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28 September 2011

Senator the Hon John Hogg
President of the Senate
Parliament House
Canberra ACT 2600
Via email: senator.hogg@aph.gov.au

Dear Mr President

Lock the Gate submission to the Senate Inquiry into the management of the Murray-Darling Basin

I write on behalf of the Australian Petroleum Production and Exploration Association which represents more than 80 national and international companies exploring for and/or producing oil and gas in Australia.

Collectively, these companies have invested an estimated A$150 billion in the sector. Australia's oil and gas industry represents more than 3 per cent of Australia's gross domestic product and contributes an estimated A$8 billion in taxes and royalties each year.

On 28 June 2011, the president of the Lock the Gate Alliance, Inc., Drew Hutton, made a submission to the Senate's Rural Affairs and Transport References Committee chaired by Senator the Hon. Bill Heffernan.

In an ABC radio interview on 22 September 2011, Mr Hutton, when explaining accidental plagiarism and misleading statements he had made in his submission to the Senate, said: "Oh look, if my opponents in the gas industry want to trawl through everything I've ever written then they can probably find all sorts of inaccuracies."

Indeed, APPEA has reviewed Mr Hutton's submission and now submits the following further inaccuracies for the Senate's benefit.

Mr Hutton's submission does not accurately describe the way in which State and Commonwealth legislation deals with coal seam gas projects and seeks to give an impression of an industry "exempt" from major environmental legislation, when the reverse is true.

In some respects, the submission is quite plainly incorrect and begs the question whether the author is familiar with the relevant legislation.

It is, in our view, incumbent on those who purport to read and understand the legislation, and to make informed comment, to represent its application fairly and accurately.

To do otherwise helps to create and feed an alarmist and histrionic culture of emotional opposition to resource projects generally. Resource development has been a feature of Australia for many decades yet Mr Hutton's submission goes close to suggesting there should be no resource development at all.

Specific comments

1. The CSG industry is not exempt *"from the provisions of many pieces of legislation"* as claimed in Mr Hutton's submission. It is subject to the main State and Commonwealth environmental legislation – the Queensland Environmental Protection Act 1994 and the Commonwealth Environment Protection and Biodiversity Act 1999.

   However, not once, in Mr Hutton's entire submission, is either piece of legislation mentioned. Rather, his submission seeks to create the impression that the industry is close to being unregulated.

   It is misleading to say the CSG industry is *"not subject to"* the *Commonwealth Water Act 2007*. It is more accurate to say the *Commonwealth Water Act 2007* simply does not deal with the industry and was never intended to. That said, the industry is heavily regulated on water under Queensland legislation – see Point 6 below.

2. It is misleading to say *"no Federal law or regulation specifically addresses the CSG mining industry".* Nor do those laws specifically address any other industry because our environmental legislation addresses impacts, not industries. This comment seeks to hide behind the word "specifically" to suggest this is in some way unusual or a weakness in the regulatory regime for CSG, or both. While Australia has no legislation called the *Commonwealth CSG Industry Act 201 ...,* the author does not in this context mention the EPBC Act which deals at length with the potential impact of the industry through the assessment of specific projects and activities. The EPBC Act does not deal with specific industries. Rather, it deals with any and all industries and activities those industries undertake which may have a significant impact on Matters of National Environmental Significance.

3. It is not correct to say that *"CSG is not subject to any formal federal review or environmental process in the application phases".* This is an extraordinary comment and quite incorrect. CSG projects have all required specific approval from the Commonwealth, following environmental assessment and evaluation under the EPBC Act. This part of Mr Hutton's submission seeks to dismiss the incredibly demanding Commonwealth environmental assessment process with the glib and equally misleading comment *"other than companies are required to address points in their submissions referencing their compliance to Federal environmental concerns".* In reality, to "address points in their submissions" means to prepare a comprehensive and exhaustive environmental impact statement in accordance with terms of

reference that are publicly advertised and in relation to which anyone may comment.

4. "*Referencing their compliance to Federal environmental concerns"* does not mean simply making unsubstantiated claims. It means demonstrating how a proponent intends to comply with Commonwealth environmental laws so it might obtain approval (subject to demanding conditions) under those laws for the project.

5. It is incorrect to say *"No follow up, no field checks, no review or responses are required".* EPBC Act approvals require monitoring to be done and reported to the Commonwealth Department of Sustainability, Environment, Water, Population and Communities. They require reporting of non-compliance. They require independent auditing at the request of the department. They require "all plans approved by the Minister" under the approvals to be published on the proponent's website. They require production of an annual environmental return which addresses compliance with conditions of approval. The return must be published on the proponent's website.

   In some cases, conditions of approval require the proponent to submit plans to an independent expert panel. This is a demanding process. The panel then advises the Minister on the adequacy or otherwise of the plans.

   The Commonwealth *review* and *response* is a combination of the approval (with conditions) required from the Commonwealth, in addition to the above (to name but a few requirements of those approvals).

   The EPBC Act itself contains several powerful compliance provisions, including directed environmental audits (in addition to those required under the approvals) (S458); criminal and civil penalties, remediation orders and injunctions from the Federal Court (S480A); executive officer liability, and remediation determinations by the Minister (S480D). Ultimately, the Minister can suspend or revoke an approval or vary conditions for non compliance (S143).

   It is simply ludicrous, therefore, to say that "*no follow up, no field checks, no review or responses are required*".

6. It is absolutely false to say *"The CSG Industry is not subject to the State Water Acts".* Chapter 3 of the Queensland Water Act 2000 was inserted into the Act specifically with the CSG industry in mind. Section 361 of the Water Act says: *The purpose of this chapter is to provide for the management of impacts on underground water caused by the exercise of underground water rights* ***by petroleum tenure holders"*** (emphasis added). What follows in Ch 3 is almost 100 sections of the Water Act dealing with a range of matters including:

   - The declaration of cumulative management areas;

   - The preparation of underground water impact reports by petroleum tenure holders;

- The provision of information to the Queensland Water Commission to assist it in performing its functions with respect to the CSG industry;
- The development of water monitoring strategies for each of the Queensland Water Commission (in the case of declared cumulative management areas) and petroleum tenure holders in other cases;
- The development of spring impact management strategies;
- Requirements for public consultation in relation to underground water impact reports;
- Provisions for compliance with and penalties for not complying with requirements of approved reports (approved by the chief executive);
- Completion of baseline assessments for bores, and compliance with baseline assessment plans (and penalties);
- 'Make good' obligations for water bores; and
- Functions and powers of the Queensland Water Commission in relation to the industry.

Claiming that the State Water Act does not apply to the industry is false.

7. Mr Hutton's submission says that *"projects have routinely been announced by the Premier before the applications even hit the desk of reviewers"* as if this is somehow unusual. Should our politicians stay silent when major companies announce their intentions to invest in Australia? Can one only have a view about a project after it has been through regulatory hurdles? This is an extremely naive comment.

8. It is not correct, and again misleading, to say that it is left to *"conditions on the license as the only way in which to regulate the industry".* Conditions are imposed through environmental authorities, Commonwealth approvals, Coordinator General conditions and other approvals. In addition, the above provisions of the Water Act regulate the industry as do provisions of the Environmental Protection Act, the Queensland Petroleum and Gas (Production and Safety) Act 2004, and the Commonwealth EPBC Act.

9. It is not correct to say that there is a *"reliance on self-assessment and self-monitoring".* Regular independent audits are required in State and Commonwealth approvals. There are mandatory requirements in legislation for reporting and compliance that are not based on self-assessment and self-monitoring. The Queensland Water Commission must develop water monitoring strategies for declared cumulative management areas. The industry is clearly one of the most heavily regulated to have ever attempted to start operation in Australia and particularly in Queensland.

10. The precautionary principle has been a feature of modern environmental law for some time. Its application to the CSG industry has been rigorous and has resulted in the industry being heavily regulated.

The principle does not mean *"if in doubt do not proceed".* Correctly stated, it says: *If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation* (taken from S3A of the EPBC Act).

This is precisely what has been done in relation to the CSG industry. The State and Commonwealth Governments have required that substantial measures are taken by Government and project proponents to address scientific uncertainty. These measures include the use of adaptive management techniques to gain and assimilate information into management as data is generated.

They include the Queensland Water Commission's role in managing aspects of the industry. They include the Commonwealth Minister's reliance on independent scientific advice from Geoscience Australia before making the decision to approve. (Indeed, Geoscience Australia advised there was enough information available to support a decision to approve, albeit pursuant to heavy conditions). They include the Commonwealth Minister's decision to "stage" critical surface water and groundwater management plans and to use the assistance of an independent expert panel to assess both stages with inputs from enhanced modelling and data collection. They include the use of compulsory third-party auditing.

Adaptive management has been recognised as a means of rational management of risk. In one of the most erudite judgments on the precautionary principle in modern jurisprudence, Mr Justice Preston CJ of the NSW Land and Environment Court said: *"One means of retaining a margin for error is to implement a step-wise or adaptive management approach, whereby uncertainties are acknowledged and the area affected by the development plan, programme or project is expanded as the extent of uncertainty is reduced …". (*Telstra Corporation Ltd v Hornsby Shire Council (2006) NSWLEC 133.)

This is precisely what is happening in the industry with State and Commonwealth Governments committed to this approach and with proponents having no choice but to comply. It is not necessary to again mention measures that are being employed to implement this approach. They are comprehensive and demanding. The commercial risk implicit in the adaptive management approach is taken by the proponents.

The submission, therefore, is quite incorrect and displays an appalling ignorance of the most respected scientific, academic and legal "literature" on the relationship between the precautionary principle and adaptive management.

It should also be noted that the precautionary principle is but one of the principles of ecologically sustainable development that guides application of the EPBC Act.

Another is: "*Decision making processes should effectively integrate both long term and short term economic, environmental, social and equitable considerations.*" The approach to the precautionary principle as outlined in Mr Hutton's submission is to effectively require complete certainty before proceeding. This is not what the principle requires.

By any objective assessment, Mr Hutton's submission is breathtaking in its preparedness to ignore and misrepresent the application of significant legislation, approval requirements, and principles of scientific-based decision making in the interests of what appears to be a desire to paint the industry as under-regulated, poorly controlled, and left to its own devices.

As anyone who has been close to the development of the industry knows only too well, the reverse is true.

Yours sincerely

BELINDA ROBINSON
Chief Executive

cc Dr Rosemary Laing, Clerk of the Senate
Jeanette Radcliffe, Committee Secretary, Senate Standing Committee on Rural Affairs and Transport