

## **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** it 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 provide another make good measure.

This right must be preserved at all costs.

## Specific Issues

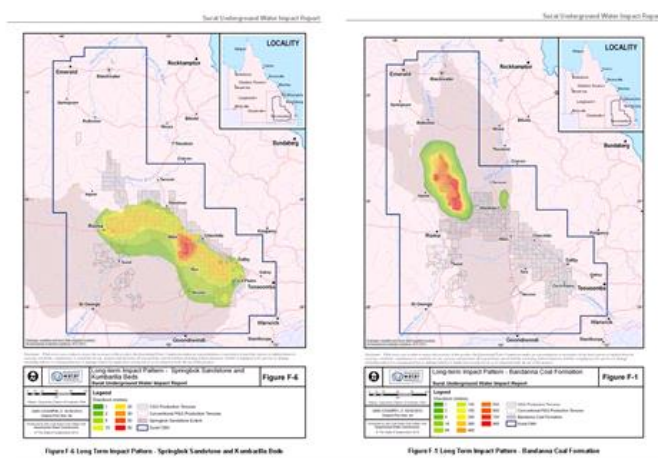
### New Bores

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 decline 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 is 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