

Basin Plan Water Resource Plan Requirements Position Statement 1M WRP imposing obligations

POLICY ISSUE	How can a water resource plan (WRP) impose a legal obligation?
REFERENCES	<i>Water Act 2007 (Cth)</i> (ss 58 and 59, and Part 8); <i>Basin Plan 2012 (Cth)</i> (Chapter 10)

MDBA POSITION STATEMENT
<p>1. Wherever, to satisfy a requirement of the Basin Plan, it is necessary for a water resource plan to impose an obligation on a person¹, the water resource plan may impose the obligation by</p> <ul style="list-style-type: none"> a. incorporating a State law² that imposes that obligation, or b. imposing that obligation independently of State law (i.e. articulating the obligation in a document or other text that forms part of the water resource plan). <p>2. These approaches are not mutually exclusive in that a combination of approaches may be used within a single water resource plan.</p> <p>3. Whichever approach is used, an obligation in a water resource plan is given effect under Commonwealth law by provisions of the <i>Water Act 2007 (Cth)</i> (see sections 58 and 59 and Part 8). Given this, the content of any obligation should be set out in clear terms in the water resource plan.</p> <p>4. Describing the existence of an obligation in State law without incorporating the relevant law (or part thereof) into the water resource plan would not satisfy a requirement of the Basin Plan that requires a water resource plan to impose an obligation on a person.</p>

Rationale

1. The MDBA’s preference is that, where possible, obligations are imposed in an accredited water resource plan (WRP) by incorporating a State law. The option to impose an obligation through the WRP alone should only be considered in limited circumstances. This includes, for example, where there is not an existing state instrument that would achieve the effect required by the Basin Plan, and there are valid reasons why a Basin state would not amend existing state instruments to

¹ A ‘person’ may include a body politic or corporate as well as an individual.

² Throughout this paper the term “State law” refers to a law of a State or Territory or an instrument made under the law, which has legal effect.

MDBA Reference:	D15/62869	<i>Accessed:</i>
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POSITION STATEMENT 1M – WRP imposing obligations

have such an effect.

2. This preference is in line with the intention of the *Water Act 2007*, for the water entitlement regime to continue to be defined and managed under state legislation. The intention is for WRPs to implement key policy settings of the Basin Plan, by bringing together state instruments into a consistent package, and provide certainty, readability and usability for water users to understand their obligations under the Basin Plan.
3. Creating two sets of legal requirements for governing water use by imposing obligations in a WRP without incorporating state instruments has the potential to cause confusion and uncertainty for water users, and create multiple compliance regimes with potential inconsistencies.
4. The MDBA may only recommend that a WRP be accredited if it is consistent with the Basin Plan. It will only be consistent with the Basin Plan if it contains the material, and does the things, that the Basin Plan requires it to contain or do. To satisfy some requirements in the Basin Plan it may be necessary for a WRP to require a person to act or refrain from acting in a particular way (i.e. impose an obligation). Provisions of the Basin Plan that require or may require a WRP to impose an obligation on a person are included in Appendix A.
5. Generally, provisions of the Basin Plan that state a WRP must *require, ensure or provide for* something to happen or *set out* or *include* rules may involve the imposition of an obligation. However, identifying when a WRP will need to impose an obligation on a person to satisfy a requirement of the Basin Plan will ultimately depend on the nature of the particular WRP area, the content of the particular Basin Plan requirement and how that requirement is satisfied by the WRP.
6. Where an obligation is included in a WRP to satisfy a requirement of the Basin Plan, that obligation is given effect by provisions of the Water Act. For example, s 58 of the Water Act requires the Authority and other Commonwealth agencies to perform their functions and exercise their powers consistently and in a manner that gives effect to a WRP. Section 59 of the Water Act requires the Basin Officials Committee, an agency of a Basin State, an infrastructure operator and the holder of a water access right to not do an act or not fail to do an act that is inconsistent with a WRP. The enforcement powers in Part 8 of the Water Act apply to contraventions of ss 58 and 59.

Imposing an obligation in a WRP

7. The two approaches to ensuring that each WRP appropriately imposes obligations are set out below. Section 10.08(2) is used to illustrate the two approaches. This section provides that a WRP must require a holder of a water access right to comply with the conditions of that right. Note that the examples given are simplistic for the purposes of illustration.

A. WRP incorporates a State law

- a. A WRP may incorporate a State law, or part of a State law, that imposes an obligation in order to satisfy a requirement of the Basin Plan. A WRP ‘incorporates’ a State law if the WRP operates to make the State law a part of the WRP, e.g. by identifying the relevant State law or part of that law and stating that it forms part of the WRP.
- b. The approach of incorporating a State law into the WRP ensures alignment between the State law and the WRP, meaning that compliance with State law would likewise be compliance with s 58 and s 59 of the Water Act.
- c. Provisions that are incorporated in the WRP should be selected such that:

POSITION STATEMENT 1M – WRP imposing obligations

- the incorporated State law fulfils the WRP requirement, noting that for some requirements (like s10.08(2)), there may be a number of related provisions in a State law that have the effect of imposing an obligation, and
 - the incorporation of an isolated provision does not carry some different interpretation from that which it is given in the context of the State law instrument. To remove doubt arising from this issue, the WRP could, for example, make it clear that the State law provisions that have been put forward for accreditation are to be interpreted consistently with the State legislative framework within which those provisions sit.
- d. For example, s 10.08(2) could be met by:
- i. identifying the State law that constitutes the WRP (this will be State law that includes the obligation required to satisfy s 10.08(2) as per s 10.04(2))
 - ii. listing the provisions of that State law that addresses the requirement in s 10.08(2) as per s 10.04(4))
 - iii. identifying the parts of that law that do not form part of the WRP as per s 10.04(5)).

B. WRP imposes the obligation independently of State law

- a. A WRP may impose the obligation independently of State law (i.e. articulating the obligation in a document or other text that forms part of the WRP). The obligation in the text will be given legal effect only through the Water Act and not through State law. Under this approach, while the WRP would not incorporate State law, the WRP may reflect the content of State law. For this approach to be effective, the relevant provision in the WRP must clearly set out the content of the obligation.
- b. For example, the requirements of s 10.08(2) could be met independently of State law by including text in the WRP that said that *'A holder of a water access right must comply with the conditions of that right'*.

Inconsistency between a WRP and State law

8. Under either approach, s 58 or s 59 of the Water Act will operate such that the WRP will override a State law to the extent that the State law is inconsistent with the WRP. An inconsistency could arise between an obligation in the WRP and State law when an obligation is imposed independently of State law or when a State law that forms part of the WRP is later amended and the WRP is not amended to reflect the change to the State law.

Example of an unacceptable approach

9. As identified in the position statement, describing the existence of a State law, without incorporating that law into the WRP, would not satisfy a requirement in the Basin Plan that involved a WRP imposing an obligation on a person.
10. For example, a WRP provision that said *'Section x of the [State law] requires a person to comply with the conditions of their water access right'* identifies the existence of a State law that may satisfy a WRP requirement, but, unless the WRP also makes it clear that the relevant section is part of the WRP, this approach would not fulfil the requirements of s 10.08(2).

Amendments to accredited WRPs

11. Amendments to an accredited WRP do not have any effect for the purposes of the

POSITION STATEMENT 1M – WRP imposing obligations

Water Act unless the amendment is accredited under s 65 or s 66 of the Act.

- a. Where the WRP incorporates a State law, consideration should be given to whether amendments to other provisions of the State law alter the interpretation of the accredited provision(s), and therefore whether the WRP needs to be amended.
 - b. In circumstances where a WRP imposes an obligation independently of State law, and a State law also imposes a same or similar obligation but does not form a part of the WRP, consideration should be given to whether an amendment to the State law introduces an inconsistency with the accredited WRP.
12. As noted above, the content of an accredited WRP will override the content of a State law to the extent that the State law is inconsistent with the accredited WRP.

Construction of provisions imposing obligations on Basin States

13. There are limitations on the extent to which the Basin Plan can impose an obligation on a Basin State (see s 1.09 of the Basin Plan). To ensure these limitations are also recognised in relation to obligations imposed on a Basin State in a WRP, it is recommended that a provision similar to s 1.09 be included in the WRP for accreditation.

PROVISIONS OF THE BASIN PLAN THAT REQUIRE OR MAY REQUIRE A WRP TO IMPOSE OBLIGATION ON ANOTHER PERSON

The following table is indicative only. Identifying when a water resource plan (WRP) will need to impose an obligation on a person to satisfy a requirement of the Basin Plan will ultimately depend on the nature of the particular WRP area, the content of the particular Basin Plan requirement and how that requirement is satisfied in the WRP.

Basin Plan provision	Obligation	Section 59 person who the obligation may apply to
<i>10.08(2) Require compliance with water access right</i>	WRP must require the holder of a water access right to comply with the conditions of that right.	The holder of a water access right
<i>10.09(2) Provide for register of HEW</i>	WRP must provide for the establishment and maintenance of a register of HEW.	An agency of a Basin State An operating authority An infrastructure operator
<i>10.11 Rules for take including water allocation rules</i>	WRP must set out rules (including if applicable, rules for water allocations) that ensure that the quantity actually taken does not exceed the permitted take.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right
<i>10.13(1) Limits on certain forms of take</i>	WRP must require that take under basic rights, runoff dams or commercial plantation does not exceed the level specified in Schedule 3 for that form of take.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right
<i>10.14(2) Effects on water resources of the WRP area</i>	WRP must (if there is an effect or potential effect on a Basin water resource from taking non-Basin groundwater) set out a process for monitoring the effect or potential effect, and actions that will be taken to respond.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right

MDBA Reference:	D15/62869
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Basin Plan provision	Obligation	Section 59 person who the obligation may apply to
<i>10.14(3) Effects on water resources of the WRP area</i>	WRP may (in order to respond to effects of taking non-Basin groundwater on Basin water resource) require a person to hold a water access right in the WRP area – however it is not mandatory to include such a requirement.	The holder of a water access right
<i>10.17(3), 10.18(3), 10.19(3), 10.20(3), 10.21(3) Sustainable use and management</i>	Under each of these provisions, the Basin Plan requirement is that in certain circumstances, a WRP must include rules which ensure (broadly) that water resources are used and managed in a sustainable way. Where those circumstances do not exist, a WRP will not be required to include an obligation.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right
<i>10.24 Monitoring impact of interception activities</i>	WRP must set out a process for monitoring the impact of certain interception activities. If the WRP requires a person to follow the process that is included for s10.24, then the WRP could involve the imposition of an obligation on that person.	An agency of a Basin State
<i>10.25 Actions to be taken</i>	WRP must identify actions that will be taken in response to monitoring showing particular impacts of interception activities. To the extent that a WRP requires a person to undertake ‘actions’ in response to certain monitoring, the WRP potentially involves the imposition of an obligation.	An agency of a Basin State
<i>10.26(1) Provide for environmental watering to occur in a particular way</i>	WRP must provide for environmental watering to occur in a specified way.	An agency of a Basin State An operating authority An infrastructure operator
<i>10.27(2) Provide for co-ordinated environmental watering between 2 WRP areas</i>	WRP must provide for the co-ordination of environmental watering between 2 connected surface water WRP areas.	An agency of a Basin State An operating authority An infrastructure operator

MDBA Reference:	D15/62869
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Basin Plan provision	Obligation	Section 59 person who the obligation may apply to
<p><i>10.28 Ensure no net reduction in the protection of PEW</i></p>	<p>WRP must ensure that there is no net reduction in protection of planned environmental water (PEW). To do this, the WRP may include certain provisions that impose obligations on persons in relation to the protection of PEW in order to ensure that the WRP maintains at least the same level of protection as in State legislation immediately before the commencement of the Basin Plan.</p>	<p>An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right</p>
<p><i>10.33 WQM Plan to identify measures</i></p>	<p>WQM plan must specify measures that contribute to the achievement of water quality objectives. A measure is defined to include ‘strategies, plans and programs’ (s 4 of the Water Act). Depending on the content of the measure, the measure could involve the imposition of obligations on persons to do certain things.</p>	<p>An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right</p>
<p><i>10.37, 10.38, 10.39 – circumstances where trade is permitted</i></p>	<p>Under each of these provisions, the Basin Plan requirement is for the WRP to set out permitted trade circumstances that ensure that certain requirements in chapter 12 are met. Generally these provisions could involve the imposition of obligations on the person who is responsible for approving a trade to:</p> <ul style="list-style-type: none"> • approve trades in the circumstances where those trades are permitted by the WRP, and • refuse to approve the trades in circumstances where those trades are not permitted by the WRP. <p>Obligations would not be imposed if the water resources are not able to be traded under State water management law.</p>	<p>An agency of a Basin State</p>
<p><i>10.43 Strategies for addressing risks</i></p>	<p>WRP must describe strategies for the management of medium and higher levels of risk, if the risk can be addressed in a manner commensurate with the level of risk. These strategies may result in the WRP imposing obligations, depending on the nature of the strategies described.</p>	<p>Dependent on the strategies described.</p>

<p>MDBA Reference:</p>	<p>D15/62869</p>
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Basin Plan provision	Obligation	Section 59 person who the obligation may apply to
<i>10.45 Supporting measuring</i>	WRP must specify measures for maintaining and, if practicable, improve the measurement of take in the WRP (both the proportion that is measured and the standard of measurement). A measure is defined to include 'strategies, plans and programs' (s 4 of the Water Act). Depending on the content of the measure, the measure could involve the imposition of obligations on persons to do certain things.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right
<i>10.46 Monitoring water resources</i>	WRP must specify the monitoring of water resources that will be done to enable the Basin state to fulfil its reporting obligations under s13.14. If the WRP requires a person to undertake particular monitoring actions, then the WRP could involve the imposition of an obligation on that person.	An agency of a Basin State An operating authority An infrastructure operator
<i>10.47 Review of water resource plans</i>	WRP must require a report to be given to the Authority.	An agency of a Basin State An operating authority An infrastructure operator
<i>10.48 Amendment of water resource plan</i>	WRP must require a Basin State to give reasons for amendment to the Authority.	An agency of a Basin State
<i>10.51(2) Measures in response to extreme events</i>	WRP must set out measures to meet critical human water needs during extreme events. This may require, for example, the WRP to impose an obligation on a person to act in a particular way to achieve the measure. A measure is defined to include 'strategies, plans and programs' (s 4 of the Water Act). Depending on the content of the measure, the measure could involve the imposition of obligations on persons to do certain things.	The Basin Officials Committee An agency of a Basin State An operating authority An infrastructure operator
<i>10.51(3) Measures in response to extreme events</i>	WRP must provide that if new scientific information suggests a change in likelihood of extreme events occurring, consideration be given to whether the water resources should be managed differently.	An agency of a Basin State

MDBA Reference:	D15/62869
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POSITION STATEMENT 1M – WRP imposing obligations

Basin Plan provision	Obligation	Section 59 person who the obligation may apply to
<i>10.55 Retention of current protection</i>	WRP must provide at least the same level of protection as was provided in a transitional WRP or interim WRP. This may include continuing provisions that impose obligations on persons in relation to the protection of Indigenous values and Indigenous uses. If no such obligations exist, it may not be necessary to impose any new obligations.	An agency of a Basin State An operating authority An infrastructure operator The holder of a water access right

MDBA Reference:	D15/62869
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