



Environmental
Defenders Office

Submission to the Rural and Regional Affairs and Transport References Committee

Water Compliance (Inspector-General and Other Measures) Act 2021 (Cth)

3 August 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
Parliament House

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The EDO welcomes the opportunity to assist the Committee with its inquiry into the *Water Compliance (Inspector-General and Other Measures) Act 2021* (Cth) (**IG Act**). The EDO has extensive experience advising a broad range of clients across the Murray-Darling Basin (**MDB**) about all aspects of water law and policy, including compliance and enforcement.

While we are broadly supportive of the IG Act, we have identified opportunities for reform which would clearly align the IG’s functions with the international environmental treaties which underpin the *Water Act 2007* (Cth) (**Water Act**), enhance the independence and efficacy of the Inspector-General of Water Compliance (**IG**), and improve the public’s confidence in this newly created office.

Our analysis of the IG Act and associated opportunities for reform are set out in [a recently published article](#).¹ We have further summarised our key recommendations, below.

1. Failure to exercise discretion

The IG Act currently confers broad discretion on the IG with respect to compliance and enforcement action. Consequently, the IG may choose to not to exercise its discretion to carry out its functions. As there is considerable precedent both in Australia and abroad for natural resource regulators failing to enforce relevant environmental and water laws, we consider this risk to be real (as opposed to merely theoretical).

Recommendation 1

- We recommend the inclusion of a positive duty which requires the IG to ‘exercise its functions consistently with, and so as to promote, the international treaties that underpin the Water Act.’

2. Independence

The Commonwealth Government has indicated that the IG will sit within the Commonwealth Department of Agriculture, Water and the Environment (**Department**) and will be supported by the Office of Water Compliance (which is a non-statutory office).² The Minister indicated in his Second Reading Speech that ‘ethical walls’ would be established to maintain the IG’s independence.³

This model arguably has the potential to undermine the independence of the IG and to give rise to real or perceived conflicts of interest (particularly given the Department’s role in administering irrigation efficiency programs and managing strategic buybacks, which

¹ [Compliance boost for the Murray-Darling Basin with new Inspector-General - Environmental Defenders Office \(edo.org.au\)](#), dated 15 July 2021.

² [Home | Interim Inspector General of Water Compliance \(igwc.gov.au\)](#) (accessed 6 July 2021). We further note that under the Amendment, the IG may delegate certain functions to departmental staff (s. 215W, IG Act).

³ Minister for Resources, Water and Northern Australia, Keith Pitt, Second Reading Speech, *Water Compliance (Inspector-General and Other Measures) Bill 2021*, 26 May 2021, *House of Representative Hansard*, page 8.

have been subject to various complaints and investigations).⁴ Further, it is our view that internal ‘ethical walls’ are legally nebulous and potentially difficult to enforce.⁵

Recommendation 2

- The IG and associated office should be entirely separate from any water agency to avoid any real or perceived conflict of interest.
- An entire Office of Water Compliance (not just the role of the IG) should be legislated (as per, for example, the NSW Environment Protection Authority and the Natural Resources Access Regulator) to enhance independence and to specialist capacity.

3. Requirement to publish

The probity and transparency of water management processes and associated decisions are frequently called into question. The panacea is both greater checks and balances with respect to decision-making and improved disclosure of meaningful information.

Recommendation 3

- The requirements for the annual report should be strengthened to include more specific, prescribed content. This could include a requirement to report on trends where confidentiality is an issue.
- The IG should be required to report publicly on inquiries conducted under s. 239AA of the IG Act (unless it can be demonstrated that doing so would breach any legitimate confidentiality requirements).
- The IG should be expressly prohibited from failing to publicly report under s.239AE on the basis that doing so could cause embarrassment to, or a loss of confidence in, the government, or because the information could be misinterpreted or misunderstood.⁶
- The IG should be required to publish any Ministerial directions.⁷

4. Investigate all complaints

We note that other, legislated ‘inspectors-general’ are required to investigate *all* complaints (unless vexatious, among other things).⁸ This ensures that valid complaints cannot be ignored, thereby ensuring consistent application of the law. It also ensures that complaints that are valid but politically inconvenient or embarrassing (for example) cannot be ignored.

⁴ See Letter dated 29 April 2019 from the Commonwealth Auditor-General to the Minister for Agriculture and Water Resources regarding ‘Performance audit—purchases of environmental water’, [Audit of purchases of environmental water by the Commonwealth, and on behalf of the Commonwealth | Australian National Audit Office \(anao.gov.au\)](#), (accessed 3 August 2021); see also, for example, [How the Murray-Darling irrigators rott was allowed to happen - Crikey](#), (accessed 3 August 2021).

⁵ Compare this with the Inspector-General of Intelligence and Security and the Inspector-General for Biosecurity, which are both separate from the agencies they monitor.

⁶ See for example s.15(c) and (d) of the *Government Information (Public Access) Act 2009* (NSW) relating to public interest principles and disclosure of government information. Specifically, s. 15(c) states that ‘[t]he fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.’ and s. 15 (d) states that ‘[t]he fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.’

⁷ Compare this with *Natural Resources Access Regulator Act 2017* (NSW) (**NRAR Act**) ss. 7(2), 7(5) and 13(3).

⁸ Compare this with ss. 11(1)-(2) of the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**).

Recommendation 4

- IG should be required to investigate all complaints, subject to reasonable exceptions (complaints that are manifestly vexatious, for example).

5. Confidential information

We note that there is no definition of ‘confidential information’ in the IG Act. This is arguably problematic insofar as it could result in either unnecessarily narrow or broad interpretations of the concept which could affect the administration of justice, due process and public reporting requirements.

We further note that information disclosed to the IG by a member of the public or a public servant is not automatically classified as confidential information.⁹ This may have a chilling effect on people who would otherwise consider coming forward with information about fraudulent or other unlawful activity or maladministration of relevant laws. This arguably undermines the purpose of the IG Act, which is to improve, *inter alia*, the public’s trust in compliance and enforcement under Commonwealth and Basin state water laws.

Recommendation 5

- The term ‘confidential information’ should be defined. The definition should cover information disclosed by individuals to the IG regarding potentially fraudulent or otherwise unlawful activity or maladministration of relevant laws.
- The requirement to protect confidential information (properly defined) should be strengthened to, at a minimum, include a requirement for the IG to take *all* reasonable steps to protect confidential information from unauthorised use or disclosure (s. 215U of the IG Act).

6. Consider and adopt features of other powers of inquiry

The IG Act includes provisions which allow the IG to exercise its powers and perform its functions in a manner that is likely to improve oversight of water management at the Commonwealth and Basin State level. However, we consider that the IG Act could be strengthened by adopting some of the features included in other legislation concerning compliance and enforcement, anti-corruption and commissions of inquiry.¹⁰ In particular, we wish to draw the Committee’s attention to the manner in which these statutes establish independent entities that are required to actively promote the public interest

⁹ See IG Act, s. 215U(1) which states that ‘[t]he Inspector-General must take reasonable measures to protection from unauthorised use and disclosure of information: (a) that is confidential information; and (b) that is given to the Inspector-General in, or in connection with, the performance of the Inspector-General’s functions or the exercise of the Inspector-General’s powers.’ This section makes it clear that information disclosed pursuant to this section is not automatically classified as confidential.

¹⁰ For example, there are considerable insights to be gained from legislation establishing other ‘inspectors-general’ and bodies, such as the IGIS Act, *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**), NRAR Act, *Royal Commissions Act 1902* (Cth), *Auditor-General Act 1997* (Cth), among others.

and transparency. These features are vital given well-aired public concerns about the administration of water laws in the MDB.

Recommendation 6

- Legislation establishing anti-corruption watchdogs and commissions of inquiry (and the like) should be closely examined with a view to transposing relevant powers and functions into the IG Act.
- The IG Act should include a provision which states that in discharging its duty to exercise its functions consistently with the international environmental treaties (see Recommendation 1), it is to seek to protect the public’s interest in lawfully managed water resources in the MDB. This could be compared with s. 12 of the ICAC Act.
- The IG Act should include a provision which imposes a positive duty to report conduct and reasonable suspicion of conduct. This could be compared with s. 11 of the ICAC Act.

7. Significantly stronger penalties

Penalties should perform both a punitive and a deterrent function. This requires them to be commensurate with the harm caused and in the case of financial penalties, larger than the gain associated with non-compliant activity. In our view, the penalties associated with the take offences in the IG Act, including the aggravated take offences, do not necessarily satisfy these two criteria. This is particularly true given the types of irreversible damage that could result from a significant aggravated take offence.

Recommendation 7

- Penalties should be set as the higher of either a particular number of penalty units or (for example) 3 times the benefit obtained (or detriment avoided) by committing the offence.¹¹

¹¹ For further information regarding the calculation of water-related penalties, see: Loch, A., Pérez-Blanco, C.D., Carmody, E. et al. Grand theft water and the calculus of compliance. *Nature Sustainability* 3, 1012–1018 (2020). <https://doi.org/10.1038/s41893-020-0589-3>.