

Make Good Agreement Templates

Guidance Notes

Under Chapter 3 of the Water Act 2000

The GasFields Commission Queensland has developed four types of make good agreements for use by bore owners and industry.

The templates are intended to be used as a starting point for negotiations between a tenure holder and a bore owner – common ground from which a make good agreement can be produced.

Guidance is provided to assist in identifying matters that the tenure holders and bore owners may wish to consider when negotiating an agreement to “make good” a water bore as a result of a bore assessment.

The Make Good Agreement templates are designed to address the mandatory statutory requirements for make good agreements, as well as some of the key issues relevant to the four common types of make good arrangements.

The templates are intended to act as a starting point for negotiations between a tenure holder and a bore owner. The clauses and conditions contained in the templates can be further adjusted to suit the parties' individual circumstances.

Each party should seek independent legal advice (if required) before signing the agreement.

Which template is right for me?

All water bores that have undergone a bore assessment require a make good agreement, even if they are not eligible for make good measures.

The attached decision table can be used as a guide to determine which make good agreement template to use based on the outcome of the bore assessment.

1. NO MAKE GOOD MEASURES
2. MONITORING
3. COMPENSATION
4. NEW BORE(S)

You may choose to use a combination of templates depending on the number of relevant bores or agreed make good measures.

Where a bore owner has one or more bores with the same bore assessment outcome it may be simplest to include them in a single agreement.

MAKE GOOD AGREEMENT TEMPLATE DECISION TABLE

All water bores that have undergone a bore assessment require a make good agreement, even if they are not eligible for make good measures. The GasFields Commission has developed this table to recommend appropriate make good agreement templates that may be used based on the outcomes of a bore assessment.

OUTCOME OF BORE ASSESSMENT		DUE TO PETROLEUM & GAS ACTIVITIES	NOT DUE TO PETROLEUM AND GAS ACTIVITIES		
Bore has the capacity to provide a reasonable quantity and/or quality of water for its authorised use or purpose	> Not impaired and unlikely to become impaired due to water level decline or free gas*	Make good agreement: NO MAKE GOOD MEASURES	Make good agreement: NO MAKE GOOD MEASURES		
	> Not impaired but likely to become impaired <table border="1"> <tr> <td>Due to water level decline</td> <td rowspan="2">Make good agreement: MONITORING <i>Bore is monitored with triggers for future assessment and variation of make good agreement</i></td> </tr> <tr> <td>Due to free gas*</td> </tr> </table>	Due to water level decline	Make good agreement: MONITORING <i>Bore is monitored with triggers for future assessment and variation of make good agreement</i>	Due to free gas*	Make good agreement: NO MAKE GOOD MEASURES
Due to water level decline	Make good agreement: MONITORING <i>Bore is monitored with triggers for future assessment and variation of make good agreement</i>				
Due to free gas*					
Bore does not have the capacity to provide a reasonable quantity and/or quality of water for its authorised use or purpose	> Impaired <table border="1"> <tr> <td>Due to water level decline</td> <td rowspan="2">Make good agreement: COMPENSATION OR NEW BORE(S)**</td> </tr> <tr> <td>Due to free gas*</td> </tr> </table>	Due to water level decline	Make good agreement: COMPENSATION OR NEW BORE(S)**	Due to free gas*	Make good agreement: NO MAKE GOOD MEASURES <i>Action may be taken by the bore owner to P&A*** the bore</i>
Due to water level decline	Make good agreement: COMPENSATION OR NEW BORE(S)**				
Due to free gas*					
Bore has never had capacity <i>Bore has always been dry</i>	> Unlikely to become a health or safety risk due to free gas*	Make good agreement: NO MAKE GOOD MEASURES	Make good agreement: NO MAKE GOOD MEASURES		
	> Likely to become a health or safety risk due to free gas*	Make good agreement: NO MAKE GOOD MEASURES <i>Resource company may P&A*** the bore if the bore owner agrees</i>	Make good agreement: NO MAKE GOOD MEASURES <i>Action may be taken by the bore owner to P&A*** the bore</i>		
	> Bore has become a health or safety risk due to free gas*				
BORE ASSESSMENT WAS ATTEMPTED BUT COULD NOT BE UNDERTAKEN:					
Due to the bore having pre-existing damage****		> No make good obligation triggered. If the damaged bore is repaired, another attempt to conduct a bore assessment may be undertaken			
Because the bore does not physically exist****		> No make good obligation triggered.			

* Free gas can impair a water bore by adversely affecting the quantity or quality of water provided, causing damage to the bore infrastructure, or creating a health or safety risk
 ** This does not cover other make good measures such as reconditioning the bore or providing an alternative water supply, which may be negotiated
 *** P&A (to 'plug and abandon' or decommission a water bore) is not a make good measure and it is not a requirement under the *Water Act 2000*. However, it may be negotiated as a special condition in the make good agreement if the parties agree for the bore to be decommissioned
 **** This may provide the tenure holder a reasonable excuse **not** to undertake a bore assessment under Section 417(2) or 418(2)(b) of the *Water Act 2000*

Key Concepts on Make Good Agreement

What is a make good agreement?

A make good agreement is an agreement between the owner of a water bore (the "bore owner") and a resource company (the "tenure holder").

The agreement identifies the outcome of the bore assessment and sets out the "make good measures" the tenure holder will provide to the bore owner for the impacts its activities have or will likely have on the bore owner's water bore, if any.

The GasFields Commission Queensland has developed a number of make good agreement guidance documents to assist bore owners and tenure holders navigate the process.

When is a make good agreement required?

A make good agreement is required for all bores that have undergone a bore assessment, even if there is no requirement for a make good measure.

The tenure holder responsible for a water bore will be required to carrying out a bore assessment to determine if the water bore has, or is likely to have, an "impaired capacity".

When is a bore assessment undertaken?

A bore assessment is undertaken:

- if a bore owner's water bore is an "immediately affected area bore" listed in an Underground Water Impact Report; or
- if a Direction Notice is issued by Department of Environment and Science to the tenure holder

What are make good measures?

If a bore assessment establishes that a water bore has or is likely to start having an "impaired capacity", the bore owner and the tenure holder will agree to appropriate "make good measures" in the make good agreement.

The agreed make good measures must achieve one or more of the following:

- ensure the bore owner has access to a reasonable quantity and quality of water for the bore's authorised use or purpose, including, for example, bore works such as lowering the pump or deepening the bore, or installing a new bore;
- carry out a plan to monitor the bore, including, for example, triggers for undertaking further bore assessments;
- give the bore owner monetary or non-monetary compensation for the bore's impaired capacity.

Are all water bores eligible for make good measures?

No, not all water bores are eligible for make good measures. Water bores that have no capacity, in particular those that have pre-existing damage that makes the bore unusable and those that have been abandoned, may not be eligible for make good measures.

Structure of the agreement templates

Each of the templates contains:

• Reference Schedule

This section provides the agreement details which includes the parties to the agreement and the bore/s the agreement relates to. It also contains the following sections:

- *Make Good Measures*: details of how the relevant make good measures will be delivered, and
- *Map*: location details of the relevant bores and the access routes (if applicable).

• Special conditions

This section allows for suggested special conditions relevant to the make good measures agreed, or a space for additional conditions agreed between the parties.

• General conditions

Standard clauses that can be used by the parties without amendment, if suitable.

Optional clauses that can be used or deleted by the parties, depending on the circumstances.

The templates have drafting notes throughout the document to help guide users as to how the template should be completed.

Engaging Professional Services

The tenure holder must reimburse the bore owner for any accounting, hydrogeology (by an appropriately qualified hydrogeologist), legal or valuation costs inclusive of GST the bore owner necessarily and reasonably incurs in negotiating or preparing a make good agreement.

It is important to communicate directly with the other party and to provide clear instructions to your professional service provider.

The bore owner should discuss these costs with the tenure holder at the commencement of negotiations and come to a common understanding about what the "necessary and reasonable" costs are likely to be.

Refer to the Commission's 'Gas Guide' for information on engaging professional advisers

Issues to consider when negotiating a Make Good Agreement

How rights and obligations are shared

In some cases, there may be two or more bore owners, or two or more resource companies holding the relevant tenement. It is important that the make good agreement address how rights and obligations are shared between those parties.

Two example clauses, which take different approaches, are provided below.

Example 1

If a Party to this Agreement is made up of more than one person, or a term is used in this Agreement to refer to more than one Party, then unless otherwise specified in this Agreement and to the extent permitted by Law:

- (a) an obligation of those persons is joint and several;*
- (b) a right of those persons is held by each of them severally; and*
- (c) any other reference to that Party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking relates to each of them separately.*

Example 2

- (a) Where more than one person is the Bore Owner, and unless otherwise specified in this Agreement and to the extent permitted by Law, this Agreement binds them jointly and each of them individually.*
- (b) Where more than one person is the Tenure Holder, this Agreement binds them severally in proportion to their respective registered interests in the Tenure, and not jointly or severally.*

Consequential loss

"Consequential loss" refers to indirect losses that arise because of the activities conducted under the make good agreement. Consequential loss can include, for example:

- loss of profit;
- loss of production; and
- loss or reduction of goodwill.

The bore owner may wish to consider how the make good agreement deals with consequential loss, if at all. Tenure holders will generally have a particular position or policy approach to the issue.

Breach of agreement by bore owner

The tenure holder may request additional clauses be included in the make good agreement, to clarify what happens if the bore owner does not comply with the agreement – in particular, if the tenure holder is denied access to the land.

Such clauses will generally allow the tenure holder to:

- suspend payment of compensation or suspend works; and
- access the land to remove its equipment.

It is open to the parties to negotiate appropriate clauses to deal with these matters.

Tax and GST

The template agreements contain a suggested GST clause. However, tenure holders may:

- have different approaches to GST issues;
- wish to include separate tax clauses.

It is open to the parties to negotiate different or replacement tax and GST clauses.

Ownership and risk

When the "New Bore" template is used, or where works are otherwise conducted under the agreement (eg to plug and abandon an existing bore), it is important that the agreement address:

- who owns the bore; and
- who accepts the risk of it failing,

once the works are complete.

The parties should negotiate acceptable clauses to address these issues and insert them into the agreement

Safety

Where the agreed make good measures involve the drilling of a new bore, parties should refer to the *Safety advisory on drilling water bores in CSG areas* for information about gas safety management and identification of risks.

Special conditions

Each template contains a Special Conditions section. This section can be used to record additional clauses agreed between the parties on issues not covered in the template, including the issues raised in this guidance note.

Things you should know before you sign

What is the “cooling off period”?

The *Water Act 2000* (Qld) allows a 5 business day “cooling off period” for make good agreements. During this period, the bore owner can terminate the make good agreement by written notice to the tenure holder.

What if the bore owner suffers loss or damage when the make good measures are provided?

Where relevant, the make good agreement guidance documents set out what will happen if the bore owner suffers loss or damage during provision of the make good measures.

Under the clauses in the templates, the tenure holder will only be liable for damage to the bore owner's property or infrastructure caused by the tenure holder's activities. However, it is open to the parties to negotiate a different position.

What if we can't agree?

If the bore owner and the tenure holder cannot agree on the terms of a make good agreement by the end of the negotiation period, either party may provide the other party with a written notice (Election Notice) seeking to enter into a dispute resolution process. The options for dispute resolution are:

1. **Conference** with an authorised officer from the Department of Natural Resources, Mines and Energy by providing a copy of the Election Notice to the Department of Natural Resources, Mines and Energy and the other party.

This is a non-binding, low cost option. An authorised officer in the Department of Natural Resources, Mines and Energy will help facilitate a discussion between the parties with the aim of working through the issues in dispute and to reach agreement.

No party can be represented by a lawyer unless the other party agrees, and the authorised officer is satisfied there is no disadvantage to the other party.

2. Alternative dispute resolution (ADR) process.

The intent is to work through issues in dispute with the aid of an independent expert outside of a court proceeding. The resource company must bear the costs of the person facilitating the ADR process, regardless of which party called for the ADR. There are four types of ADR to choose from:

- **Mediation** - an independent and neutral person facilitates a discussion between the parties to work out the issues in dispute and come up with an acceptable solution. The mediator does not advise or make any decisions.
- **Conciliation** - a neutral person who is an expert on the subject of the dispute discusses the strengths and weaknesses of each party's arguments. The conciliator acts in an advisory role, but does not make any decisions.

- **Collaborative Negotiation** - both parties work through their legal counsels to reach a negotiated agreement.

- **Arbitration** - an independent arbitrator acts as a judge. The arbitrator hears the arguments from both parties and makes a decision that is binding on both parties.

3. Application to the Land Court to resolve the dispute if:

- the conference failed to finish within the required period
- the parties failed to finish the ADR process within the required period
- only one party attended the requested conference or ADR
- a make good agreement was not reached at the end of the conference or ADR.

What if things change?

If circumstances change, the parties can agree to vary the make good agreement. Any variation must be in writing and signed by both parties.

Under section 424 of the *Water Act 2000* (Qld), each party can also give the other a notice to negotiate a variation to the agreement if:

- there has been a material change in circumstances;
- one or more of the agreed make good measures is not effective; or
- another effective and more efficient make good measure is available.

Both parties must use best endeavours to address the matters stated in the notice.

It may not always be possible to issue such a notice. For example, if compensation has been paid by the tenure holder in full settlement of its make good obligations and a new bore then constructed by the bore owner does not work, the bore owner may not be able to give the tenure holder a notice under section 424.

If you are uncertain about whether you can issue this type of notice, you should seek legal advice.

If you have feedback or questions about the templates, please contact the GasFields Commission Queensland by emailing enquiries@gfcq.org.au

This guidance note is not intended to provide legal advice. The GasFields Commission Queensland recommends bore owners and tenure holders obtain independent professional advice before finalising a make good agreement.