APPEARANCE FOR BSA – AREC 29 OCTOBER 2014

1. I'd like to thank the committee for allowing BSA to talk to our submission. This reform process is one of the biggest issues facing much of regional Queensland into the foreseeable future. My name is Peter Shannon and I am a committee member of the BSA. BSA's details are in our submission. I have practiced as a solicitor in the Surat Basin for 30 years and the last 5 of those almost exclusively in landholder resource matters. I am a Legal Partner at Shine Lawyers.
2. BSA is astounded that the Government sees "make good" as a satisfactory alternative to a landholders right to object to mining leases, the right to address water take impacts by resource companies in the EA conditioning process, and the right to have a say in the grant of a water licence to a mining company as is available to them under existing law but now to be removed. All these existing rights are to be replaced by an absolute entitlement for mining companies to take water free of oversight and outside the water planning regime in exchange for "make good" – which Government even proclaims is a means of protecting landholder water resources. The Bill is a further step in that process.
3. At its most basic this removes significant individual rights for landholders, including the right to natural justice (i.e. to have a say in matters that affect them) and also ensures the effective compulsory resumption of their underground water rights (and property interests herein) where bores are invariably impacted. The concept of make good by its very nature recognises the loss of something and the need for it to be compensated.
4. The Bill therefore represents a most basic non-compliance with legislative standards expected of this Parliament and required to be addressed in the manner set forth in the Legislative Standards Act ("LSA"). The Queensland Parliamentary Council ("QPC") has seriously failed this committee by failing to recognise that and failing to "justify" the non-compliance.
5. Clearly the "justification" within the meaning of the LSA is solely the entitlement of landholders to "make good". In our respectful view it is critical for the committee to understand how complicated the make good process can be and why the existing provisions of the Water Act do not provide the relevant "justification" under the LSA.
6. It is apparent there has been no analysis undertaken by QPC of the adequacy or otherwise of "make good". Were such an analysis done serious flaws in the make good concept and the make good process would be highlighted and the clear lack of "justification" for the non-compliance with legislative standards would be apparent.
7. To provide a rudimentary understanding of the current Water Act provisions in respect of CSG – and purely by way of backgrounding - we provide a copy of a presentation made by me at Roma in mid-2013 (**document 1**).
8. As a lawyer practising extensively in the area of make good, your presenter has prepared a list of <u>but some</u> of the flaws in the make good process for landholders that evidence a gross lack of protection for landholders in the process (**document 2**).
9. This committee has the opportunity of remedying and improving the situation, in respect of mining at least, by requiring amendments as are outlined in the document we seek to table (**document 3**).
10. Make good is a poor substitute for the right to have a Court vet the extent of impacts of each individual mining project on landholders, to decide whether those impacts are acceptable and/or the extent to which they should be conditioned, and the right to object to the grant of a water licence.
11. If make good is to be the "justification" for such a drastic intrusion into landholder rights it must be remedied accordingly to provide even basic fairness and equity for landholders.

Peter Shannon – Committee Member
Basin Sustainability Alliance
& Legal Partner Shine Lawyers

BORES AND MAKE GOOD AGREEMENTS
Peter Shannon, Partner, Shine Lawyers

I assume for today's purposes that **everyone is aware of the risks** posed to water bores from CSG activities. Essentially they are **quantity** risks which are due to drops in water levels of a bore due to direct removal or movement between aquifers and **quality** risks which might be because of inter-aquifer mixing or being contaminated by **chemicals, gas impurities or radon** or the like due to opening up migration paths or **mobilising things** that were otherwise stable.

We know these projects were approved and instigated with unseemly haste and little regard to water impacts. In 2010 the then government moved the make good obligations from the **P & G Act into the Water Act** and set up a framework which is now contained in **Sections 361 to 434 of the Water Act**. This was said to implement a new regime to address community concerns.

The Make Good regime now involves 3 key concepts – the **Underground Water Impact Reports**, **Baseline Assessments** and **Make Good obligations**.

Underground Water Impact Reports

The first thing they did was implement Underground Water Impact Reports for different areas. This essentially involves modelling the expected water to be **extracted** by the approved projects in an area, considering the known characteristics of aquifers and the underground geology and trying to predict what bores will be relevantly affected within the next 3 years – that is, those bores predicted to drop by more than 5m or 2m depending on the type of aquifer it is in within 3 years or thereafter.

In your area that has been done and the relevant report is to be found in the UWIR for the Surat Cumulative Management Area.

Each report has to provide a system to monitor and record bores and has to identify details of each bore.

The reports are then **reviewed and updated every 3 years** including reviewing the bore areas to be affected.

Areas that are going to be affected within 3 years because of drops below the trigger threshold are called **immediately affected areas (IAA).** Areas that will be affected at some time but just not within the next 3 years are called **long term affected areas** (LAA) **(387)**.

Long term affected bores **will eventually become immediately** affected bores presumably as this **rolling 3 year review process** goes on.

SLIDE 1

Underground Water Impact Reports (UWIR)

- Models water to be extracted and attempts to predict which bores will be affected
- Reviewed and updated every 3 years
- Immediately affected areas (IAA) – areas where bore level drops will exceed trigger thresholds within 3 years.
- Longterm affected areas (LAA) – areas where bore level drops will exceed trigger thresholds at some point but not within next 3 years

Every bore owner should be searching the UWIR's to see where their bore stands in the reports. You can do that for the Surat Basin by **accessing the UWIR online** and entering in the bore number. It will give you a report such as this

SLIDE 2

By the way **Stock and domestic** bores don't have to be registered so they aren't necessarily on the government **database** and don't have a number**.** If you don't tell the companies about the existence of a bore then they **don't know about it** and it won't be covered in the UWIR. The fact your bore isn't registered isn't a problem. When you tell them one exists though they have to include it and it will get it's own number in the Report.

Baseline Assessment Plan

The second concept involves the Companies having to do a plan to do Baseline Assessments for all bores in the area – a **Baseline Assessment Plan.** This records the details of a bore now so we have a "baseline" of the characteristics of the bore hopefully before gas activity started. Obviously the sooner this is done the better – especially in areas where the activities are already well under way.

The BAP will say when they will do **baseline assessments for each water bore** in their area. Those assessments have to be done **immediately** if the bore's within **2**

kilometres of activity and in the target aquifer which is usually the Walloon Coal Measures.

Failing that they have to propose a timetable within which baseline assessments will be done **before production or production testing** start. Where production is already happening such as in the Surat CMA they have to work with the CE to get a timetable approved. The idea is they are meant to get cracking and do them.

Once the BAP is approved the baseline assessments **must be done** according to that plan and if you own a bore you are **entitled to a copy**.

The Baseline Assessments contain information about the bore including the following:

(a) the level and quality of water in the bore;
(b) how the bore is constructed;
(c) the type of infrastructure used to pump water from the bore.

With **baseline assessments** you are actually **obliged** to provide information. It's up to you whether you provide access, but if you don't do so you are probably just prejudicing your position.

The assessments have to be done according to government prepared **baseline assessment guidelines** and I urge all bore owners to **read them**.

The assessments will be recording current **usage** of the bore including how many **stock i**t is watering or what the **existing pumping configuration** is, type of **casing**, **standing water levels**, **some quality aspects**, etc. They also will have regard to drilling contractor records in that process.

SLIDE 3

Baseline Assessment Plans (BAP's)

- requires baseline assessments to be done by companies for each water bore in the area
- if bore within 2 kilometres of activity and same aquifer as CSG – immediately
- if not within 2 kilometres – proposed timetable (before production / testing)
- landholder entitled to copy
- records water level, construction details, pump and infrastructure type
- 2 suites of testing – mandatory and voluntary
- Landholders should do their own

I make a couple of quick observations:

- Firstly some of the things that are to be tested are **mandatory** but some are **voluntary.**

- The **mandatory** ones are in my view mainly only to do with **water levels** and **quality** impacts related to that which is **interconnection** of water caused by drawdown.

- The **voluntary** ones however are largely to do with water quality from things such as **fracking or other contamination risks**. I suspect some of the companies won't be doing wide ranging chemical tests because their liability under the Act is only directed to water level impacts where quality issues arise. Certainly **every bore owner should** ideally **be doing their own Baseline assessments. You can't assume the company will be doing the tests for things like fracking.**

- I know also there have been **problems** with companies **accessing bores** because a bore owner doesn't want to stop for **long enough** for **water levels** to return or because there is **infrastructure** on it. I would think that because the legislation requires the companies to use "**best endeavours**" it should be expected they would have to **bear the cost of** doing this and compensating for the cost of stopping the bore and for any monetary damage that might occur. Unfortunately that **doesn't seem to be the approach** the Guidelines have taken which is very unfortunate. I think it undermines the process.

OK – so we have this framework:

- A report that assesses bore areas into immediately affected areas and long term affected areas

- Every 3 years this will be remodelled and redrawn so as to accommodate what has actually happened in the last 3 years and then to provide further predictions for the next 3 years as to then immediately affected bores and long term affected bores.

- We also have a baseline assessment approach recording the pre-existing condition of all the bores in the area.

So then we get to the third concept – the Make Good obligations.

Make Good Obligations

There are only **2 circumstances** for practical purposes in which Companies have **make good obligations**.

Immediately Affected bores – Section 409

The first situation is if you are in **an immediately affected area** under an UWIR. That means your bore is predicted in the relevant UWIR to **drop by more than 5m or** 2m depending on the type of aquifer it is in **within 3 years**.

I need to emphasise here that **Long term affected bores** – i.e. those predicted to be impacted beyond the trigger thresholds after 3 years but as yet at an indeterminate

time, **have no right** to insist on the company undertaking make good obligations. They have to wait until either they become immediately affected bores in the next **triennial UWIR** or wait until they are **directly affected** and then try to come under Section 418 which I will come to.

Dealing though with the immediately affected area bores under Section 409 the Company has make good obligation, there are still a couple of **hoops** to go through before you get the make good obligations **even though you are identified** in the immediately affected area.

First Hoop – Bore Assessment

The first hoop is the obligation for the Company to do a **bore assessment** of the bore.

The stated purpose of a Bore Assessment is to see whether the bore **has or is likely** to have **"impaired capacity"**.

That expression is very important and it is defined in section 412 as requiring the proof of two things:

1. there has been a decline in the water level of the aquifer at the location of the bore **because** of the exercise of the underground water rights (or is likely to be) **AND**
2. **because of the decline** the bore can no longer provide a reasonable quantity or quality of water for it's authorised purpose

This second requirement will no doubt be where many stumble – proving the decline was due to the activities and not drought or other problems.

Second Hoop – Negotiating a Make Good Agreement

Assuming you get through that hoop you then get to go through the second hoop and that is the right to **negotiate** a Make Good Agreement which the Company has to observe under Section 410. This process mirrors all the joys and problems that beset negotiating CCA's but I will come to that.

The required content of a make good agreement is set out in section 420 and it says a MGA will provide for each of the following matters—

(i) the **outcome of the bore assessment** for the bore;
(ii) whether the **bore has or is likely to have** an impaired capacity;
(iii) if the bore has or is likely to have an impaired capacity—the **make good measures** for the bore to be taken by the responsible tenure holder.

Note that the MGA might only get to the stage of recording the fact the Bore Assessment showed that the impairment was NOT due to the gas activity. In that case you can still be required to sign off an agreement recording that which presumably makes it very difficult to sue elsewhere or come back later so negotiating

even that might be extremely important for a bore owner binding his future descendants etc.

SLIDE 4

Make Good Obligations for Immediately Affected Bores

- Bore assessment done by company to answer:
  (a) Does the bore have "impaired capacity" due to water decline
  (b) Is impaired capacity due to gas activity

- Must negotiate a make good agreement which:
  - Records outcome of (a) and (b) above
  - Only if (b) is answered "yes" do you get make good measures

Ok so we have gotten past the hoop of showing the bore has been relevantly impaired and we have shown it's because of the activities so we can negotiate for "make good measures". What are they? Those are set out in section 421 which reads

SLIDE 5

Make Good Measures

- Only if impaired capacity – i.e.
  - Due to decline in water levels and
  - Due to gas activity

- Measures include
  - Bore enhancement / deepening
  - New bore
  - Alternative source
  - Money / compensation

WHAT IF MY BORE IS NOT IN AN IMMEDIATELY AFFECTED AREA OR IS IN A LONG TERM AFFECTED BORE OR OTHERWISE BECOMES AFFECTED?

The only other time a bore owner can get within the make good framework is when he actually becomes impacted (or moves into an IAA).

Section 418 provides that if the bore ceases to **provide a reasonable quantity or quality of water** for its authorised use or purpose you can ask the Chief Executive to intervene and insist on the company discharging its make good obligations.

It doesn't matter what the reason is for the inability to provide a reasonable quantity or quality of water, its just if the bore has failed to provide a "**reasonable quantity or quality" of water**.

This is of some relevance because there is a real prospect of water quality being impacted regardless of whether or not there has been a drop in the water level such as by fracking and certainly there are many bores where a drop of less than 5 meters could still be a big problem.

Again there is the two step process for section 418 affected bores – firstly a bore assessment has to be done and then the make good agreement provisions apply.

Section 418(8)(b) provides that the bore assessment under **a section 418 matter** is to find out **the reason** that the bore can no longer provide a reasonable quantity or quality of water. This assessment doesn't refer to impaired capacity due to the drop in the level of the aquifer – just to find the reason the bore can't provide a reasonable quantity or quality of water.

The next steps for a section 418 matter is to again then negotiate a make good agreement and are essentially the same – that is you enter into a make good agreement but only get to record the vital make good measures if the bore has an "impaired capacity", and there lies a huge problem.

Section 420 which is the entitlement to the vital make good measures only kick in if you have "impaired capacity" and we have seen that expression requires a drop in the water levels. For an IAB that is fine, but it doesn't help a section 418 affected bore if the inability of the bore is because of a quality impacts unrelated to a decline in water levels. In fact it is still unclear whether a bore that falls 4.9 meters (short of the magical 5 meters) and suffers "impaired capacity" gets make good measures although I suspect it does.

So your make good agreement under both IAA's and Section 418 **firstly** records the **outcomes of the assessment and regardless of the outcome. You are obliged** to record it in an agreement. If you don't have the **impaired capacity** which is defined under 412 as relating to a **decline in the water levels** exceeding the trigger thresholds then under section 420 you do not get the make good measures available.

SLIDE 6

Make Good Obligations for Section 418 Bore – all others

- If bore can't provide reasonable quality and quantity of water
- Chief Executive directs bore assessment
- Bore assessment is to determine why a reasonable quantity or quality of water can't be provided
- Must negotiate Make Good Agreement to record reason
- Only if the reason is due to "impaired capacity" (i.e. decline in water levels due to gas activity) are the make good measures available.

If you doubt my reading of the legislation then I suggest you read the bore assessment guidelines. This is an extract from the Baseline Assessment Guidelines which obviously reflects the government view:

SLIDE 7

Baseline Assessment Guideline, Department of Environment and Heritage Protection. Part F, Page 11.

It should be noted that only changes in water quality caused by a decline in water level which results from the exercise of underground water rights, form part of the make good framework.
Potential water quality impacts that may have resulted from other activities such as the use of hydraulic fracturing products (fracking products) are dealt with through the framework of the Environmental Protection Act 1994 (EP Act).

This is not about protecting the aquifer – its just about compensating or making good (such as that is) existing bores – NOT new bores.

Negotiation

Regardless of what it might have to contain, the parties are required to negotiate an agreement or by default the Land court can be asked by the other to impose one.

The negotiation process largely mirrors the negotiation processes for Conduct and Compensation Agreements.

- Essentially the Landholder is left to his own devices in the negotiation process.
- Ultimately the extent of the make good obligation and the acknowledgements you make in a make good agreement depend entirely on how well you negotiate outcomes. There is every incentive for a company to drive the hardest commercial bargain it can and to take commercial advantage of their superior knowledge and bargaining position just as happens with CCA's.
- Bore owners are entitled to reimbursement of accounting, legal and valuation costs under section 423. If you think as a farmer you make a good hydrologist, a good lawyer, a good accountant and a good valuer then good luck to you. It seems to me you should use all the tools at your disposal to get the best outcome for your bore and future users of it.
- These are commercial negotiations. There are no specific consumer protection laws to fall back on here. The Government expects you to be sensible enough to get the professional help they allow for.
- I have no doubt that the whole negotiation process will involve the same tactics by some companies in particular that Glen will talk about including trying to get around your lawyer, two tier negotiations , and use of conferences without allowing legal representation etc

Land Court

If agreement isn't reached through the negotiating process, the matter can be referred to the land court which has broad powers to decide the terms of the agreement or circumstances of variation. I wouldn't be intimidated by the Land Court when it comes to make good obligations because I think the court will be robust.

Variation

Make good agreements can be varied in a number of circumstances including:

- where there has been material change in circumstances or
- to address a make good measure that's proved ineffective to to provide another make good measure.

This right must be preserved at all costs.

Specific Issues

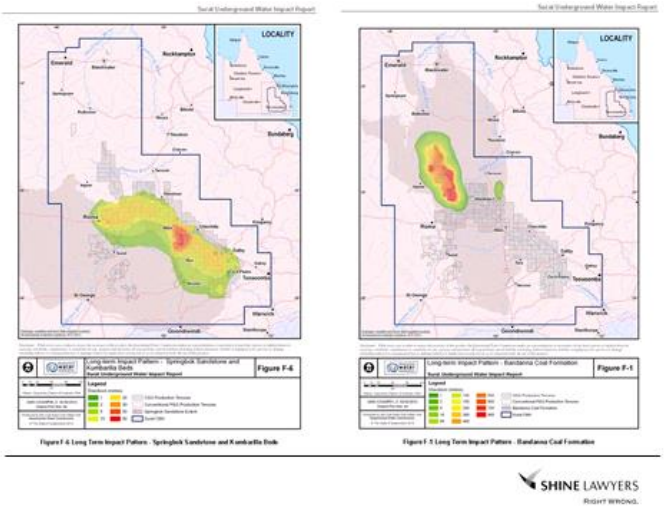
New Bores

It's important to understand that new bores come to the problem and will only be entitled to make good if the decline is greater than is predicted in the UWIR.
This is because the test for "impaired capacity" for new bores (after 1/12/12) is not whether there has been a declined in the water level beyond the trigger thresholds. It requires the decline to be more than was predicted in the relevant UWIR.

The declines predicted are way beyond the 5 metre maximum trigger threshold for existing bores.

These are maps contained in the Surat UWIR.

SLIDE 8



The colour coding here predicts impacts in the Springbok Sandstone and Kumbarilla beds at up to 90 metres and Bandana at up to 900 metres.

I suspect you will want to be drafting make good agreements involving substitute bores very carefully. You will not want to lose the ability to revisit if a make good measure fails and you won't want it being a "new bore" within the legislation.

Long Term Affected Bores

The fact is these are now on the public record. I can do a search of the UWIR, key in a bore number and it will tell me where that bore stands in the UWIR.

Searches will indicate if the bore is in the long term affected area so he is not entitled now to a make good agreement but might be in the future if he satisfies the criteria.

A buyer doing his homework, banks doing their homework or the public generally can now ascertain whether or not you are going to be affected in the future.

A long term affected bore doesn't have a right to a make good agreement until it becomes either an immediately affected in the 3 year review process or under section 418 where your bore fails and you can establish it dropped below the trigger thresholds.

I think that matter is of concern because it seems to me you are stranded in the meantime to some extent.

SLIDE 9

About Protecting Existing Use not Potential

This is clearly not about protecting the aquifer and its probably not even about protecting the potential expansion of existing bores.

Whilst the legislation is unclear, the guidelines have a clear focus on clearing recording the existing infrastructure and it emphasises that is to determine what the make good obligations are. So if that means you were only watering 500 head with a small pump configuration, you are always locked in for make good purposes to

only being restored to that capacity. I think there is a very real danger that government at least interprets the legislation that way. If you have a bore that it capable of being expanded and are counting on that to expand the feedlot or to run more cattle when you finish clearing or whatever it may be you only get make good to the limit of the existing use.

It won't help you sinking a new bore because you will be having to drill below the expected impacts in the relevant report.

Not About Protecting Aquifers

It is of concern that at least one of the companies actively promotes plugging and abandoning bores and paying monetary compensation instead. Unfortunately, the Make Good regime is clearly not about protecting aquifers. It is about accommodating bores as they are impacted.

Because new bores come behind the gas impacts, as each existing bore is made the subject of make good agreements or paid out or plugged and abandoned, the make good obligations will slowly disappear and eventually the impacts of the gas activities will determine the fate of future generations access to underground water. This will hasten with every bore that is plugged and abandoned

MAKE GOOD FLAWS (document 2)

1. It is critical to appreciate the importance of underground water to landholders in regional Queensland. In many cases bore water is the only reliable source of water available to the landholder. In others it is an important fall-back measure to supplement other water and by far the most reliable source of water over a long time. Not all bores are fully used or developed but the ability to access the water when needed, the ability to expand as needed and the reliability factor associated with them is something that underpins the "business" and lifestyle operations for many rural Queenslanders.
2. No doubt many in Government intend to truly allow landholders the ability to secure "make good" however the inadequate drafting of the existing legislation lets down both Government and landholders.
3. Make good is a phrase that belies its complexity. It infers more than it delivers. It is no more than a process whereby those considered to have been impacted by resource activity have an opportunity to negotiate make good measures if they can overcome significant obstacles and uncertainties in the legislation.
4. A make good agreement is a legal contract that involves complex and exceptionally important documents that affect property values and the rights of landholders for an indefinite period. They attach to the land and will determine the extent of the underground water rights of the owner of that land from time to time.
5. It is every bit as important as a lease, a mortgage, an easement or any of the more commonly understood legal documents that landholders face, but it is treated with far less caution.
6. Once a landholder is identified as potentially impacted they begin the make good process.
7. The relevant resource company is in control of that process because it is the entity that undertakes the critical bore assessment that determines eligibility for make good measures. Unless the resource company comes to the conclusion that not only is the bore impaired but that it is also due to the resource company's activity, the landholder has no entitlement to make good measures (i.e. a source of water, compensation, new bore etc.).
8. One CSG company states that DNRM have yet to issue an investigation that establishes impairment due to gas activity. It says that the only reason it undertakes make good is to keep landholders and Government happy. A less community minded company would presumably then simply deny liability every time rather than when it suits it.
9. Invariably the causes are attributed to any number of factors including drought, over pumping by landholders, poor aquifer characteristics, poor bore siting as well as gas activity. They are invariably inconclusive.
10. If a landholder wishes to apply pressure to a company they have to disprove the assessment or establish the most likely cause is gas activity. Scientists are a cautious lot and often reluctant to come to a definite conclusion so a landholder is often left pointing to the obvious inadequacies of the company's assessment as a lever to apply pressure to them.
11. To understand how difficult the process of attributing cause can be in this area, one only needs to consider the enormous amount of money that the Government has spent on ascertaining the cause of the Condamine River seeps only to still have an inconclusive report – notwithstanding the apparently obvious connection with the extensive gas activity in the area.
12. To do this properly the landholder and/or his legal representative needs to understand the hydro geology of the area, examine the companies bore assessment, challenge the assessment where appropriate (almost always), have a detailed understanding of the bores role in the landholders operation, have a detailed understanding of the likelihood of alternative underground water

being available and/or in what quantities and/or quality and/or reliability. That is not a process properly undertaken in a short period of time nor without the assistance of independent hydro geologists and water engineers.

13. There is no automatic provision under the legislation for a landholder to have the professional help of an hydro geologist in the make good process, notwithstanding that the onus is upon the landholder to establish not only that impairment has occurred, but also more frequently that it is due to the resource activity. This is a glaring inadequacy.
14. The resource companies will sometimes resist paying landholder hydro geologists fees because they say, landholders should rely upon DNRM and OGIA information to assist. We have found the DNRM to be under resourced, under manned, staffed by hydro geologists that seem unwilling to commit to a position contrary to the company's unless the evidence is overwhelming. We have also experienced long delays in receiving DNRM reports and ultimately had to engage other experienced hydro geologists who have then found serious flaws in not only the company assessments but also DNRM's approach. Likewise independent hydro geologists have severe concerns with the modelling of the UWIR (which is widely accepted as being a "start" to understanding impacts anyway).
15. In any event, it is inappropriate for landholders to be forced to use a Government department that they perceive as not being independent given the clear conflict of interest Government faces in promoting the industry and relying on royalties etc.
16. In this process the companies also have the benefit of extensive repeat player experience, and control of much of the information a landholder needs to properly assess the causes of impairment. Government does little to help access critical information. The companies resist disclosure of the Fracture Risk Assessments they are meant to provide to Government under their Environmental conditioning. There is absolutely no reason for that. They should contain critical information as to the underground stratigraphy. The companies also do not provide easy access to information concerning reinjection undertaken in areas nor the history and extent of fracking (including in particular shallow fracking undertaken in the past) or a host of like information that could be critical in understanding the behaviour of the underground water in response to resource activity. They are also often aware of the location of fractures and fissures under the ground due to their repeat experience but do not readily disclose that – again notwithstanding that the onus is effectively on the landholder if the company's assessment is considered inadequate. It is only with independent hydro geological advice and access to this information that landholders can be properly equipped to challenge or evaluate bore assessments.
17. To properly consider the alternatives, a landholder also needs to understand the dangers inherent in drilling through gassy aquifers (that are becoming progressively more so) with greater potential for danger and contamination, the fact that drilling costs are increasing continuously because of these issues (including the need for blow out preventers, significant insurance and qualification requirements of drillers - there are only a handful of capable water drillers able to do the job), and a host of other things that could become relevant to their decision making. In some cases accessing deeper aquifers will require the building of turkey's nests or other means of cooling the water, water may need to be treated for iron or other issues, greater electricity requirements might apply and extensive new reticulation means might be needed if ideal alternative sites are located away from existing yards and watering sources.
18. Drilling a replacement bore may not be as straight forward as expected. There may not be suitable water available, or there might be several holes drilled to find water – and even then unsuccessfully. This can involve extensive costs and the companies are well aware of that potential if they undertake the drilling. A licence is required to drill a replacement bore and that process may involve advertising and objection from other landholders - with no assurance of outcome. As more and more people in the area seek to access deeper aquifers it is logical to

assume that there simply won't be available water (or licences) in some areas. Increased salinity and other issues associated with resource activity may well also lead to shorter life for bore casing and bore operation in particular areas.

19. Repeat player experience with hydro geological and water engineering assistance, means that these issues will be properly addressed and landholder representatives able to see through some of the inadequacies of the assessments – for instance where gas itself might be the reason that water levels remain high and give the appearance of there being no impairment. Likewise repeat player experience will alert a landholder to many of the problems with alternative water sources and company proposals if they can manage to overcome the important hurdles of establishing impairment and that impairment being due to the resource activity.
20. The point is much preparation and research needs to be done for a landholder if they are to get good outcomes and to be treated fairly in the process. Many are daunted by the conduct of the companies and eventually worn down by extensive and hard headed commercial negotiations where the companies have little incentive not to resist bitterly and move very slowly towards a resolution. In other circumstances they might maintain pressure to take advantage of a landholder whilst they are unrepresented and not adequately familiar with the complications involved.
21. For instance many landholders assume that simply plugging and abandoning a bore is a straight forward process. $50,000 might seem generous on its face and lead to a landholder signing whatever is put in front of him. Properly informed that landholder will come to understand that plugging and abandoning a bore can be a far lengthier and more complicated process than it appears. Often bores are located in cultivation, near houses or in awkward locations that might mean significant intrusion, compaction from gravel roads and pads – in some cases requiring intrusion onto cultivation areas, the possibility of extensive interference with productivity etc. The companies are often unwilling to commit to any timeframe to undertake the activities unless pressed.
22. In particular areas landholders might have had an automatic right to drill a replacement bore without requiring a further licence of permit if an existing bore collapses or fails provided it is drilled within 10 metres of the original bore. The legislation does not address that situation and some companies are reluctant to treat that right as one entitling "make good" if the landholder has not actually exercised the right. They then argue that the collapsed bore is not a "bore" because it is not producing and there is no obligation to "make good" the lost automatic right to drill a replacement. Again any uncertainty is exploited in the commercial negotiation process – as would be expected in sophisticated commercial negotiations but not in good neighbour county dealings. These commercial negotiations are foisted upon landholders and the existing regime assumes equality between the parties.
23. There are two commercial facts that are undeniable and that mean that negotiation will always be undertaken by the companies with a degree of vigour that is obviously not widely understood.
24. Firstly, companies do not like unquantified debits on their balance sheets – it affects share price and financial performance. Secondly, the companies will always revert to their duty to shareholders to maximise profits.
25. The companies therefore always try to cap their liability and/or minimise their exposure and get the best deal they can. On the other hand landholders expect that Governments will protect them, are often trusting by nature and often vulnerable.
26. Some of the tactics regularly employed by companies in the make good process mirror those we see in the Conduct and Compensation Agreements ("CCA") process such as:
    a. Offering what appear to be large financial incentives to sign an agreement within a short period (e.g. $40,000 if you sign within a month). This prevents the obtaining of proper advice and is often enormously attractive to landholders facing drought, imminent

mortgage payments etc. It blinds landholders to the fine print in the contract which can be every bit as important as the amount of money on offer and/or can undermine the value of that money. Company Field Agents become very friendly with landholders and gain insight into their vulnerabilities. I have been involved in matters where the company coincidentally offers an incentive payment for the landholder to sign that match exactly a repayment known to be due to a financier, notwithstanding that the other terms were unsatisfactory.

b. Companies sometimes make promises of future potential access to associated water or some other oblique benefit that might come the landholders way in the future. Even though the company will never reduce such promises to writing and invariably back away from them later, there are many cases where that kind of approach has induced cooperation in the CCA process.

c. Other conduct we see with CCA's is making its way into make good negotiations including undermining the relationship between the landholder and their advisors, having lawyers without practising certificates deal directly with landholders whilst refusing to allow landholder lawyer dialogue with company employees, threatening not to pay professional fees notwithstanding that they are obliged to do so, and like tactics.

27. Uncertainty in the legislation is also used by the companies to increase negotiation pressure. For instance, the companies will argue that the legislation only requires the substitution of "like for like" – so if a landholder is not using a bore to its full capacity they will seek to limit compensation to the provision of equivalent water. Landholders naturally consider that the make good obligation is to compensate to the full potential of the bore and not to "lock in" limitations on its potential. Aspects of the guidelines do lead to some confusion that should not exist given departmental assurance that Government considers the obligation to be to protect the bore as a source rather than to lock in existing usage.
28. Another example of uncertainty being exploited involves whether or not the legislation intends that the make good measures require the ongoing supply of water or whether they can choose to simply pay monetary compensation. Government is clearly of the view that "just" compensation should mean an obligation to provide water in lieu where that is preferred by the landholder, however the companies on occasions threaten to take advantage of the poor wording of the Act. They will argue that all they need do is provide monetary compensation from the outset and then argue that a particular bore adds no value to the property so there is no or little obligation to compensate.
29. Most landholders want access to alternative water and indefinitely, such as their current bore affords them. That is the way we assume the Act was intended to operate and Section 424 of the Act seems to make that obvious because the landholder is entitled to go back to Court if a particular make good operation proves unsatisfactory.
30. Notwithstanding that, the companies make every effort to contain their liability and to convert the obligation to money. They will attempt to pass, undetected, clauses designed to cut off a landholder's right to go back to Court and hope the landholder is more focused on the money than the terms. Aside from more obvious clauses forever compromising such rights, they also put in clauses such as having landholders agree never to drill another bore in the Walloon Coal Measures or even clauses requiring a landholder never to bring any further make good claims of any nature against the company for <u>any</u> future bores they may drill at all.
31. These clauses are deliberately "tried on" because it is widely believed that the modelling for the current UWIR is flawed and will understate the extent of impacts. As indicated above there has been plenty of acknowledgement that the current Government modelling process is far from ideal and is purely a "start" in trying to understand future impacts, so companies are being commercially clever in trying to cut off this future liability in this way. An unwitting landholder

focused on the money and not the terms will be compromising not only their own rights into the future but the effectiveness of future property owners.

32. If you are in doubt as to the extent as to which companies are willing to treat the negotiation processes as a "strictly business" matter you need only look to the conduct of one company that presents CCA's in the form of the standard Government agreement but just happens to add in an short Alternative Arrangement Agreement in one short paragraph and without drawing attention of the landholder to the incredible importance of the arrangement (which effectively cuts off all and any right of the landholder to ever complain about noise made anywhere by the company no matter how loud or intrusive).
33. It is inevitable that such commercial tactics will be applied in a make good negotiation process and it is already happening.
34. For instance, one of the companies regularly suggests that it is quite happy to have the ongoing liability to supply water into the future and volunteers that it will drill a replacement bore and continue to drill future bores as needed - only to then say that they can't drill any water bores for at least 40 weeks because of their tight gas drilling programs. No landholder is willing to wait 40 weeks. When pressed for a timeframe to be included in the agreement, the company simply will not commit to any timeframe at all – not even 2 or 3 years. It is obviously a ploy to convert their uncapped future liability to a fixed monetary compensation because no landholder can wait that long and will invariably seek to arrange for drilling themselves or take monetary compensation.
35. When a landholder then indicates they would rather drill the bore themselves and produces a quote from a water driller the company will then protest that it could do it at a much cheaper rate because they have commercial relationships with particular suppliers and if the landholder is choosing to arrange to drill himself they will only pay the cheaper rate by way of compensation.
36. My point is simply that these are important commercial negotiations that need to be handled carefully. It is difficult to be critical of the companies when the Government does nothing to ensure equal dealings. Our only criticism is that in undertaking this approach they are not truly seeking to co-exist and maintain good relations – sharp practice is not the way of country dealings.
37. The fact is many landholders simply don't have the experience, the resources, the circumstances or the resolve to see through a complex commercial negotiation or to see through the entire process - or alternatively they get distracted by money and taken advantage of.
38. Landholders are vulnerable – whether due to drought, financial pressures, a trusting nature, a lack of education or understanding of legal issues, a lack of repeat player experience or a lack of hard edged commercial experience. They certainly are not lawyers, valuers or hydro geologists, so to expect them to secure outcomes for themselves without the assurance of representation or some kind of statutory protection is irresponsible on the part of Government – especially when they are forced to accommodate the unwanted intrusion of the gas companies to extract the communal resource.
39. The legislation contains no consumer protection whatsoever - there are no "Tips for Landholders in Negotiating Make Good Agreements" as there is with CCA's, there is no Government template make good agreement and in particular there is no Code of Conduct required of the companies to provide all available and reasonable necessary information to enable a landholder to challenge a bore assessment without first having to go to Court.
40. Further, and notwithstanding that Government forces landholders into sophisticated commercial dealings with such an imbalance in experience knowledge and power, there is no requirement that landholders certify they have had independent legal advice before signing the contract, no statutory protection against sharp conduct or unfair advantage taken of landholders, nor any cheap and readily available recourse to protect them from misconduct – as happens with the

Ombudsman procedures available in other monopoly industries such as telecommunications and banking.

41. It is simply not good enough to leave landholders to their own devices in these circumstances. We are astounded to hear that the Deputy Premier commented in Toowoomba last week that he thinks it's insulting to suggest landholders can't fend for themselves in dealing with gas companies. That is every bit the equal of Joe Hockey's comment that poor people don't have cars. Clearly the Deputy Premier does not understand what's happening "on the ground" and seeks to appeal to vanity to justify the lack of consumer protection under the existing processes.
42. It is important to remember that this is all about obtaining compensation – not a commercial benefit. It is not like a consumer going to buy a fridge where they have choice about who they deal with, whether they buy it or whether they just walk away from the transaction. Even there the law protects them to some extent. Even if basic legislative standards did not demand it to "justify" the rights and property being lost in this process, the community interest must surely require that landholders do not bear any cost in facilitating the industry forced upon them.

Peter Shannon – Committee Member
Basin Sustainability Alliance
& Legal Partner Shine Lawyers

BASIC REQUIREMENTS TO ADDRESS MAKE GOOD DEFICIENCIES (document 3)

1. Reverse the onus of proof in the assessment of impairment and reason for the impairment.
2. Impose a Code of Conduct within the legislation obliging the companies to act in good faith at all times, to approach negotiations in a generous not niggardly fashion (this being the expression the law requires in compensation matters) and to fully disclose all available information of relevance to the landholder to enable the landholder to negotiate on an equal footing.
3. Develop "Tips for Landholders" and like documents to assist and guide both industry and landholders.
4. Clarify uncertainty in the law.
5. Amend the legislation to allow for landholders to recover reasonable and necessary hydro geologist and water engineer expenses in undertaking make good investigations and negotiations.
6. Introduce an Ombudsman process reflective of the telecommunications and banking industries.
7. Extend Section 276 of the Mineral Resources Act to also require that a breach of a Make Good Agreement is a breach of the Mining Lease.
8. Allow an ability to revisit a Make Good Agreement at any time that fairness and equity (as determined by the Court) so warrant, regardless of the provisions of the agreement.

Peter Shannon – Committee Member
Basin Sustainability Alliance
& Legal Partner Shine Lawyers