

Basin Plan Water Resource Plan Requirements Position Statement 1B Interpreting ‘have regard to’

POLICY ISSUE	How are requirements to ‘have regard to’ interpreted when assessing a WRP and what must be demonstrated to show that regard has been had?
REFERENCES	<p>The Note at the end of s1.07 of the Basin Plan relates to interpretation of the phrase ‘have regard to’ and similar phrases.</p> <p>Paragraphs 12 to 18 of the Basin Plan Explanatory Statement contain further information about the phrases ‘have regard to’, ‘having regard to’ and ‘regard must be had’.</p> <p>All instances in the <i>Basin Plan 2012 (Cth)</i>, Chapter 10 of a requirement to ‘have regard to’ a matter are listed in the table at Attachment A.</p>

MDBA POSITION STATEMENT
<ol style="list-style-type: none"> 1. If the Basin Plan requires that a person ‘have regard to’ a matter, or that ‘regard must be had’ to a matter, this means that the relevant decision-maker must give those matters proper, genuine and realistic consideration. 2. In assessing whether any requirement in Chapter 10 to ‘have regard to’ a matter has been met, MDBA will seek evidence of the way in which regard was had to the matter or matters. The appropriate way to ensure proper consideration of a matter will vary depending on the context of the requirement, including any additional obligations associated with that requirement. 3. Under Chapter 10, additional obligations are sometimes associated with a requirement to ‘have regard to’ a matter. For the purposes of this position statement, MDBA has grouped the sections that require regard to be had into 3 different categories: <ul style="list-style-type: none"> • Category A - a requirement to have regard to a specified matter, with no additional requirements • Category B - a requirement to have regard to a specified matter, with an additional requirement that the water resource plan describe or explain how that requirement was complied with • Category C - a requirement to have regard to a specified matter, with an additional requirement to include specified additional material in the water resource plan, depending on the outcome of regard being had. 4. Attachment A indicates the category to which MDBA has allocated each section that imposes a requirement to ‘have regard to’ a matter.

MDBA Reference:	D15/15007	<i>Accessed:</i>
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5. To support assessment of whether the requirements have been met, an explanation of the approach, tools or information used to ‘have regard to’ a matter should be provided to MDBA (in supporting evidence or in the water resource plan as relevant).
6. A requirement to ‘have regard to’ a particular matter does not mean that the decision-maker is precluded from having regard to other matters when making a decision.
7. Further, the requirement to have regard to certain matters does not mean that the water resource plan is ultimately bound to contain any particular material or provide for any particular thing. Each section needs to be read in context, including in conjunction with any associated sections.

Rationale

1. In some cases, the requirement to ‘have regard to’ a matter may be associated with an additional obligation. Examples of additional obligations that a water resource plan (WRP) could be required to include are:
 - a description of how regard was had;
 - a demonstration that specific matters were considered when having regard;
 - an explanation of why certain matters have or have not been included as a result of that consideration;
 - inclusion of rules or strategies if needed as a result of that consideration.
2. Where a requirement for a WRP to be prepared having regard to a matter is accompanied by a requirement to describe how regard was had, a demonstration of how regard was had will be part of the accredited WRP. If not, the information provided to show how regard was had will be considered by MDBA as supporting information, which is not part of the accredited WRP.
3. The risk assessment required by Part 9 of Chapter 10 is critical to informing decision-making for the development of a WRP and the approach to different obligations in the Basin Plan. Part of assessing how regard was had to risks is seeing how the risk assessment influenced the management arrangements in the WRP. The Basin Plan requires WRPs to include strategies that are commensurate with the level of risk a matter poses to the water resources of the area. Assessment of the adequacy of these arrangements is a separate issue.
4. This position statement should be read in conjunction with MDBA’s WRP Position Statement 2A on what forms part of the accredited WRP and what is supporting information, and the WRP Position Statement 9A regarding risk assessment.
5. What constitutes proper, genuine and realistic consideration of a matter, and what sort of evidence the MDBA will require about such consideration, will vary depending on the context of the requirement to have regard to the matter. For assessment purposes there will need to be some further interpretation of what this phrase means for each relevant section of Chapter 10, based on the context of the requirement to ‘have regard’ to a matter. For example:
 - Risk assessment - s10.41 is supported by additional requirements relating to the risk assessment, including the requirement to describe strategies to address risks, and to consider risks when deciding whether rules are required for the sustainable use and management of water resources under Part 4 of Chapter 10.
 - Interception - s10.23(3) lists factors to which regard must be had when deciding whether an activity has potential to have a significant impact on water resources - including the location, impact and projected growth of the activity.
 - Water quality - s10.30 requires regard to be had to the causes of degradation

POSITION STATEMENT 1B – Interpreting ‘have regard to’

identified in Chapter 9, Part 2, and Schedule 10 of the Basin Plan, which may be more prevalent in highly used systems.

6. The Handbook for Practitioners provides more specific details on the types of supplementary information or descriptions which may be used to show how ‘regard was had’ for relevant provisions of Chapter 10 of the Basin Plan.
7. In addition to this position statement, separate guidelines are being developed that will consider the term ‘have regard to’ specifically in the context of the water quality provisions of Chapter 9 of the Basin Plan.

MDBA Reference:	D15/15007
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The extent of Basin Plan, Chapter 10 requirements for water resource plans to ‘have regard to’ matters and the various levels of additional obligation.

For the purposes of this position statement, MDBA has grouped Basin Plan Chapter 10 sections that require regard to be had into 3 different categories:

- Category A - a requirement to have regard to a specified matter, with no additional requirements
- Category B - a requirement to have regard to a specified matter, with an additional requirement that the water resource plan describe or explain how that requirement was complied with
- Category C - a requirement to have regard to a specified matter, with an additional requirement to include specified additional material in the water resource plan, depending on the outcome of regard being had.

Note: The specifics of what a WRP is obliged to do, in addition to having regard to a matter for Chapter 10, will need to be considered on a case by case basis. The requirement of each Chapter 10 provision must be read in the context of other related provisions that may specify an additional activity that goes beyond having regard to a matter. This may lead to some, or all, of the detail about how regard has been had to a matter, being required to be set out in the WRP itself, as opposed to being given only as supporting evidence.

BASIN PLAN CHAPTER 10 SECTION		CATEGORY A	CATEGORY B	CATEGORY C
“✓” denotes where each category applies		HAVE REGARD TO A MATTER (how this has been done to be provided to MDBA as supporting evidence)	ADDITIONAL REQUIREMENTS	
			DESCRIPTION/EXPLANATION (how a matter was given regard to be included in accredited WRP)	ADVANCED (the outcome of having regard to a matter to be included in accredited WRP)
10.05	Regard to other water resources	✓	✓	
10.10	Annual determinations of water permitted to be taken	✓		
10.17	Priority environmental assets and priority ecosystem functions	✓	✓ (consequence of s 10.22)	✓ (dependent on the result of the regard)
10.18	Priority environmental assets dependent on groundwater	✓	✓ (consequence of s 10.22)	✓ (dependent on the result of the regard)
10.19	Groundwater and surface water connections	✓	✓ (consequence of s 10.22)	✓ (dependent on the result of the regard)

MDBA Reference:	D15/15007
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POSITION STATEMENT 1B – Interpreting ‘have regard to’

BASIN PLAN CHAPTER 10 SECTION		CATEGORY A	CATEGORY B	CATEGORY C
10.20	Productive base of groundwater	✓	✓ (consequence of s 10.22)	✓ (dependent on the result of the regard)
10.21	Environmental outcomes relating to groundwater	✓	✓ (consequence of s 10.22)	✓ (dependent on the result of the regard)
10.23	Listing types of interception activity	✓		✓ (dependent on result of regard - consequence of ss 10.24 and 10.25)
10.26	Planning for environmental watering	✓		
10.30	WQM Plan to identify key causes of water quality degradation	✓		
10.33	WQM Plan to identify measures	✓		
10.35	Impact of WQM Plan on another Basin State	✓		
10.41	Risk identification and assessment methodology	✓		✓ (dependent on result of regard - consequence of ss 10.22, 10.42, 10.23 and 10.31)
10.43	Strategies for addressing risks	✓		
10.52	Objectives and outcomes based on Indigenous values and uses	✓		
10.53	Consultation and preparation of water resource plan	✓		
10.54	Cultural flows	✓		

MDBA Reference	D15/15007
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