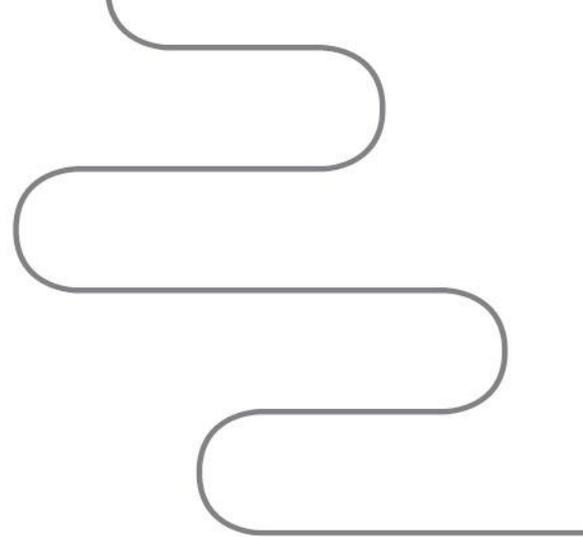




Australian Government



Compliance strategy



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Cover image: Yarrowonga Weir on the Murray River, with a hydroelectricity plant at the right (photo by Brayden Dykes)

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Disclaimer

The provisions in the *Water Act 2007* govern the application of the enforcement and the special powers available to the Authority. The special power provisions include the entry onto land by authorised officers and powers to enter land for compliance purposes. All decisions regarding enforcement and the use of special powers will be made by reference to these laws. This Compliance Strategy has no statutory force. Whilst decisions in relation to enforcement and the use of special powers may consider the Compliance Strategy, decisions will be based on the aforementioned laws. While reasonable care has been taken in the preparation of this strategy, the Murray–Darling Basin Authority does not accept responsibility for the accuracy or completeness of its contents and shall not be liable for any loss or damage that may be occasioned directly or indirectly through the use of or reliance on the strategy.

Part 1 – Purpose of this strategy

This strategy outlines the compliance approach of the Murray–Darling Basin Authority (MDBA), as a regulatory agency in administering and enforcing aspects of the *Water Act 2007* (Cwlth) (the *Water Act*) and the *Basin Plan 2012* (Cwlth) (the *Basin Plan*) as they relate to external entities. The strategy identifies who has obligations and explains key elements of MDBA’s compliance approach and compliance program. MDBA’s compliance with the *Water Act* and *Basin Plan* requirements is managed in accordance with the arrangements set out in part 3 of the strategy.

We will review this strategy from time to time in light of findings from intelligence, risk evaluation and engagement.

Part 2 – The role of MDBA

The Water Act established the Murray–Darling Basin Authority (MDBA) to, amongst other things:

- prepare, implement, enforce and review an integrated plan for the Murray–Darling Basin
- measure, monitor and record the quality and quantity of the Basin’s water resources
- support, encourage and conduct research about the Basin’s water resources
- develop measures for the equitable, efficient and sustainable use of the Basin’s water resources
- operate the River Murray system and deliver water to users in a fair and efficient way
- disseminate information about the Basin’s water resources
- engage and educate the Australian community about the Basin’s water resources.

The MDBA works in collaboration with other Australian Government agencies, Basin State governments, local governments, regional bodies, industry groups, landholders, environmental organisations, scientists, research organisations and Murray–Darling Basin communities including Aboriginal communities, and the broader Australian community.

In 2012, the Basin Plan became law, changing how planning and management of water in the Basin occurs. The Basin Plan sets sustainable diversion limits for the major water resources of the Basin, along with other Basin-scale arrangements for environmental water, water quality and salinity, and water trading. Basin States are responsible for the detailed water planning and management within that framework, including developing catchment water resource plans, determining seasonal water allocations, and issuing and managing water access entitlements. Basin communities and organisations will continue to have an important role in managing the water resources of the Basin.

Under section 137 of the Water Act, the MDBA is the ‘appropriate enforcement agency’ for contraventions relating to Part 2 of the Water Act (Management of Basin Water Resources, including the Basin Plan) and the information gathering provisions of Part 10 of the Water Act.

The way we undertake our regulatory, compliance, assurance and enforcement functions reflects the role and approach of MDBA, as outlined above, and draws on best practice approaches to regulation.

Part 3 – Regulatory context

Who has obligations under the Water Act and the Basin Plan?

Regulated entities under the Basin Plan and Part 2 of the Water Act include the MDBA and:

- Basin States and agencies of Basin States
- Basin Officials Committee
- operating authorities
- approval authorities
- Commonwealth Environmental Water Holder (CEWH)
- infrastructure operators (including irrigation infrastructure operators (IIOs) and water service infrastructure operators)
- holders of water access rights
- Commonwealth Department of the Environment (DoE)
- other Commonwealth agencies.

The majority of the obligations under Part 2 of the Water Act and the Basin Plan lie with the Basin States and Commonwealth agencies. Commonwealth agencies, including the MDBA, the CEWH and the DoE, must perform their functions and exercise their powers consistently with, and in a manner that gives effect to the Basin Plan and/or water resource plans (sections 34 and 58 of the Water Act).

The other regulated entities such as Basin States, infrastructure operators and holders of water access rights, 'must not do an act, or fail to act, in relation to Basin water resources or the water resources of a water resource plan area, if the act or failure to act is inconsistent with the Basin Plan and/or the relevant water resource plan' (sections 35 and 59 of the Water Act). This includes specific obligations relating to the Basin Plan water trading rules which have broader application than many other parts of the Basin Plan. Further information on the application of the water trading rules can be found in the technical guidelines for water trading rules on the MDBA website.

Who has enforcement responsibilities under the Water Act?

The MDBA is the 'appropriate enforcement agency' for contraventions relating to Part 2 of the Water Act (Management of Basin Water Resources, including the Basin Plan) and the information gathering provisions of Part 10 of the Water Act. It has the powers to seek injunctions, declarations, warrants to enter land and issue enforcement notices and enter into enforceable undertakings. These are discussed in more detail in Part 5 C of this document, *Managing non-compliance*.

Basin States continue to have a regulatory role, such as ensuring water licence holders fulfil their licence obligations. The compliance activity that MDBA undertakes aims to complement the day-to-day compliance activities that Basin States will continue to undertake.

Under the Water Act, the Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the Basin water charge rules and water market rules; and the Commonwealth Water Minister has enforcement powers in relation to Part 7 of the Water Act, which covers the water information functions of the Bureau of Meteorology (BoM).

The MDBA plans to work closely with all those who have enforcement responsibilities under the Water Act to ensure appropriate sharing of information and minimisation of costs and duplication.

Basin Plan implementation

The MDBA, the Commonwealth Environmental Water Holder and Basin States¹ have entered into a Basin Plan Implementation Agreement (BPIA). The BPIA guides each of the parties in their Basin Plan obligations and sets out the principles for compliance and assurance. Each party to the agreement, including the MDBA, will publish annually, Statements of Assurance reporting on compliance with the Basin Plan obligations.

The BPIA also outlines MDBA's approach to compliance. This includes our focus on promoting and monitoring compliance in areas where we reasonably believe the underlying issue may impact materially on the achievement of the Basin Plan objectives.

Governance

An internal Compliance Governance Committee comprising the Chief Executive and key senior executives, oversees the MDBA's the compliance program as it relates to external entities. The committee is responsible for considering compliance risk assessments and advising the Chief Executive when enforcement action may be required.

We will work on implementing the key elements of the compliance program with external entities, and Basin States, particularly through the Basin Plan Implementation Committee (which includes representatives from each Basin State) and its relevant sub-committees.

The MDBA manages compliance with its own obligations under the Water Act and Basin Plan in accordance with its corporate risk management arrangements and with the Audit Committee, Executive and the Authority. The MDBA is also subject from time to time to external audits conducted by the Australian National Audit Office (ANAO).

We will establish arrangements to manage any conflict of interest issues that may arise in the MDBA's conduct of the compliance and assurance program in relation to our own obligations under the Basin Plan and the Water Act. In addition to publishing annual Statements of Assurance with respect to our compliance with the Basin Plan obligations, we will also publish our Audit Plan and relevant audit reports. The ANAO may also publish Audit reports.

¹ At the time of writing NSW and Queensland had not signed the BPIA.

Part 4 – MDBA’s approach to compliance

In undertaking our compliance functions we have an emphasis on engagement, education, awareness raising and support, and transparency and reporting. The compliance program is based on an assessment of risk, including both the likelihood and consequence of non-compliance with the various obligations, enabling us to focus on material risks and cost-effective solutions.

We will work in good faith with all parties and use our enforcement powers only when needed.

Our guiding principles

The following principles guide our compliance approach:

- *Cooperation* — cooperative engagement with stakeholders and other regulators allows our compliance activity to complement the work of others and encourages voluntary compliance.
- *Engagement* — listening to the community allows information sharing and communication to provide the right level of information and assurance of compliance with the Basin Plan and Water Act.
- *Risk assessment* — assessing risk allows us to focus our compliance efforts on matters where the MDBA has a reasonable belief the underlying issue may impact materially on the achievement of Basin Plan outcomes.
- *Voluntary Compliance* — encouraging voluntary compliance and advancing community and industry water stewardship wherever possible will deliver cost-effective opportunities for better outcomes.
- *Fairness and Equity* — ensuring fairness and equity in our compliance approach means the community can be confident we will deal with compliance issues consistently to support the integrity of the Basin Plan, accredited water resource plans and the water market. We will also manage any conflict of interest in the conduct of the compliance program in relation our own obligations.
- *Timeliness* — promptly and openly responding to issues of non-compliance will minimise adverse impacts.
- *Transparency* — sharing and reporting about the compliance process and decision-making will enhance confidence in regulatory outcomes.
- *Efficiency* — collecting information once and using it many times will minimise costs to parties.

Compliance approach and tools

Our approach to compliance and the various tools we will use depend on the attitude to compliance of the entity with whom we are dealing. Where entities are engaged and seeking to comply, we will focus on working with them to achieve compliance. However, where an entity is unengaged and demonstrates a lack of willingness to comply, we will rely on the more formal enforcement approaches including mediation and enforceable undertakings, enforcement notices and injunctions. This approach and the various tools we will use are illustrated in Figure 1 below.

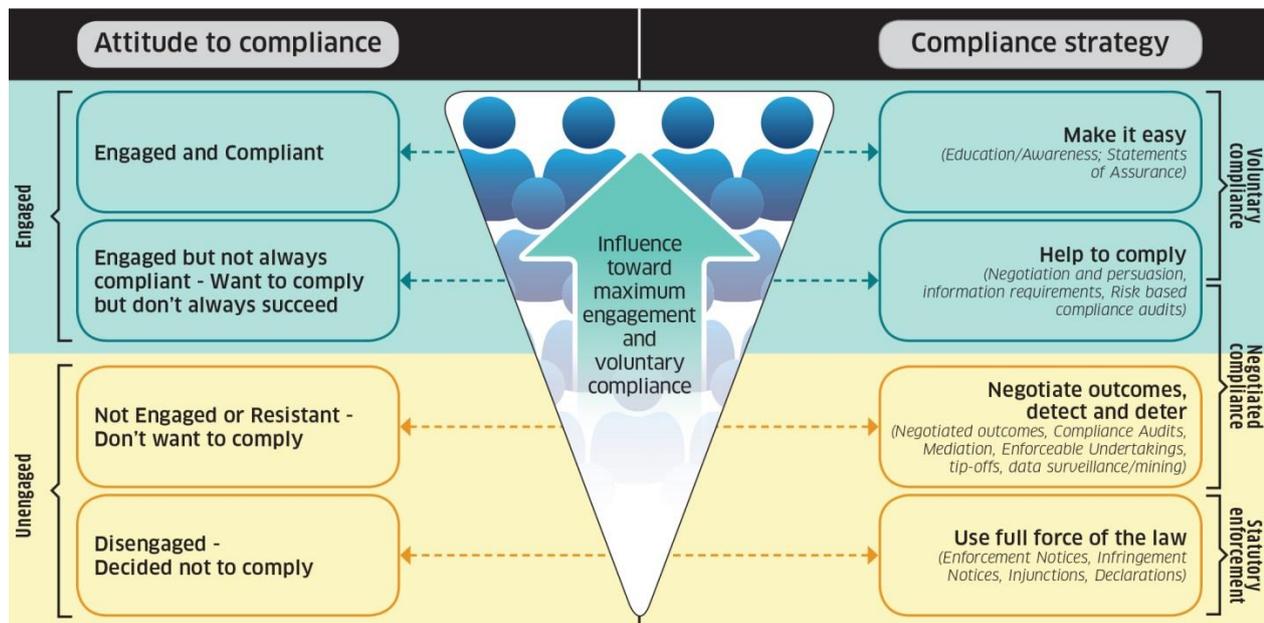


Figure 1: Compliance approach and tools

Part 5 – The key elements of the compliance program

A: Education, engagement and awareness raising, aimed at encouraging voluntary compliance

Providing people with relevant information and assistance supports them to undertake voluntary compliance. We have released a number of documents and web material to assist with understanding the Basin Plan and their obligations. For example:

- A handbook for practitioners – Water resource plan requirements
- Technical guidelines for the water trading rules
- Constraints Management Strategy 2013 to 2024
- Web content and factsheets.

The MDBA also meets regularly with communities, Aboriginal groups, irrigators, environmental groups, irrigation infrastructure operators, its own Basin Community Committee and Northern Basin Advisory Committee in implementing the Basin Plan. This engagement will help identify ongoing communication and education needs.

B: Information gathering, assessment and reporting

Information gathering, assessment and reporting are, as per below, fundamental to cost effective and accountable compliance programs.

Regulators have a responsibility to provide assurance to the Australian community that regulated entities are meeting mandated requirements. A systematic, risk-based programme of compliance assessment activities provides a regulator with a cost-effective approach to monitoring compliance, enabling it to target available resources at the highest priority regulator risks and to respond proactively to changing and emerging risks. (ANAO – Administering Regulation – Better practice guide)

Assurance reporting

Ensuring transparency and accountability to the public is important in building confidence that the objectives of the Water Act and Basin Plan are being achieved. To meet this critical need, we will publish on our website Statements of Assurance prepared by the MDBA, Basin States and Commonwealth agencies in relation to meeting Basin Plan obligations each year.

Strategic intelligence

Strategic intelligence gathering allows for a systematic examination of the factors that may lead to non-compliance. It is future looking and enables the setting of priorities by asking what forces are at play and what drives the behaviour or issue. Understanding the drivers of behaviour assists us in targeting compliance effort and forms a key input to our identification and prioritising of compliance risks.

Strategic intelligence gathering techniques include environmental scanning, strategic risk assessments and trend analysis.

Fostering cooperative arrangements with partner agencies at the Commonwealth, state and local level is vital for the MDBA in delivering its compliance functions, and in clearly identifying roles and responsibilities with other regulators. In addition to performing formal functions under authorised arrangements, other agencies can assist in communication and education, provide information and intelligence regarding breaches, and provide local knowledge.

We will seek to establish effective compliance-oriented relationships with relevant state and Commonwealth regulatory agencies, such as state water regulators, the ACCC and the BoM to ensure the implementation of this strategy does not create duplication of effort by, or for, those regulated under the Water Act, and to maximise intelligence sharing arrangements.

Risk assessment and management

Focussing on issues that have a material effect on achieving the Basin Plan outcomes is fundamental to our approach. We are developing a compliance risk management framework and will undertake compliance risk assessments on key elements of the Basin Plan. The methodology underpinning compliance risk assessments is in accordance with Australian risk management standards.

Focusing on risk management allows us to develop our understanding of compliance issues across the Basin, underpins compliance audit priorities, enables us to identify co-operative solutions to significant compliance issues and develop proactive strategic interventions.

A risk based approach to compliance includes consideration of issues such as:

- the potential impact of non-compliance
- the timing and spatial nature of the issues
- the likelihood of non-compliance continuing or being repeated
- the availability of alternative solutions
- whether good faith is present
- how long the issue has been occurring
- any aggravating or mitigating circumstances.

Audit

Using auditing to test compliance and assist in assessing compliance risk is also fundamental to our approach. We will have a program of audits designed to assess the extent of compliance with the Basin Plan. We will generally link the need for compliance audits to risk assessments, however, we may undertake audits outside this framework where necessary or where we consider random audits are appropriate.

Effective audits assist in identifying potential non-compliance, providing input to our risk management and intelligence gathering processes. The audit process may also identify issues that the auditor considers could have broader ramifications for policy and planning activities. We will publish on our website our audit plans and any relevant audit reports.

The National Water Commission (NWC) may also audit the effectiveness of implementation of the Basin Plan and water resource plans, and we will work closely with the NWC to minimise reporting requirements on parties.

Evaluation and reporting

A range of stakeholders including Ministers, Basin States, regulated entities and the public, need to know if compliance efforts are succeeding, and if they are not, how they can be improved. To achieve this we will report on the effectiveness of relevant compliance interventions and other assurance activities.

C: Managing non-compliance

Managing non-compliance is critical to ensure the integrity of the Basin Plan and Water Act. We will allocate resources based on risk and cost effectiveness. We will address suspected non-compliance in proportion to the issue, its potential to impact on the achievement of Basin Plan outcomes and in accordance with the approach set out in Figure 1 above.

Where an entity is engaged but non-compliant, we will seek to negotiate a return to compliance through an agreed pathway. Negotiation may include agreeing to engage professional mediators to help resolve a matter.

Where negotiation and/or mediation are unsuccessful or where the entity is not engaged and the relevant party is not acting in good faith, we will consider employing the appropriate enforcement provisions of the Water Act, as described below.

Good faith embraces a sincere motive without any malice or the desire to defraud or wrong others. In the context of the Basin Plan, it means that we will negotiate with non-compliant parties so long as we believe the party is negotiating with a genuine view to achieving compliance as quickly as is possible, recognising that some matters may take some time to achieve this outcome.

The MDBA recognises there may be circumstances where the immediate application of a statutory enforcement tool is appropriate. For example, under section 165 of the Water Act, the MDBA may issue an enforcement notice if it is satisfied that the impact of an act or an omission by a person or entity prejudices or has an adverse impact on the effectiveness or the implementation of the Basin Plan or a water resource plan. This may be appropriate even where the act or omission is not a clear contravention of the Water Act or regulations.

Injunctions

The MDBA may apply to a court for an injunction if a person has engaged in, is engaging in or is proposing to engage in conduct that would be a contravention of sections 34, 35, 58 or 59 of the Water Act. Mandatory, prohibitory and interim injunctions are available. The Court has the discretion whether or not to grant an injunction.

Declarations

The MDBA may apply to a court for a declaration that a person has contravened a requirement of the Water Act. The Court may make the declaration if it is satisfied the person has contravened the Act. Declarations provide a clear statement from the Court that the person's behaviour contravenes the Water Act.

Enforceable undertakings

Enforceable undertakings are voluntary agreements entered into between a person and the MDBA. They are a lower cost alternative to taking a matter to court and allow both parties to agree on the steps required to achieve compliance.

If the MDBA considers that an action taken by, or an omission of, a person constituted a contravention, it may accept certain enforceable undertakings from the person.

If the MDBA considers that a person has breached the undertaking, it can apply to a court for orders directing the person to comply with the undertaking, to compensate another person or to make payments to the MDBA where a person obtains a financial benefit that is reasonably attributable to the breach.

Enforcement notices

An enforcement notice can instruct a person to take specific action. The MDBA can issue an enforcement notice to a person if satisfied that the person has contravened, is contravening or is likely to contravene sections 34, 35, 58 or 59 of the Water Act or has engaged in, is engaging in or is likely to engage in conduct that:

- was, is or would be inconsistent with the Basin Plan or a water resource plan; or
- prejudiced, is prejudicing, or would prejudice, the effectiveness or the implementation of the Basin Plan or a water resource plan; or
- had, is having or would have an adverse effect on the effectiveness or the implementation of the Basin Plan or a water resource plan.

The MDBA may also issue an enforcement notice where a person is omitting or is likely to omit to perform an act, where the omission:

- was, is or would be inconsistent with the Basin Plan or a water resource plan; or
- prejudiced, is prejudicing, or would prejudice, the effectiveness or the implementation of the Basin Plan or a water resource plan; or
- had, is having or would have an adverse effect on the effectiveness or the implementation of the Basin Plan or a water resource plan.

Enforcement notices provide a method for the MDBA to stop or prevent conduct which runs counter to the objectives and outcomes sought to be achieved by the Basin Plan or accredited water resource plans.

A breach of an enforcement notice gives rise to a civil penalty of up to 600 penalty units (\$170 per unit at the time of writing) for each day that contravention occurs.

Appendix A – Further details on managing non-compliance

Our approach to compliance and the various tools we will use depend on the circumstances. Where negotiation and/or mediation are unsuccessful or where the entity is not engaged and/or not acting in good faith, we will consider employing the appropriate enforcement provisions under the Water Act.

Generally we will seek to resolve compliance issues via negotiation or mediation before seeking to use our enforcement powers.

Negotiated compliance

Negotiated compliance resolutions focus on working in good faith with those persons and entities that have obligations under the Water Act and/or the Basin Plan on specific compliance issues as they arise to reach a negotiated outcome. Its aim is to have the non-compliant entity come to an acceptable level of compliance within an acceptable timeframe.

Mediation

The MDBA will approach mediation in good faith with the purpose of achieving an open, fair and acceptable compliance outcome.

The MDBA, in consultation with the other party, may source a suitably qualified mediator. Having issues resolved through mediation is preferred to seeking a resolution through the Courts.

How we decide which enforcement power to use

In deciding when and which enforcement power to use there may be circumstances where extended negotiation may be inappropriate due to the severity of the non-compliance or urgent intervention is necessary to prevent potential harm to key Basin Plan objectives.

Our decision to use enforcement powers will depend on the seriousness of the non-compliance and we will consider each case on its merits. This may result in us commencing one or more enforcement processes or pursuing an acceptable outcome not based on our enforcement powers.

Some factors we may consider in deciding which remedy to pursue include:

- The nature and seriousness of the alleged contravention:
 - whether the non-compliance may impact materially on the achievement of Basin Plan outcomes
 - whether the contravention involved dishonesty or was intentional
 - the value of any benefit or detriment caused as a result of the contravention
 - the impact of the non-compliance on the water market, including potential loss of public confidence
 - the value of any financial loss caused to water market participants
 - the extent of actual or potential environmental damage

- whether the non-compliance has ceased or is continuing
- whether the non-compliance is one-off or part of a systemic compliance failure
- the impact on fairness and equity if the matter is not pursued
- whether the non-compliant person has a poor compliance record.
- Conduct of the person following the alleged contravention:
 - when and how the breach came to our attention (i.e. was it self-reported or detected via other means)
 - the level of cooperation with our reviews, audits or investigations
 - whether remedial steps have been taken.
- How robust our case is:
 - the availability of evidence to support the relevant enforcement option
 - the likelihood of success.
- The expected public benefit of enforcement action:
 - whether the case is likely to clarify the law and help people to better understand their obligations
 - the length and expense of a contested hearing and the remedies available compared with other remedies that may be available more quickly.

Enforcement options

The MDBA can apply, or seek to have a court apply, the range of enforcement options detailed below to all people and entities with obligations under the Water Act. These include Commonwealth agencies, Basin State agencies, operating authorities (both State controlled and private), infrastructure operators (covering both irrigation and water service infrastructure) and holders of water access rights (see Part 2 above for more details).

Injunctions

The MDBA may seek from the Court:

- **a Prohibitory injunction** - to restrain a person from engaging in illegal conduct
- **a Mandatory injunction** - to require a person to perform (or cease performing) a particular activity that is in contravention to the Water Act and/or the Basin Plan
- **an Interim injunction** - to restrain a person from, or require a person to perform an activity until such time as a formal hearing can be arranged between the MDBA and the other party.

The Court will consider a number of factors when determining whether to issue an injunction including (but not limited to):

- Whether or not it appears as though the other party intends to engage in (or continue to engage in) activities that are in breach of the Water Act and/or the Basin Plan
- Whether or not the other party has ever engaged in the conduct before
- Whether there is significant risk of injury to people
- Whether there is potential for damage to property or assets
- If there is risk of harm to, or loss of, Basin water resources.

Declarations

The MDBA may also seek from the Court a declaration that a person has committed a contravention of the Water Act. If the Court is satisfied that the person has committed the contravention, it may make a declaration to that effect.

Declarations can help to resolve an issue in dispute by providing an authoritative but non-coercive statement from the Court as to the legality or otherwise of a particular matter.

The MDBA will publish all declarations on its website.

Enforceable undertakings

An enforceable undertaking (an undertaking) is a voluntary written agreement entered into between a person and the MDBA which is enforceable via the Courts, if required.

An undertaking provides that the person will take specified action and/or refrain from taking specified action so as to ensure that the person does not, or is unlikely to, contravene Part 2 of the Water Act. It allows both parties to agree on the steps to be taken to achieve an acceptable level of compliance.

In order to accept an undertaking it is necessary that the MDBA 'consider² that an action contravened a provision of the Water Act. We may accept an undertaking where we consider that an action by, or omission of, a person constituted a contravention of the Water Act.

An undertaking can only bind a person who gives the undertaking. A person giving an undertaking may withdraw or vary the undertaking with our consent. The MDBA can cancel an undertaking by giving written notice.

Enforcing undertakings

In the event that a person who has given an undertaking fails to meet their agreed obligations, we may apply to a Court to enforce the undertaking.

Prior to applying to the Court, we must follow administrative decision-making principles³ in forming a belief that the undertaking has been breached. If the Court is satisfied that the person who gave the undertaking has breached a term of the undertaking, it may make one or more of the following orders:

- directing the person to comply with that term; and/or

² In the present context, 'considers' is equivalent to 'believes'. We can believe something without having evidence admissible in court proceedings to prove a civil penalty contravention. However, we must reach this conclusion in accordance with applicable administrative decision-making principles.

³ These administrative decision-making principles include:

- to have had material capable of supporting its belief
- to have taken into account all relevant considerations
- to have disregarded irrelevant considerations
- not to have formed a belief that was so unreasonable that no reasonable person could have formed it.

- directing the person to pay to the enforcement agency, on behalf of the Commonwealth, an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach and/or
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and/or
- any other order that the Court considers appropriate.

The MDBA Compliance Strategy emphasises the importance of voluntary compliance. We consider the publication of undertakings generally serves the public interest and facilitates voluntary compliance. Therefore we may publish the undertaking on our website.

Enforcement notices

An enforcement notice can instruct a person to take specific action. Failure to comply with an enforcement notice incurs a civil penalty of 600 penalty units for each day during which the non-compliance with the notice continues.

Enforcement notices provide a method for the MDBA to stop or prevent conduct which runs counter to the objectives and outcomes of the Basin Plan or accredited water resource plans.

We may issue an enforcement notice to a person directing them to take action specified in the notice where we are satisfied that a person or entity:

- has contravened, is contravening or is likely to contravene a provision of Part 2 of the Water Act
- has engaged in, is engaging in or is likely to engage in conduct that:
 - was, is or would be inconsistent with the Basin Plan or a water resource plan; or
 - prejudiced, is prejudicing, or would prejudice, the effectiveness or the implementation of the Basin Plan or a water resource plan; or
 - had, is having or would have an adverse effect on the effectiveness or the implementation of the Basin Plan or a water resource plan; or
- has omitted, is omitting or is likely to omit to perform an act, where the omission:
 - was, is or would be inconsistent with the Basin Plan or a water resource plan; or
 - prejudiced, is prejudicing, or would prejudice, the effectiveness or the implementation of the Basin Plan or a water resource plan; or
 - had, is having or would have an adverse effect on the effectiveness or the implementation of the Basin Plan or a water resource plan.

An enforcement notice can instruct a person to take action to:

- ensure that the person does not engage in conduct of that kind in the future
- ensure that the person does not omit to perform acts of that kind in the future
- remedy, or make good, any adverse consequences of the conduct, or the omission, on the health or continued availability of Basin water resources or
- not exercise some or all of their water access rights, irrigation rights and/or water delivery rights.

We can also vary or revoke an enforcement notice where we deem it appropriate to do so. The variation or revocation must be by written notice given to the person.



Investigations

What is an investigation?

For the purposes of this guide, an investigation is:

A systematic process of gathering information to make an unbiased assessment aimed at establishing a valid and reasonable conclusion with regard to potential breaches of sections 34, 35, 58 and/or 59 of the Water Act

An investigation is not a compliance audit conducted under section 13.10 of the Basin Plan.

The aim of an investigation is to determine whether or not there has been a contravention of Part 2 of the Water Act and gather evidence which would be admissible in civil proceedings, or which may facilitate appropriate administrative remedies. We seek to achieve this aim within a reasonable time and at a reasonable cost, considering legislative requirements and the nature of the investigation.

The broader benefits of investigations include:

- improved controls to prevent future contraventions
- specific deterrence - deters the person from committing further or similar offences

Australian Government Investigation Standards

We undertake investigations in accordance with the Australian Government Investigation Standards (AGIS) published by the Attorney-General's Department. The application of the AGIS by the MDBA is limited to investigations. Reviews and audits we may undertake are not subject to the AGIS requirements.

Who undertakes an investigation?

We do not anticipate a significant number of investigations will be required. We expect that most matters will be appropriately addressed via negotiation and, where necessary, mediation. However, for those situations where the investigation of a breach is required, we will engage suitably qualified investigators to undertake these activities.

Investigators are accountable for their actions and the decisions they make during the course of investigations. We will require investigators to make ethical and informed decisions and demonstrate a culture of accountability and professionalism. Investigators will have the level of training or qualification recommended by the AGIS.

At the conclusion of an investigation the investigator will prepare a brief with recommendations for the MDBA to consider.

When does the MDBA investigate?

We may identify potential breaches of the Water Act or the Basin Plan as part of our ongoing monitoring activities. We may also receive allegations from a number of sources including Basin States, Water Corporations, Irrigation Infrastructure Operator's and the public.

We will record and assess the allegation and determine that the breach is significant and may initiate a formal investigation. During an investigation we will gather evidence in order to establish whether an offence has occurred, identify the person(s) involved and determine what the extent or consequences of the breach were.

We may seek further clarification during the assessment and contact the relevant parties via site visits, telephone or in writing.

Special powers

Part 10 of the Water Act gives the MDBA special powers to enforce contraventions of the Water Act. These include:

- Appointing authorised officers
- Powers to enter private land
- Information gathering.

Authorised officers

The Water Act provides for a civil rather than criminal regime to manage non-compliance and allows for appointment of authorised officers for the purpose of entry to land.

Authorised officers appointed by the MDBA may include:

- an APS employee
- an individual whose services are made available to the MDBA under s 207 of the Water Act
- an individual who holds an office or position with a State or an authority of a State where the State or authority of a State agree to the appointment
- an individual whose services have been acquired by the MDBA under contract.

Entry onto land

The Water Act confers on the MDBA a power for an authorised officer to enter land for:

- compliance purposes (including monitoring compliance with the Water Act and the Basin Plan and searching for evidential material)
- other purposes (including where an authorised officer reasonably believes it is necessary for the performance of any of the MDBA's functions in Part 2 of the Water Act, which relate to the Basin Plan and accredited water resource plans, to measure, monitor and record the quality and quantity of the Basin water resources or the condition of water-dependent ecosystems associated with the Basin water resources,)

Before entering premises, an authorised officer must provide to the occupiers of the premises reasonable written notice of their intention to enter. Where the premises are residential, the occupiers must voluntarily consent to the entry, after having been informed that they may refuse consent.

Authorised officers must carry identity cards, which they must show if required to do so by an occupier. They must also provide to the occupier a written statement of the occupiers' rights and obligations in relation to the officer's proposed entry on to the premises.

After entering premises, the authorised officer may do anything reasonably necessary to perform the relevant functions of the MDBA, as well as, inspecting a water resource infrastructure, conducting tests and clearing vegetation.

In undertaking these activities, an authorised officer must:

- take all reasonable steps to ensure that they cause as little detriment and inconvenience, and do as little damage, as is practicable to the premises and to anything on, or growing or living on, the premises
- cooperate as far as practicable with an occupier of the premises
- remain on the premises only for such period as is reasonably necessary
- leave the premises, as nearly as practicable, in the condition in which it was immediately before the thing was done.

Monitoring and contravention related warrants

The Water Act also permits an authorised officer to enter onto land for the purposes of monitoring compliance with the Basin Plan, accredited water resource plans and relevant regulations or search for evidential material.⁴ However, entry onto land to monitor compliance can only occur:

- with the consent of the landholder
- pursuant to a monitoring warrant, or
- pursuant to a contravention-related warrant.

The MDBA may apply to a magistrate to issue a warrant for an authorised officer to enter premises for the purposes of:

- monitoring compliance with the Basin Plan, accredited water resource plans and relevant regulations, or
- searching for evidence of a contravention of Part 2 of the Water Act.

The magistrate may issue a warrant where satisfied that entry onto land is reasonably necessary for the purposes of monitoring compliance with the Basin Plan, accredited water resource plans and relevant regulations.

⁴ *evidential material* means any of the following:

- (a) a thing with respect to which a provision (the *compliance provision*) of Part 2, or regulations made for the purposes of Part 2, has been contravened or is suspected, on reasonable grounds, of having been contravened;
- (b) a thing as to which there are reasonable grounds for suspecting that it will afford evidence as to the contravention of the compliance provision;
- (c) a thing as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of contravening the compliance provision.

In relation to a contravention related warrant the magistrate may issue a warrant if satisfied there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, evidential material in or on the premises subject to the warrant.

Authorised officers may enter premises without the occupants consent under the powers of the warrant, but are obliged to announce they are authorised to enter the premises and give the occupant(s) an opportunity to allow entry.

Authorised officers must make a copy of the warrant available to the occupant.

Authorised officers are not obliged to announce their authorisation or wait for the occupant to allow entry if they believe on reasonable grounds that immediate entry to the premises is required:

- to ensure the safety of a person, or
- to prevent serious damage to the environment, or
- to ensure that the effective execution of the warrant is not frustrated.

Information gathering

The Water Act confers upon the MDBA a power to request information relating to the preparation and implementation of the Basin Plan, the investigation of possible contraventions of Part 2 of the Water Act and regulations made for the purposes of Part 2 and other matters relevant to the performance of our functions that are specified in the regulations.

We may, in writing, require the person to give specified information to us within a specified time and in a specified form or manner.

It is a civil penalty not to provide information requested or to provide false and misleading information. The civil penalty amounts are 50 and 60 penalty units. The information gathering provisions are subject to reasonable excuse and self-incrimination exemptions.

Criminal provisions

The Water Act does not create criminal offences for contravention of obligations under Part 2 of the Water Act such as, the Basin Plan. However, certain conduct may constitute an offence under other Commonwealth legislation, including the *Criminal Code Act 1995* or the *Crimes Act 1914* or State or Territory law and may be pursued as a criminal offence through that legislation.

Consistent with the Commonwealth Fraud Control Guidelines (CFCG), the MDBA is responsible for investigating routine or minor instances of fraud, including providing false or misleading information to the commonwealth or failing to provide it when there is an obligation to do so.

Appeals, complaints and privacy

Appeals and Complaints

A Basin State or an agency of a Basin State agency may appeal an enforcement notice issued by the MDBA by application to the Federal Court of Australia. Other entities may appeal an

enforcement notice issued by the MDBA by application to the Federal Magistrates Court or the Federal Court of Australia.

We will manage complaints and/or disputes managed in accordance with our Dispute Management Plan.

Privacy

We will undertake compliance, assurance and enforcement activities consistent with the requirements of our Privacy Policy

Contact Us

If you would like further information or wish to provide us with information, please contact the MDBA using the details below.

General enquiries

Phone: 02 6279 0100 or 1800 230 067

Fax: 02 6248 8053

Address: Level 4, 51 Allara St, Canberra City, ACT 2601

Postal Address: GPO Box 1801, Canberra City 2601

Email: engagement@mdba.gov.au

If you have any questions, concerns or information please contact the Director of Compliance on:

Phone: 1800 687 044

Fax: 02 6248 8053

Address: Level 4, 51 Allara St, Canberra City, ACT 2601

Postal Address: GPO Box 1801, Canberra City 2601

Email: compliance@mdba.gov.au

Should you wish to provide information to us regarding allegations of breaches to the Basin Plan you can write via the Report a breach of the Plan form.

Media Contact

Phone: 02 6279 0141

Subscriptions

Visit our subscriptions page to register for:

- The Spillway e-newsletters
- Education updates
- Media announcements.

You can also use our enquiry form to write to us.