



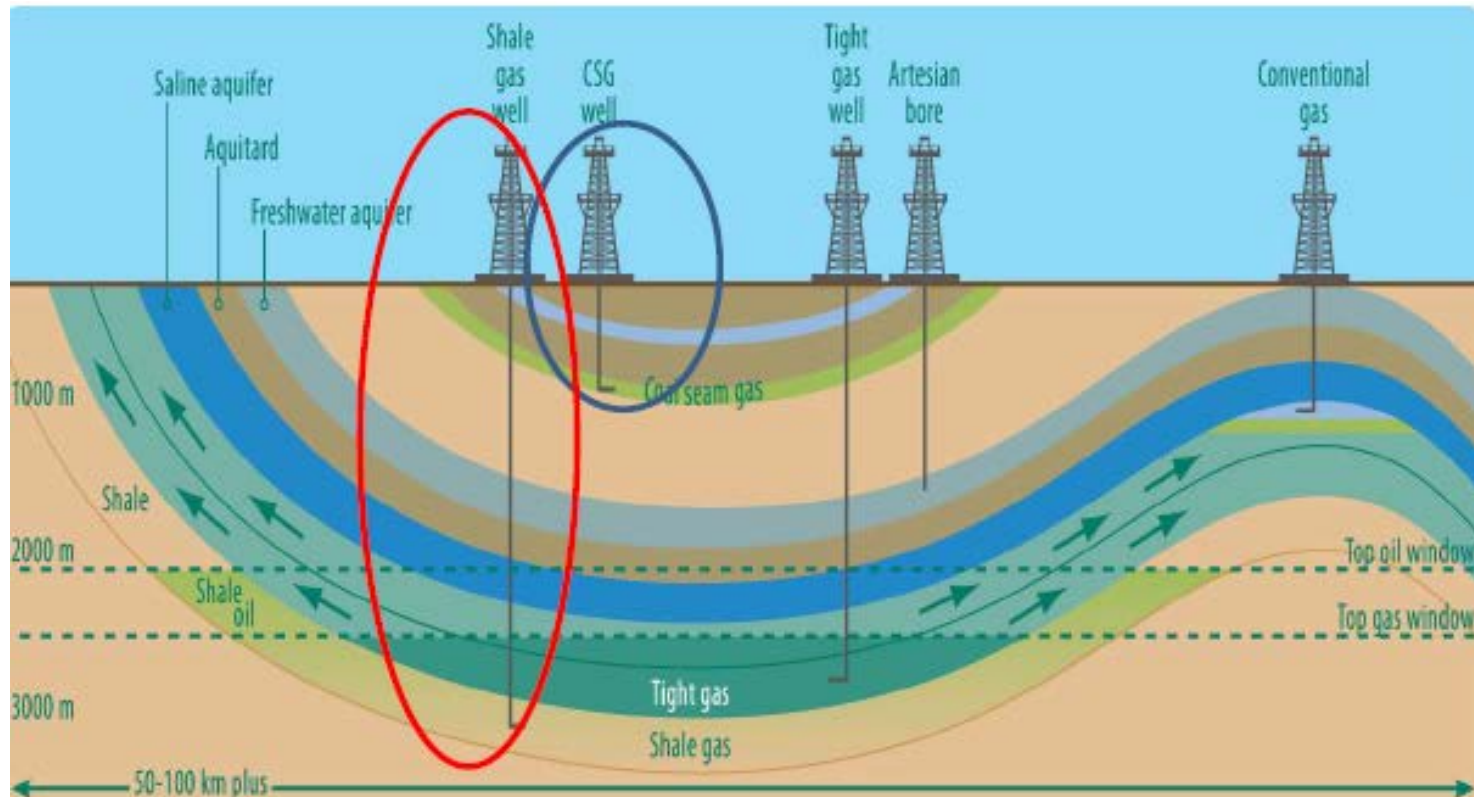
The Transparency of Aboriginal Cultural Heritage Legislation in the Context of Water: 'Aboriginal Object' or not?

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Overview

- ▶ Shale gas in Australia – the future of gas?
- ▶ Water as an “Aboriginal Object”
 - What is an “Aboriginal Object?”
 - Arguments for
 - Arguments against
- ▶ Possible solutions
 - Legal?
 - Commercial

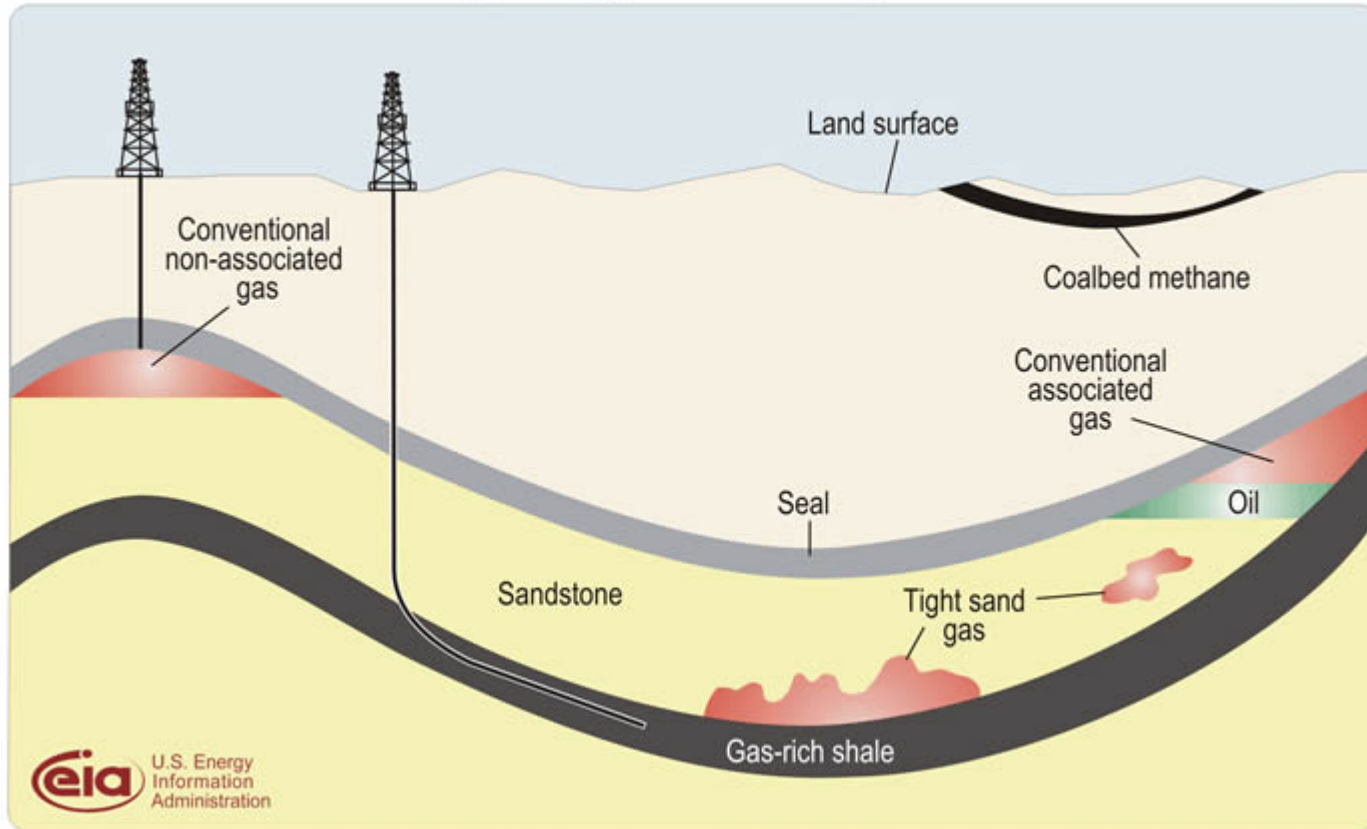
Shale Gas



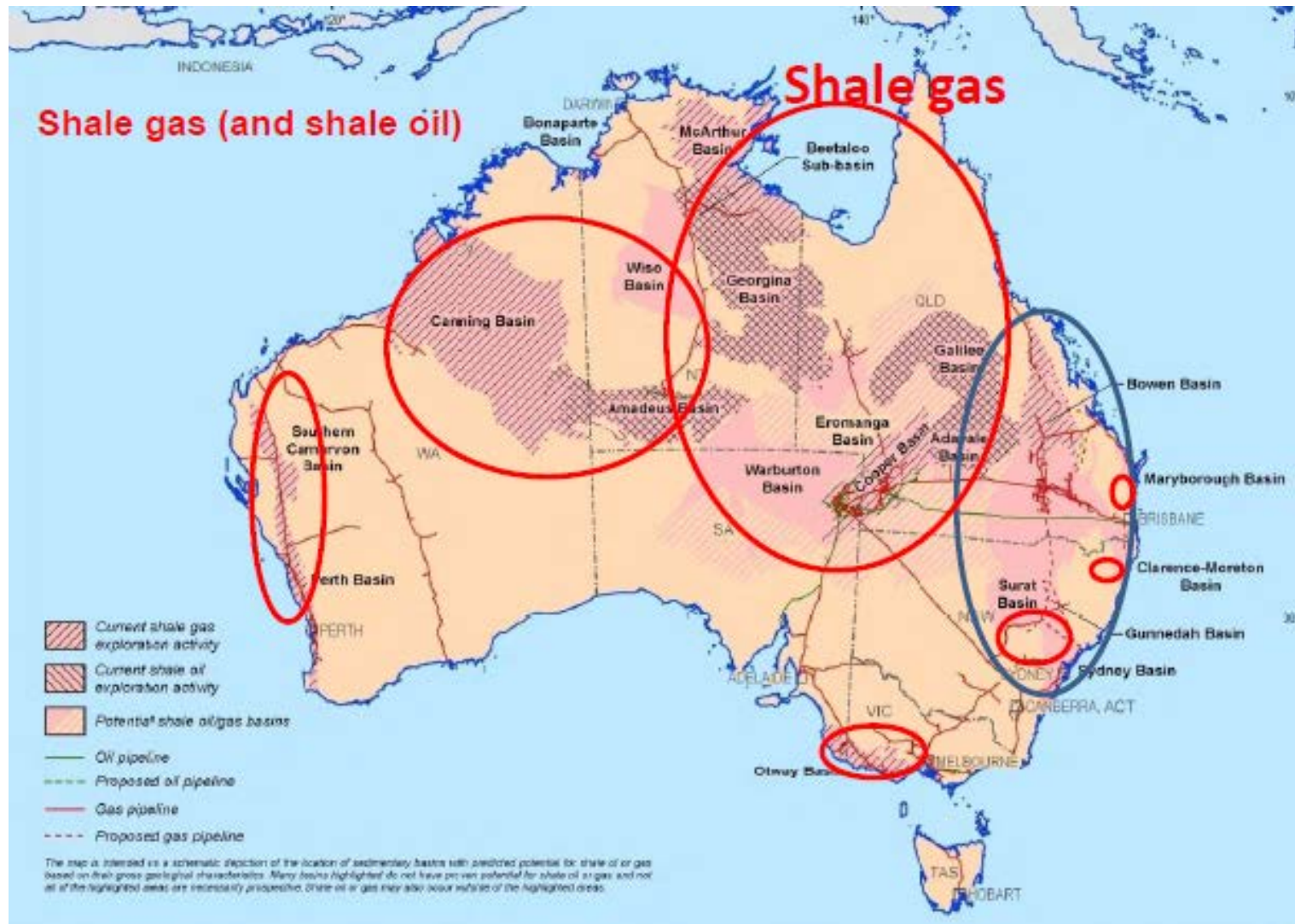
Source: ACOLA – Engineering Energy: Unconventional Gas Production

Shale Gas

Schematic geology of natural gas resources



Shale gas in Australia – the future?



Possible impacts of Shale Gas

- ▶ Landscape
- ▶ Ecosystems
- ▶ Atmosphere
- ▶ Communities
- ▶ **WATER**

Water

Table 8.1: Median volume of water used per shale gas well in the United States

Shale Gas Play	Volume of water used (MI)
Barnett, Texas	10.6
Haynesville, Texas	21.5
Eagleford, Texas	16.5
Marcellus, PA	17.1

Source: Nicot & Scanlon, 2012 and Beauduy, 2011.

Impacts of water usage

- ▶ Impact on other industry (eg. Farming)
- ▶ Impact on local communities' water supply
- ▶ Concern from the Australian public generally in respect to national water reserves
- ▶ **Cultural impact for Traditional Owners**

“Aboriginal Object”

Jurisdiction	Definition of “Aboriginal Object”
QLD	A significant Aboriginal object is an object of particular significance to Aboriginal people because of either or both of the following— (a) Aboriginal tradition ; (b) the history, including contemporary history, of an Aboriginal party for an area.
NSW	Any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.
SA	an object — (a) of significance according to Aboriginal tradition ; or (b) of significance to Aboriginal archaeology, anthropology or history, and includes an object or an object of a class declared by regulation to be an Aboriginal object but does not include an object or an object of a class excluded by regulation from the ambit of this definition.
VIC	An object in Victoria or the coastal waters of Victoria that— (i) relates to the Aboriginal occupation of any part of Australia, whether or not the object existed prior to the occupation of that part of Australia by people of non-Aboriginal descent; and (ii) is of cultural heritage significance to the Aboriginal people of Victoria.
NT	No legislative definition of “Aboriginal Object”. “Sacred Site” means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition , and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.
WA	All objects , whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent , or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.

"Object"

- ▶ Macquarie Dictionary definition of "object":

"Something that may be perceived by the senses, especially by sight or touch; a visible or tangible thing."

“Significance”

Surface Water  Significant

Underground Water  EVIDENCE?



Bissett v Mineral Deposits
(Operations) Pty Ltd [2001] NNTTA
104; (2001) 166 FLR 46

“If a native title party is seeking the Tribunal to carry out its duties pursuant to this criterion it should bring to the inquiry material which demonstrates a knowledge of the areas or sites, the location of the areas or sites and why those areas or sites are of particular significance in accordance with their traditional laws and customs.”

Silver v Northern Territory [2002] NNTTA 18; (2002) 169 FLR 1

*“If an area or site of particular significance is claimed, then it must be capable of identification. **A bald assertion ... without any supporting material is not sufficient.** Clearly the best evidence about such areas or sites if they are of particular significance to native title holders is from those native title holders. It is clearly incongruous to claim that areas or sites are of particular significance to objectors and then imply that the objectors either won’t or can’t identify them, or possibly don’t even know anything about them. If an area or site is significant it **must be known** and **must be able to be located** and the **nature of its significance explained** to the Tribunal.”*

Peter George Hunt/James Butterworth &
Ors (Wiri People Core Country Claim) v
State of Queensland [2011] NNTTA 162

“It is not ordinarily possible for the Tribunal to make a finding that an area or site is of “particular significance” without direct evidence from the native title party. The only exception is where there is direct and compelling evidence from government databases, previous cultural heritage work or previous direct evidence from the appropriate members of the claim group.”

Evidentiary Issue

- ▶ Question of evidence – can the Traditional Owners establish that:
 1. They have identified the underground water source
 2. The underground water source is of “significance” to them
 3. The people making that claim have the necessary authority to speak about the traditions of the claim group

Hindmarsh Island Bridge Case



Tenneco Pipeline Case

*“There is, in my view, **no acceptable evidence** before me capable of suggesting that the activities of Tenneco Energy, in constructing the part of the pipeline that has been completed in the lands now claimed by the Gunggari People, has caused any significant harm to any of the rights or interests of the Gunggari People as native title owners of those lands. **Nor is there anything to suggest** that harm to those interests will result from completion of the pipeline within the claimed lands.”*

Tenneco Pipeline Case

*“There is **no evidence** that there are any cultural sites within the pipeline corridor that are of any significance to the Gungarri People...Mr Smith says that the claimed area has very great traditional significance to the Gungarri People...**he does not however offer any further evidence** identifying what those circumstances might possibly be or how the completion of construction of the pipeline in the claimed area would have these consequences. **If [the Gungarri People]...wish to contend that very significant harm will follow from completion of the pipeline in the claimed area, they have, in my opinion, an evidentiary onus to discharge, which is not satisfied by the bare assertion of any harm.**”*



What is the
SOLUTION?

Cumulative effect

- ▶ There is no universal 'yes' or 'no' answer and it is a matter of evidence
- ▶ Hydro geological studies are extremely expensive and time consuming
- ▶ Many of the shale gas basins in Australia are in remote and unexplored parts of the country
- ▶ Limited and often no information as to the hydrology of these areas



Cumulative effect

What are the implications of this?

Two sides to every coin...and a middle ground?

Stop all
Activities and
impose a
moratorium on
activities (eg.
Victoria)



Proceed with
activities
without
consideration of
the cultural
impacts

Possible Solutions

- ▶ Baseline studies and ongoing monitoring
- ▶ Hydrological studies, particularly moving into production testing and production, to gain a better understanding of the impact that withdrawal of water from one place may have on other water sources
- ▶ Use of best practicable technology to prevent any contamination or other harm to water sources
- ▶ Recycling of water for re-use and development of waterless methods of hydraulic fracturing

Possible Solutions

- ▶ Recognition, Education and Transparency is KEY!





Thank you

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