

# Inquiry Framework

## Inspector-General of Water Compliance

### Introduction

1. The Inspector-General of Water Compliance (Inspector-General) is an independent statutory officer established under the *Water Act 2007 (Cth)* (the Water Act). The Inspector-General is supported by an office of Australian Public Servants provided by the Department of Climate Change, Energy the Environment and Water (DCCEEW). The Inspector-General's functions include monitoring and oversight of the performance of specified functions and exercise of specific powers by the Commonwealth, and the performance of obligations by Basin States from within the Water Act, the *Basin Plan 2012 (Cth)* (the Basin Plan), Water Resource Plans, regulations and other instruments made under the Water Act. The Inspector-General's functions also include monitoring and oversight of the performance of the implementation of commitments by the Commonwealth and Basin States in specified intergovernmental agreements (Basin Agreements).
2. An inquiry is one of the Inspector-General's principal tools for delivering their monitoring and oversight functions. An inquiry enables the Inspector-General to examine, in a structured and detailed way, whether functions, powers and obligations under the Water Act, the Basin Plan, or commitments under specified Basin Agreements are being met by Commonwealth and Basin State agencies, and to make findings and recommendations relevant to the exercise of those functions and powers and the delivery of those obligations and commitments, particularly where performance may be improved or enhanced to deliver on intended outcomes.
3. This framework sets out, at a high level, the Inspector-General's approach to conducting inquiries. This includes their legal basis and a description of the actions and activities that are undertaken in an inquiry.
4. The purpose of the framework is to inform individuals and organisations who may be involved in, or affected by, an inquiry of what they may expect when engaged in an inquiry. It is not intended to provide a detailed step-by-step procedure the Inspector-General follows when conducting an inquiry.
5. This framework does not limit the Inspector-General's discretion in conducting an inquiry. The Inspector-General may adapt the approach to the nature, scope, and circumstances of each inquiry.

## The Inspector–General’s inquiry function

6. The Inspector–General has the power to conduct inquiries under section 239AA of the Water Act. The Inspector–General may conduct an inquiry on their own initiative (section 239AA(1) of the Water Act), or in response to a direction from the responsible Minister (section 239AA(2) of the Water Act). Where the Minister directs the Inspector–General to undertake a particular inquiry, the Inspector–General must comply, but maintains independence in how the inquiry is conducted.
7. A decision or direction to undertake an inquiry into a matter or subject does not imply that any party has acted unlawfully or failed in its obligations, nor is its purpose to identify contraventions or undertake enforcement action. An inquiry explores the performance of functions and implementation of obligations and commitments, focusing on identifying specific or systemic issues. The Inspector–General will make findings and recommendations directed at improving compliance, performance, delivery and implementation of the relevant functions, obligations and commitments and their intended outcomes.
8. The Inspector–General does not have the power to make binding recommendations or to impose penalties through the undertaking of an inquiry. Where an inquiry identifies conduct that may constitute a contravention of the Water Act or other law, the Inspector–General may refer the matter for investigation to the appropriate investigative agency or regulator, or where appropriate, conduct an investigation under their investigative and enforcement powers.
9. In conducting an inquiry, the Inspector–General will seek and utilise the best available evidence and act in accordance with procedural fairness principles to ensure the inquiry reflects an accurate and balanced evidence base. This includes identifying and managing actual or perceived bias and conflicts of interest and providing parties a reasonable opportunity to respond to material that is critical or may adversely affect their interests. These processes will be undertaken throughout the inquiry, including during inquiry establishment, information gathering, analysis and findings and recommendation development and in the preparation of the inquiry report.

## Deciding to conduct an inquiry

10. Where the Minister directs the Inspector–General to conduct an inquiry, the direction may specify the subject or matter into which the Inspector–General should inquire, the date by which the inquiry is to be completed and whether the Inspector–General must prepare a written report and provide it to the Minister. The Minister must not specify the way in which the inquiry is to be conducted.
11. Where the Inspector–General acts on their own initiative to conduct an inquiry, the decision is a matter of the Inspector–General’s judgement, constrained to matters related to the Inspector–General’s monitoring and oversight functions under section 215C of the Water Act. Relevant considerations may include:
  - a. whether there is a credible basis to examine whether functions, obligations and commitments under the Water Act, the Basin Plan, or a relevant Basin Agreement are being met
  - b. whether the issue is of sufficient significance to warrant an inquiry, having regard to the Inspector–General’s broader priorities and the

- public interest in accountability and transparency
  - c. whether the issue is consistent with the Inspector–General's priorities as articulated in the IGWC Strategic Plan, and
  - d. whether an inquiry would add value that could not be achieved through the performance of other Inspector–General functions or using other available tools, such as strategic engagement, performance assurance, audit or investigation.
- 12. The Inspector–General may identify potential inquiry topics through any means, however commonly this may include:
  - a. routine monitoring and oversight activities
  - b. referrals from Commonwealth or Basin State agencies
  - c. complaints from, or engagement with, members of the public,
  - d. insights or information gathered through their other functions.
- 13. The source of the referral or information does not affect the Inspector–General's independence in deciding whether, and how, to conduct an inquiry on their own initiative. That decision rests with the Inspector–General personally and cannot be delegated.

## Terms of Reference

- 14. Before commencing an inquiry, the Inspector–General may determine, in writing, the terms of reference for the inquiry under section 239AB of the Water Act.
- 15. In practice, the terms of reference define the scope of an inquiry and the Inspector–General's determination of what an inquiry will examine. They are critical to the conduct of the inquiry and shape what the Inspector–General will examine and may report upon.
- 16. Terms of reference must specify the legislative powers of the Commonwealth that support the exercise of the Inspector–General's powers to compel the provision of information in relation to the inquiry. This specification is required because there is no Commonwealth legislative power that would support the exercise of the Inspector–General's powers to compel the provision of information in all circumstances.
- 17. Identifying these legislative powers establishes the potential legislative basis for the Inspector–General's compulsory information-gathering powers. It does not guarantee that a particular exercise of those powers will be constitutionally valid, this will depend on the specific circumstances of each notice.
- 18. If the Inspector–General determines written terms of reference, they are required to be published. In practice, this will generally occur at the same time an inquiry is publicly announced and commenced.
- 19. Announcement of the inquiry and publication of the terms of reference is ordinarily accompanied by a call for public submissions, and the initiation of information gathering to inform the evidence the inquiry will consider.
- 20. If, during the conduct of the inquiry, the Inspector–General considers it necessary to amend the terms of reference during an inquiry, the Inspector–General will notify affected parties and publish the amended terms of reference.
- 21. The Inspector–General retains discretion over the conduct of the inquiry,

including the method and sequence of information gathering, the conduct of interviews or consultations, and the presentation and nature of findings and recommendations, but must do so consistent with procedural fairness principles.

## Information gathering - voluntary

22. Voluntary information gathering is an important source of evidence in an inquiry and includes accessing publicly available information relevant to the inquiry. The Inspector-General may gather voluntary information at any stage of an inquiry.
23. Voluntary information gathering includes calls for public submissions, requests for information or documents directed at specific parties, and direct engagement such as interviews, briefings, or consultations without the use of the Inspector-General's powers to compel under sections 239AC and 239AD of the Water Act.
24. In recognition that providing information to support the conduct of an inquiry places an impost on the provider, before requesting information be provided voluntarily, the Inspector-General will consider whether the information requested may assist in conducting the inquiry and only request that information if they reasonably believe it will do so.
25. The Inspector-General may call for submissions publicly. This invites any person or organisation with information or interests relevant to the terms of reference of the inquiry to provide a written submission to the Inspector-General. When used, the Inspector-General will publish a call for submissions on their website with guidance on matters the submission should address, the closing date for submissions and the Inspector-General's intent on publication of any submission received. It will also advise how the author of a submission can request non-publication or claim confidentiality over all or part of the submission.
26. Submissions received will ordinarily be published. However, before publishing a submission, the Inspector-General will review it to confirm that:
  - a. no non-publication request has been made;
  - b. no confidentiality claim has been made; and
  - c. publication is consistent with the Inspector-General's obligations under the *Privacy Act 1988 (Cth)*.
27. The Inspector-General may conduct voluntary interviews, briefings, or other direct engagement with parties. For voluntary interviews, parties will be contacted to arrange a mutually suitable time to conduct an interview which may occur in person or online.
28. Reliance on voluntarily provided information must be consistent with the Inspector-General's responsibility to gather information that is complete, reliable, and accurate to form the best available evidence base for findings and recommendations.

## Information gathering - compelled

29. The Water Act confers powers to the Inspector-General to compel the production or provision of information and documents, and to compel attendance for the purpose of answering questions that may be relevant to an inquiry. These powers may be exercised at any stage of an inquiry. The Inspector-General will have regard to relevant legal considerations, including constitutional risks, before exercising powers to compel information or attendance, and will seek legal advice as they determine appropriate.
30. Under section 239AC of the Water Act, the Inspector-General may, by written notice, require a person to produce documents or information relevant to an inquiry in the form or manner specified. A notice under section 239AC must specify the documents or information required and the period within which they must be provided. A person who receives a notice under section 239AC is legally obliged to comply unless they submit a Public Interest Immunity (PII) claim over the information.
31. Under section 239AD of the Water Act, the Inspector-General may, by written notice, require a person to appear before the Inspector-General to give evidence relevant to an inquiry. A notice under section 239AD must specify the time and place at which the person is required to appear. A person who receives a notice under section 239AD is legally obliged to attend and give evidence as required.
32. Before compelling information or attendance for an inquiry, the Inspector-General must reasonably believe the information or attendance sought may assist in conducting the inquiry. Where this test is met, and it was determined that a legislative basis exists to support the use of the power to compel the provision of information or attendance, the Inspector-General will decide whether to exercise those powers. In making that decision the Inspector-General will have regard to a range of factors including:
  - a. the nature of the inquiry,
  - b. the information sought,
  - c. the protections available,
  - d. whether the information is likely to be more complete, reliable and accurate if compelled, and
  - e. any associated legal risks, including the potential for claims of PII or legal professional privilege.
33. Where the Inspector-General issues a notice to compel the provision of information, documents or attendance, the Inspector-General will consider the form and content of the notice to ensure that it is appropriately specified and targeted to collect the information or attendance necessary to support the conduct of the inquiry but not present an unnecessary and inappropriate burden on the party. The Inspector-General may seek constitutional legal advice from the Australian Government Solicitor before issuing notices to compel information or attendance.
34. Where the Inspector-General issues a notice under section 239AC or 239AD, a person is not excused from complying with a notice on the grounds that doing so might tend to incriminate the person or expose the person to a penalty. Section 239AH of the Water Act provides protections in relation to the provision of self-incriminating information and information subject to legal professional privilege provided under compulsion, or in response to critical material under

section 239AG, including limitations on the use of that information in criminal or civil proceedings against the person. Claims of legal professional privilege will be considered and managed by the Inspector-General on a case-by-case basis.

35. Failure to comply with a notice issued under section 239AC or section 239AD without reasonable excuse may constitute an offence under the Water Act. The Inspector-General will inform notice recipients of their obligations and consequences of non-compliance with each notice.
36. A respondent to a notice to compel may claim confidentiality over their response, or part thereof. The Inspector-General is required to take reasonable measures to protect confidential information under section 215U of the Water Act. Where a claim of confidentiality is made, the Inspector-General will seek clear advice from the respondent at the time of provision on what material is claimed to be confidential and the reasons for that claim. Where confidential material is critical to the inquiry's evidence base, the Inspector-General will engage further with the respondent to determine how that material may best be used consistently with this obligation, including through anonymisation, redaction or aggregation.

## **Analysis and findings and recommendation development**

37. The Inspector-General analyses the evidence gathered to assess the relevance, reliability, and completeness of information before the inquiry, identify and resolve any evidence gaps or inconsistencies, and begin to develop evidence-based observations, findings and recommendations.
38. The Inspector-General may undertake additional information gathering during this period where analysis suggests that additional or corroborative evidence is required to support reaching conclusive findings and recommendations on a matter before the inquiry.
39. Analysis and findings and recommendations development may take some time depending on the complexity of the inquiry and the volume of information and evidence gathered. The Inspector-General is unable to provide a clear estimate of how long this may take.
40. Findings are the Inspector-General's conclusions on matters examined in the inquiry, in relation to Commonwealth and Basin State agencies and other persons or entities within the Inspector-General's jurisdiction under section 215C of the Water Act. Findings may be made in relation to whether:
  - a. functions and powers under the Water Act, the Basin Plan, water resource plan or other regulation are being used appropriately
  - b. obligations under the Water Act, the Basin Plan, water resource plan or other regulation are being met
  - c. commitments under relevant Basin Agreements are being met and the extent of their compliance
  - d. implementation has delivered on the proposed outcomes, and
  - e. how the functions and powers are used, or obligations and commitments met, including whether the conduct of any person or entity has been inconsistent with their power, function, obligation or commitment.
41. The Inspector-General will only make findings supported by evidence assessed as relevant, reliable and complete.

42. Inquiry findings may identify systemic failures, implementation gaps, accountability and governance arrangements that are not fit-for-purpose, or other matters warranting remedial action. A finding may be made without necessarily amounting to a breach of legal obligations. In general, an inquiry will not make findings about the intent and conduct of individuals unless specific circumstances require it, and the Inspector-General will have due regard to privacy considerations and procedural fairness in making such findings.
43. Recommendations are actions the Inspector-General concludes should be taken in response to findings. Recommendations may be directed at Commonwealth or Basin State agencies, the Minister, or any other person or entity with the capacity to act on them within the Inspector-General's jurisdiction.
44. Recommendations are not binding on the person or entity to whom they are directed. The Inspector-General's approach to responses and follow-up on recommendations is set out at paragraphs 61 to 65.
45. If an inquiry identifies conduct that may constitute a contravention of the Water Act or other law, the Inspector-General may refer the matter to the relevant authority for investigation or enforcement action. A referral of this kind is separate from findings and recommendations of an inquiry and does not require the inquiry to be concluded before it is made.

## **Report preparation**

46. The Inspector-General may prepare a written report setting out their findings and recommendations addressing the terms of reference under section 239AE of the Water Act.
47. The Inspector-General is likely to produce a written report for any inquiry undertaken.
48. The inquiry report is the Inspector-General's independent assessment. No person or entity, including the Minister, may direct the Inspector-General on the content of the report, nor the findings or recommendations presented, however the Inspector-General will have due regard for any feedback received on the inquiry report from affected parties.
49. Consistent with the Inspector-General's obligation to protect confidential information under section 215U of the Water Act, confidential material will not be explicitly referred to in the inquiry report, unless reasonable measures have been taken to protect it. Where analysis indicates confidential material is critical to the inquiry as supporting evidence, the Inspector-General will take reasonable steps to consult the provider of that information on its use, including through anonymisation, redaction or aggregation.

## **Report consultation and opportunity to comment on critical material**

50. Where the inquiry results in the preparation of a written report, the Inspector-General will consult with affected parties on a draft to test the findings and recommendations presented, and the evidence relied upon in making those findings and recommendations to ensure the report presents an accurate assessment of the evidence available.

51. Where the Inspector-General proposes to include information in an inquiry report that is expressly or impliedly critical of a person or entity, the Inspector-General will provide that person or entity an opportunity to comment before the report is finalised, as required under s239AG of the Water Act.
52. The Inspector-General will duly consider all feedback received through consultation and opportunity to comment on critical material processes and determine whether that feedback results in an amendment to the draft report or other action. The Inspector-General may decide to:
  - a. revise material in the report consistent with the response provided where adequate supporting evidence is available;
  - b. revise report material to reflect that an alternate position was provided by a person or entity but that the position of the Inspector-General remains unchanged based on the balance of evidence available; or
  - c. make no report modification as the Inspector-General does not accept or agree with the response, and it is not supported by the balance of evidence available.
53. Following consideration of responses received through consultation or under section 239AG processes, the Inspector-General may provide affected parties a further opportunity to respond before the report is finalised, where this is considered necessary having regard to the significance of any amendments made, and the nature and complexity of the report.
54. Responses received during the final section 239AG process will be published alongside the report unless a respondent requests otherwise or claims confidentiality over their response.

## **Publication and reporting**

55. Under section 239AE(1) of the Water Act, the Inspector-General must report to the Minister on any inquiry conducted. If a report is to be published (as per section 239AE(5) of the Water Act), the Inspector-General will provide the finalised report to the Minister no fewer than 5 days before the date of publication. No public release of the report or its contents will occur during this period.
56. The Inspector-General will publish a report in full on their website unless the Inspector-General determines that publication of included information would be contrary to public interest. Information may be withheld from publication if it:
  - a. is commercially sensitive;
  - b. could prejudice ongoing legal proceedings or enforcement action; or
  - c. is subject to an accepted claim of confidentiality or PII.
57. The Inspector-General will not withhold information from a published report for the purpose of protecting a party from reputational or political consequences, having due regard to procedural fairness and responses to opportunities to comment on critical material processes undertaken during the conduct of the inquiry.
58. Where information is withheld from a published report, the Inspector-General will acknowledge this in the published report alongside the reason for withholding the information, to the extent possible.

59. Where a report is published, the Inspector-General may provide an embargoed copy of the final report at least one day prior to those parties consulted as part of the draft report consultation and opportunities to comment on critical material processes under s239AG.
60. In addition to an inquiry report, the Inspector-General may publish other documents considered relevant to public understanding of the inquiry and its findings subject to claims of confidentiality, consideration of provider requests and the Inspector-General's obligations under the *Privacy Act 1988 (Cth)* or other legislation.

## Post-inquiry follow-up

61. Under section 239AF of the Water Act, where a recommendation directs an agency of the Commonwealth or a Basin State to take action, that agency must give a written response in particular circumstances where recommendations relate to functions, powers and obligations under the Water Act, Basin Plan, water resource plans or other regulation. Where the Inspector-General makes a recommendation relating to the implementation of a specified agreement under section 215C(1)(c) of the Water Act, a response is not mandatory but may be voluntarily sought.
62. The Inspector-General may publish responses to recommendations received from agencies, unless the agency has expressly requested that its response not be published.
63. The Inspector-General will assess responses against the findings and recommendations of an inquiry report. Where a response indicates a recommendation will not be implemented, implemented in-part, ineffectively addressed, or where no response is received within a reasonable period, the Inspector-General may consider further action such as:
  - a. referring the matter to the responsible Minister or another relevant authority
  - b. conducting follow-up reviews or enquiries into the implementation of recommendations
  - c. reporting publicly on failure to implement a recommendation, such as in the Inspector-General's annual report
  - d. taking other action consistent with the Inspector-General's functions under section 215C of the Water Act
64. Where a party accepts a recommendation, but implementation is delayed or incomplete at the time of response, the Inspector-General may request further updates and continue to monitor progress until satisfied the recommendation has been adequately implemented or that further monitoring is no longer warranted.
65. The Inspector-General recognises that some recommendations will require policy change, intergovernmental negotiation, or other action which takes time to implement. The Inspector-General will have regard to the complexity of the required actions in assessing the adequacy of a response, while maintaining an expectation that progress is being made in good faith and within a reasonable timeframe.