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Dear Joanna,

Further to our meeting with the Authority last week, I provide the attached advice from the Independent Assurance Committee (IAC) on the main recommendations in the Productivity Commission's recent Basin Plan report which have a direct bearing on the regulatory and compliance roles of the Authority.

The Productivity Commission's five-year assessment of the *Basin Plan 2012* (Basin Plan) is an important accountability measure prescribed by the *Water Act 2007* (Water Act). The assessment scrutinises progress with the Basin Plan and has stimulated public discussion on its findings and recommendations.

While there is much of value in the assessment, we believe it is flawed in the important findings and related recommendations in relation to Basin Plan Compliance (Chapter 12 of the assessment) and Institutions and Governance (Chapter 14 of the assessment). The Productivity Commission's major thrust is the abolition of the Murray Darling Basin Authority (MDBA) and then its replacement by a separate agency and a regulator. We see this as a retrograde proposal, diminishing independent authority and leadership which is so needed to deliver the outcomes of the Basin Plan. This seems to be in the hope that returning to a state dominated and largely consensual model will deal with the inherent challenges of managing a shared resource across state boundaries and interests.

In the IAC's opinion, the Productivity Commission report does not acknowledge sufficiently the extraordinary challenge of managing and sharing water resources with parties driven by their own individual interests. This is writ large in the history of the management of the Murray-Darling Basin. The Water Act and the Basin Plan are the most recent evolutionary steps to deal with this challenge. It should be of no surprise that implementation of the Basin Plan would be as vexed and challenging as it has been. There will always be a tension between jurisdictions acting in their own individual interests versus acting in the collective and national interests, reflected in the Basin Plan for a sustainably managed, shared water resource.

Two of the great challenges are to find a way to get all jurisdictions to cooperate in the implementation of the Basin Plan and, at the same time, to have the states deliver strong water compliance and enforcement programs. On the one hand, this requires collective leadership and a genuine desire to act in the national interest. On the other hand, it requires strong leadership and authority at the national level to bring transparency and accountability to what states are doing to implement the Plan. This is particularly the case as the states maintain the primacy in relation to compliance and enforcement on water utilisation, as set out in the Basin Plan. The MDBA has grappled with this balancing act of

working collaboratively with states, yet simultaneously bringing them to account when they do not meet their obligations.

The answer is not to restructure the MDBA but to strengthen its resolve to respond to public concerns about transparency and accountability. The IAC's strong advice to the Authority is to see itself as a regulator, first and foremost – a regulator with the unique role of implementing the Basin Plan, working collaboratively with states, and regulating in accord with the Water Act and Basin Plan. The Water Act and the Basin Plan are Commonwealth instruments that the Commonwealth has the responsibility to implement. The states can be encouraged and coerced to the extent allowed by the Water Act, but the overarching responsibility rests with the Commonwealth.

The IAC considers that the Authority has made significant progress over the last year in clarifying its regulatory role and putting in place needed regulatory and compliance policies and programs to improve transparency and accountabilities by all jurisdictions. This progress could easily be stalled by a wholesale restructuring of the Authority at this time.

The Authority undoubtedly needs to consider whether additional administrative or statutory measures are required, perhaps as an interim measure, to respond to the widespread public concern about accountability and transparency of Basin Plan implementation. The IAC and the Northern Basin Commissioner are examples of actions taken to bolster public trust and confidence. The Commonwealth department responsible for water may have a stronger role to play, as may the Auditor-General. The IAC has not given further thought to this but recognises some additional steps may be required.

Blaming the states or the Commonwealth will not help the situation. There is a need for governments to agree to cooperate and do the right thing. Improving the Basin Official Committee arrangements would be a good first step through the introduction of an independent chair as recommended by the Productivity Commission and by making their proceedings and resolutions public.

More detail is provided in the attached advice and we offer any further assistance that you may require.

Yours sincerely

Allan Holmes

Chair of the Independent Assurance Committee

14 June 2019

**Attachment** – Advice to the Authority on the Productivity Commission Report No.90

Advice from the Independent Assurance Committee to the Authority on certain findings and recommendations of the Productivity Commission in its report on the five-year assessment of the Murray Darling Basin Plan (Productivity Commission Report No. 90, 19 December 2018)

Allan Holmes,  
Chair of the Independent Assurance Committee

14 June 2019

## Part 1 - Background

Under section 87 of the *Water Act 2007 (Cth)* (Water Act), the Productivity Commission has the responsibility to inquire into the effectiveness of the implementation of the *Basin Plan 2012 (Cth)* (Basin Plan) and water resource plans for each five-year period, with the first period ending 31 December 2018. The first report, Report No. 90, was published in December 2018.

In the report there are three chapters with direct relevance to the work of the Independent Assurance Committee (IAC):

- Chapter 12 Basin Plan Compliance;
- Chapter 13 Reporting Monitoring and Evaluation; and
- Chapter 14 Institutions and Governance.

Chapter 13 on reporting, monitoring and evaluation is not discussed further in this advice. The recommendations from this chapter are straight forward and uncontroversial. There is no doubt that the MDBA must think carefully about how the Basin Plan should be monitored, evaluated and reported on.

This advice to the Authority is structured around the recommendations in Chapters 12 and 14. The IAC's role is to provide expert advice on the design, implementation and adequacy of the MDBA's Basin Plan compliance program and related matters. On 5 June 2019, the IAC met with the Authority to discuss the Productivity Commission report findings. It was agreed at that meeting to provide this advice.

The IAC is an expert committee with its membership based on experience in the fields of regulation and compliance, public administration and governance, water measurement and metering, and natural resource management and policy.

## Part 2 - Chapter 12 Basin Plan Compliance

### **Recommendation 12.1**

As a transitional measure, the Murray–Darling Basin Authority should house its Sustainable Diversion Limit and Water Resource Plan compliance functions within the Office of Compliance, before its compliance role comes into full effect in July 2019.

This recommendation relates to how the MDBA structures and organises its work. It is a subset of the broader question of roles and responsibilities and appropriate governance which are dealt with in more detail in Chapter 14. These matters are discussed further at Part 3, dealing with Institutions and Governance.

The IAC notes that the MDBA has made significant progress in establishing policies and procedures to improve compliance and enforcement programs over the last year. In our experience, there has been a demonstrated cultural change in addressing the unique challenge of being a regulator of regulators.

**Recommendation 12.2**

Basin States should consider the role, costs and benefits of consistent metering policies including the role of metering standards.

Basin Governments should work with Standards Australia to formally revise standards to ensure quality and cost effectiveness in water measurement.

Before new Basin State metering regulation and implementation plans are put in place, they should be subject to scrutiny through publicly available business cases.

This recommendation could be seen to undermine the unambiguous need for reform of metering and measurement, demonstrated through the multitude of reviews and investigations in the wake of the Four Corners program in 2017.

Under the 2009 *National Framework for Non-Urban Metering*, all Australian governments had committed to new meters being compliant with the Australian Standard (AS 4747) by July 2020. And in 2017, following the Murray–Darling Basin (MDB) Water Compliance Review, all Basin governments agreed a Compact that included clear actions on metering and measurement. The Ministerial Council recognised the importance of consistent and standard metering and measurement across the Basin through the Compact. The costs and benefits of any significant reform are weighed carefully to shape that reform. This matter goes to the heart of public confidence in the management of the Basin water resources.

**Recommendation 12.3**

The Murray–Darling Basin Authority (MDBA), as the regulator responsible for overseeing compliance at a Basin-wide level, should publicly report instances where Basin States are not effectively enforcing their water take laws.

The MDBA’s 2026 Basin Plan review should reconsider the risk to meeting the objectives of the Basin Plan from non-compliance of water take, including the case for reducing Sustainable Diversion Limits if there is evidence of persistent illegal water take.

The IAC strongly endorses this recommendation. It reinforces the role of States as the primary regulators of water-take laws and strengthens the action that can be taken when faced with a persistent failure to regulate adequately. While the MDBA may have step in powers in some circumstances, and could use them as a last resort, it is far preferable to keep States publicly accountable for regulating water take and enforcing compliance. Potential duplication of effort and possible public confusion about who has primary responsibility should be avoided.

However, the MDBA does have a very important role in overseeing and reporting on the Basin States' compliance arrangements. It also endeavours to improve compliance across the Basin through facilitating a community of practice with the States.

## Part 3 - Chapter 14 Institutions and Governance

### **Recommendation 14.1**

Basin Governments should demonstrate strategic leadership, take joint responsibility and direct the implementation of the Basin Plan.

The Murray–Darling Basin (MDB) Ministerial Council should collaborate to provide the strategic leadership and policy direction required to implement the Plan, and be ultimately accountable for implementation.

In 2019, the MDB Ministerial Council should commence reforms to the institutional and governance arrangements for implementing the Basin Plan by:

- enhancing the role of and delegating accountability for implementation to the Basin Officials Committee (BOC). BOC should be responsible for managing the significant risks to successful implementation and ensuring effective intergovernmental collaboration
- ensuring that formal directions to BOC regarding implementation are publicly available
- ensuring that arrangements to assess progress, evaluate outcomes, and ensure compliance with the Plan are fully independent
- recognising that the Murray-Darling Basin Authority's agent of government role will continue to be key to driving collaboration between and providing technical support to Basin Governments as they implement the Plan
- ensuring that Basin Governments are individually and collectively resourced to perform their roles to implement the Plan.

### **Recommendation 14.2**

Basin Governments should agree to the restructure of the Murray–Darling Basin Authority to separate its service delivery and regulatory functions into two institutions.

The Australian Government should then embark on the necessary institutional reforms to establish the:

- Murray-Darling Basin Agency – as the agent of Basin Governments
- Basin Plan Regulator – an independent Commonwealth Statutory Authority.

These institutional reforms should be in place by 2021.

### **Recommendation 14.3**

As a transitional measure, and before the Murray–Darling Basin Authority’s compliance role comes into full effect in July 2019, the Office of Compliance should be broadened to be the Office of the Basin Plan Regulator, and include compliance, evaluation and Plan review functions.

These recommendations are dealt with together because they are inextricably linked through the logic of the Productivity Commission. The IAC supports the need for greater accountability for the implementation of the Basin Plan. However, we strongly disagree with these recommendations on the basis of its flawed logic and a failure to recognise the lessons of experience.

The MDBA was established under the Water Act as the Commonwealth entity responsible for the management of the Basin through the Basin Plan. The Authority’s primary responsibility is to provide leadership and regulatory authority across the Basin. The operational roles under the *Murray Darling Basin Agreement* are constituted differently. The Productivity Commission argues that the role for leading implementation of the Basin Plan is unclear. The IAC takes an entirely different position.

The Authority has, and needs to have, this leadership role. The leadership role is unambiguous in the *Water Act 2007*. The great challenge with these arrangements is how to work effectively and collaboratively with the States to find the optimum solutions to very difficult challenges. History has demonstrated how challenging and difficult this can be and explains in part why the old Murray–Darling Basin Commission was replaced by an Authority under the *Water Act 2007*. The consensual governance model was unable to tackle the problems of over-extraction and deteriorating river health. The Productivity Commission recommendations appear to be a proposal to reverse this history by reinstating an arrangement reminiscent of the old Commission – with the Basin Officials Committee (BOC) taking the central role.

Of course, Basin Governments should “demonstrate strategic leadership and take responsibility for implementing the Plan”. However, to abandon the Authority and replace it by a service agency, accountable to a basin officials committee, and a plan regulator, ignores the pivotal role of leading and regulating Basin water resource management performed by the Authority. This role needs to be strengthened, not diminished.

It would be appropriate to examine the concerns expressed by the Productivity Commission about adhering to its set of principles for effective institutional arrangements and good governance (Box 14.1 pp347,348), and to consider how the Authority can respond to these concerns.

- **Clear roles and responsibilities** – in summary, the Authority has clear roles and responsibilities under the Act and under the Agreement. The roles under the Act are the primary ones of water resource management and regulation, and those under the Agreement are service roles of water infrastructure operations and other

nominated water and natural resource management activities. There is no ambiguity about these roles.

- **Conflicting objectives and functions are effectively managed** – The potential conflicts are more imagined than real. In fact, the synergies from having the service roles within the Authority far outweigh the potential conflicts. Technical expertise from the operational areas inform policy and regulation and the housing of water resource information management in the one organisation avoids duplication and facilitates access to vital information. This expertise is very specialised and in short supply, and a newly established regulator, needing to build capacity in water management and operations, is likely to encounter serious difficulties in recruiting the necessary staff. Implementation of the Plan has to be highly adaptive where doing informs learning. This creates a dynamic and evolving regulatory environment. A regulator without access to the requisite skills will be left behind. Any potential conflicts can be dealt with by clear structural separation and governance within the MDBA.
- **Effective mechanisms for accountability** – This is not essentially a structural issue unless one was to argue structural separation of roles was a prerequisite for accountability. The reporting regimes required of a Commonwealth statutory agency plus the cyclical reporting role of the Productivity Commission and the specific requirements of the Water Act and the Basin Plan should, in normal circumstances, suffice. However, these are not normal circumstances and the Authority must give special attention to how best to satisfy the public interest in and concern about performance. The Independent Assurance Committee is one mechanism that has provided independent scrutiny of the compliance function, but more may need to be done. Deeper consideration of the PC's recommendations on reporting, monitoring and evaluation may address this challenge.
- **Effective processes for collaboration** – this is a major issue in relation to the BOC but it is not an inherent shortcoming of the Authority structure. It relates more to the functionality of BOC as the forum for collaborative effort. This matter is addressed in response to recommendation 14.4 below.
- **Capability** – as discussed previously, this is an overwhelming argument for keeping the Authority intact rather than splitting into multiple agencies where capability is diminished.
- **Effective engagement of stakeholders** – not identified by the Productivity Commission as a factor in its recommendations on governance and institutional arrangements but clearly a major challenge for the Authority in terms of public trust and confidence.

#### **Recommendation 14.4**

By 2020, to enable it to carry out its enhanced role (recommendation 14.1) the Basin Officials Committee should:

- have an independent Chair, appointed by the Australian Minister for Water in consultation with the Murray–Darling Basin Ministerial Council
- comprehensively review the capability and the resourcing it requires to jointly implement the Plan
- agree on the capability and services Basin Governments require of the Murray–Darling Basin Agency to support them to implement the Plan and for shared water resource management
- establish new arrangements and processes to support ongoing intergovernmental collaboration.

The IAC agrees that the BOC should be reformed and have an independent Chair.

The IAC also draws attention to the recommendations of the Independent Panel for the Murray–Darling Basin Water Compliance Review (2017) –

*Recommendation 3 - COAG to endorse a revision of BOC membership to:*

*a) require BOC members to bring a whole-of-government view to the forum, which includes representing the interests of the state river operators and environmental water holders; and  
b) allow MDBA to participate as a full member for matters relating to Basin Plan implementation, and as a non-voting member for river operations.*

*- page 101 of the Independent Panel's Report*

These matters do not appear to have been acted on. Further, there is still an unresolved question of transparency of the operation of BOC. One important accountability measure is for the proceedings and decisions of BOC to be made public.

The remaining recommendations of 14.4 are speculative in that they assume that the governance arrangements are changed, and a commission style arrangement is put in place. The IAC argues that this would retard Basin Plan implementation and increase public disenchantment.