust in the Basin. The ACCC's compliance and enforcement policy sets out the principles we adopt to achieve compliance with the CCA, and outlines our compliance and enforcement functions, strategies and tools. Each year the ACCC reviews and publishes its compliance and enforcement priorities.⁹ The IGWC may wish to consider adopting a similar approach.

We welcome the opportunity to comment on the draft regulatory policy, and to further develop our working relationship with the IGWC. It is the ACCC's experience that progress has been strongest

⁵ Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment, Inquiry Report* <https://www.pc.gov.au/inquiries/completed/basin-plan/report/basin-plan.pdf> (page 361).

⁶ ACCC, *Murray-Darling Basin water markets inquiry: Final report*, <https://www.accc.gov.au/about-us/publications/murray-darling-basin-water-markets-inquiry-final-report>, February 2021.

⁷ Explanatory Memorandum, *Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021*, http://www5.austlii.edu.au/au/legis/cth/bill_em/wlaowcaomb2021782/memo_0.html (paragraph 306).

⁸ Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment, Inquiry Report* <https://www.pc.gov.au/inquiries/completed/basin-plan/report/basin-plan.pdf> (page 347).

⁹ ACCC, *Compliance and enforcement policy and priorities*, <https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities#toc-working-with-other-agencies>.

where regulators have worked with a clear understanding of respective roles, and each has had sufficient resources and expertise to contribute meaningfully towards delivering on shared goals.

Yours sincerely,



Mick Keogh
Deputy Chair