QRC Submission

To the:
State Development, Natural Resources and Agricultural Industry Development Committee

On the:
Resources Safety and Health Bill 2019

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QUEENSLAND resources COUNCIL

Overview

The Queensland Resources Council (QRC) is the peak representative organisation of the Queensland minerals and energy sector, with a membership that encompasses minerals and energy exploration, production and processing companies, as well as associated service companies. The QRC works on behalf of its members to ensure Queensland's resources are developed profitably and competitively, in a socially responsible and environmentally sustainable way. The QRC welcomes the opportunity to make a submission to the State Development, Natural Resources and Agricultural Industry Development Committee on the *Resources Safety and Health Queensland Bill 2019* (the Bill).

This submission follows a number of earlier responses QRC has provided on the issues that are addressed by the Bill; the QRC provided submissions to the CWP Parliamentary Select Committee in 2016, the Project Management Office (PMO) in 2017 and the Department of Natural Resources, Mines and Energy (DNRME) on a Discussion Paper released in April 2018.

Most recently the QRC also provided a response to DNRME on a consultation draft of the Bill that is now before Parliament. In that submission the QRC expressed the concern that the draft Bill was inadequate for the purposes of consultation, primarily because it did not provide a proper analysis of the costs and benefits of the Bill, particularly in the creation of a statutory entity in the form of Resources Safety and Health Queensland. This proposal will require regulatory amendment to adjust the safety and health fee to meet the costs of the new regime, however those costs have not been properly assessed, and for some parts of the resources industry there are limited controls on those fees being increased in the future. The QRC is of the view that the total costs should be understood before the model and the enabling legislation is given full consideration by Government.

The QRC has supported initiatives designed to separate the functions of resources industry development and the regulation of safety and health, to ensure the independence of the Commissioner and to enhance the functions of the Advisory Committees. The QRC supports initiatives that will improve the risk based regulatory approach, however we do have concerns that introducing a statutory body will increase the regulatory burden without any demonstrated improvement to safety and health. This is particularly apparent in the case of the Petroleum and Gas industry.

The QRC's view is that the interests of safety are best served where the lessons from safety incidents can be openly shared and is concerned that an overly aggressive approach to prosecution that inhibits such sharing would reduce openness and transparency. If companies and individuals are incentivised to take a defensive approach, where responses may be driven by managing legal risk rather than putting safety improvements first, then this can only be detrimental to the safety performance of industry overall.

For other components of the Bill the QRC has some suggestions on how those proposals could be improved. In particular, we believe that the independence of the Commissioner would be enhanced by an ability to enter into contracts and if the RSHQ Employing Office's functions specifically included employing staff to perform work for the Commissioner.

The QRC also believes there is a strong argument for clarifying the public interest test applicable for matters to be referred for prosecution, to ensure that prosecutions are not solely determined by the likelihood of success. This could potentially be moderated by ensuring the Commissioner retains a role in referrals, even if that is only to be consulted on the public interest in pursuing a referral.

The QRC is also concerned that introducing broad individual rights to request prosecutions (with appeal rights) risks exacerbating the public interest issue, imposing significant administrative burden and building unrealistic expectations. The current legislation already provides a right for an ISHR or an SSE to put a case for a prosecution, with appropriate checks and balances.

More detailed comments on the major components of the Bill follow.

Establishing a statutory body called Resources Safety and Health Queensland

The QRC is aware of the Government's commitment in the 2019-20 Queensland budget to provide $2 million to establish an independent regulator for resources safety and health, however we also anticipate an increase in the health and safety fee presently paid under the resource safety Acts. This follows on from comments in the discussion paper DNRME released with the draft Bill that "the government is separately progressing necessary adjustments to the safety and health fee in light of recommendations made by the PMO".

While cost is not the primary concern when it comes to safety, there is a need to demonstrate that the regulatory burden associated with resources safety and health is commensurate with the effectiveness of the model used to deliver compliance services to industry. Tabling a Bill and going through the current Committee process without disclosing the issue of ongoing cost, does not meet the Government's commitment to proper and meaningful consultation with the resources industry[1].

The QRC is still waiting to be advised as to which changes under the statutory entity model delivered by the Bill will improve safety and health outcomes for resources workers. The only reason given for introducing a statutory entity is that confidence with the old regulator model was eroded due to the re-identification of CWP. None of the tripartite participants in coal mining safety and health realised the extent of the systemic failures that resulted from normalisation of the dust risk, because CWP was believed to have been eradicated; this led to a drift to failure of the Coal Mine Workers' Health Scheme and thereby reinforced the belief that the disease had been eliminated [2].

The factors leading to those systemic failures would still have existed under the legislative framework proposed by the Bill. It is unreasonable to attribute what is fundamentally a failure in the risk management process to the structure of the regulator model, and there is no reason to think that a statutory regulatory body would have led to a different outcome. Put simply, the QRC remains unconvinced a statutory body is required because there is no reason to believe that the re-identification of CWP would have been different under **any** alternative regulatory model, including the RSHQ model being proposed. If there are other benefits in the model proposed in the Bill, then they should be properly explained.

For the coal and metalliferous sectors, fee increases associated with the new statutory entity should require a Regulatory Impact Statement (RIS) to implement, however for the Petroleum and Gas (P&G) sector all that might be required to recover the additional compliance costs associated with RSHQ is to adjust the "cost estimate" for each of the fee categories under Schedule 6 Part 3 of the *Petroleum and Gas (Safety) Regulation 2018*. That would be a particularly inequitable outcome for the P&G sector since they were not involved in the respiratory health issues that were believed to have eroded confidence in the Regulator to the point that an entirely new regulatory model is now being proposed. Adding to this concern is the fact that the P&G sector has expressed a preference for being regulated by the Work Health and Safety Regulator as a step towards resolving some of the jurisdictional issues they face[3]. Not

[1] For example, the *Queensland Government Guide to Better Regulation* which assists agencies in incorporating regulatory impact analysis into policy development and supports an evidence-based approach to Government decision making. The commitment to full consultation on all regulatory changes was reiterated in a letter to QRC Chief Executive from the Treasurer on behalf of the Government leading into the last election, and the Premier's commitment in her speech at the 2018 QRC Annual Lunch.

[2] See QRC Submission to the CWP Committee of 26 November 2016

[3] See QRC Submission on the PMO paper *Options for resources safety and health regulator models in Queensland*

only do P&G operators face an unwanted regulator model with no evidence it is beneficial, they may not be afforded a proper opportunity to understand the associated cost beforehand.

More broadly, the QRC believes that passing the Bill and then advising on how the increased cost will have to be met by industry is not proper consultation. The best way to progress this issue is to examine the proposed regulator model and the associated benefits and industry impacts at the same time. Government should assess the proposed regulator model, with all its components fully costed, and demonstrate through a cost benefit analysis and Regulatory Impact Statement, that the additional cost is justified by expected improvements to safety and health.

Establishing an independent Commissioner for Resources Safety and Health

The QRC supports the establishment of the Commissioner for Resources Safety and Health with responsibilities across all sectors, but not necessarily within the Bill. There is no reason that the amendments required to better define the role of an independent Commissioner cannot be progressed within the existing legislative framework.

The QRC has supported the steps already taken to house the Inspectorate separately from the rest of the Department and from the Commissioner, while increasing resources and operating the Commissioner as a full-time role. The QRC believes that a truly independent Commissioner should be maintained to restore and maintain confidence in the effectiveness of the regulator as was intended by the Ombudsman in recommending in 2008[4] that the position be created.

There are two areas where the draft Bill might still risk perceptions regarding the independence of the role by making the Commissioner reliant upon RSHQ to function effectively. The first is within the employment conditions of staff engaged to assist the Commissioner. Section 62 of the proposed Act states that "the Commissioner may, with the agreement of the chief executive of a government agency, arrange for the services of officers or employees of the agency to be made available to the Commissioner". The QRC understands that the reasoning behind this proposal might be efficiency, by avoiding the additional administration associated with establishing the Commissioner as a hiring entity, however it raises the potential perception that RSHQ would maintain undue influence over the Commissioner. The QRC suggests that this perception might be addressed by ensuring that a commitment to provide adequate staff for the Commissioner is formalised in some other way. For example, under the model proposed by the Bill, the functions of the RSHQ Employing Office could also include employing staff to perform work for the Commissioner. If there is a statutory requirement to provide adequate staffing, then there could be no risk of a threat to limit recruitment or subsequently withdraw Commission staff.

Secondly, there is no overt provision for the Commissioner to enter into contracts. While this may be covered under section 59(1) of the Bill [where the Commissioner has "the power to do anything necessary or convenient to be done for the performance of the Commissioner's functions"] the Bill would be enhanced by clarifying that such a power exists. It is likely that as part of their function to review the performance of RSHQ the Commissioner may wish to engage an entity to undertake part of that review. If the Commissioner is reliant on the regulator to establish such a contract it could jeopardise the perception of the independence of the review. To address the issue of budgeting for these functions, the Commissioner could have the responsibility to prepare an annual budget for approval by the Minister.

[4] See recommendation 39 of the Ombudsman's Report

That budget should cover all the Commissioner's functions, including costs associated with chairing the Advisory Committees (see below).

The QRC also notes that the Bill removes the current role of the Commissioner in the commencement of prosecutions. As stated in previous submissions, the QRC does not support completely removing the Commissioner from a compliance function in this way. This is an area where the regulator risks taking an overly prosecutorial approach, particularly when it is considered in conjunction with the proposal to prosecute serious offences through the WHSQ Prosecutor, which is discussed later in this submission.

The QRC has previously proposed that one role of the Commissioner could be to ensure that the compliance response with the greatest likelihood of being effective is being applied. There is a decision point at which the intent of the compliance policy is considered, and a determination is made about whether prosecution is in the public interest and in the best interests of resources safety and health. The QRC has suggested that a NSW-like causal investigation model should be introduced, and this is discussed further below. If a causal investigations approach was available, then following an initial assessment there would need to be a decision point for the type of investigation outcome that is sought (either solely causal or one aimed at prosecution). A different outcome would be sought depending on an initial judgement as to which process would be most likely to deliver improvements to safety and health. The QRC has suggested that this decision role should be fulfilled by the Commissioner, because that person should be able to judge the relative impacts on the safety goal, having regard for both operational and strategic considerations.

"Enhanced functions" of CMSHAC and MSHAC

The QRC has supported, and continues to support, the retention of the advisory committees and the tripartite approach overall. The Bill generally lays out these functions more clearly than the current legislation, however it does not guarantee that the committees will be consulted in the development of policy for resources safety and health. There have been several instances in the last few years where the committees have not been engaged in this process, and this has raised questions about their relevance. It is noted that the Committees are advisory, therefore there can be no obligation on the Minister to heed their advice, but it is clearly good practice for the Minister to at least seek such advice.

Apart from the provision of a specific budget for the Commissioner that includes the functions of the Committees raised earlier, the only other concern the QRC has is the decision to no longer explicitly refer to the role of the committees in reviewing the effectiveness of the legislation and relevant guidance. While it may be implicit that the Committees will set out how they will undertake this kind of review in their required 5-year strategic plans, there is a risk that removing the current explicit requirement will mean that there is no longer any trigger to do so.

Work Health and Safety (WHS) prosecutor

The Bill proposes utilising the independent Work Health and Safety (WHS) prosecutor to prosecute serious offences under resources safety legislation. While the prosecutor can also prosecute lesser offences, anything deemed to be a serious offence would be required to go through the WH&S prosecutor. The QRC has not supported this option because the primary focus of the Prosecutor's Office is likely to be whether a successful prosecution is probable, not whether prosecution is in the best interest of resources health and safety.

It is worth noting the advice that the QRC has been given by some of our members who operate both in NSW and in Queensland. For a number of years, the NSW Regulator was considered by the resources industry in that State as overly aggressive in seeking prosecution. This had a detrimental impact on the relationship with the Regulator, promoted the use of legal privilege and stifled the desire to share

information on serious accidents. These concerns appear to have been heeded more recently leading to a more balanced approach, which includes the employment of a Causal Investigations process. The QRC believes that this provides a precautionary story; we believe that the Queensland resources industry generally has an effective and productive interaction with their health and safety regulator and would not want that jeopardised through the employment of a model driven by prosecution outcomes alone.

As stated previously the QRC believes that broader issues need to be considered in making a decision whether to prosecute and has suggested that the independent Commissioner is the best person to decide on the value of prosecution and its implications for the overall delivery of resources safety and health.

While not supporting the proposal in the Bill, if it is progressed the QRC believes the Office of the WHS Prosecutor should not be the default position, nor should that Office be able to decide unilaterally to prosecute a case. At the very least the Office of the WHS Prosecutor should always be required to seek the opinion of the Commissioner in deciding whether or not to prosecute.

The QRC is also concerned that the ability for a "person" to request the WHS Prosecutor to consider bringing a prosecution for a serious offence, with appeal rights if that request is denied is too broad a right, builds unrealistic expectations, could be used mischievously and could lead to an excessive administrative burden. In the case of a fatality, it is quite likely that at least one grieving family member would wish to seek prosecution, even if there was little basis for bringing any charges. The current legislation already provides a right for an ISHR or SSE to put a case for prosecution, and it provides adequate checks and balances in this process. The QRC can see no compelling reason for changing the legislation in this area.

The QRC notes a change between the exposure draft Bill and the one tabled; Clause 84 (introducing s256B into CMSH Act), Clause 112 (insofar as it introduces s235B into MQSH Act) and Clause 126 (introducing s837C P&G Act) regarding Procedure if prosecution is not brought. These clauses now impose a time limitation of 12 months for a person to make a written request to the WHS prosecutor that a prosecution be brought. The QRC supports this change. The QRC questions however whether the current structure provides a potential for multiple prosecutions to occur for the same offence, being pursued by both RSHQ and the WH&S Prosecutor.

Concern has also been raised regarding subsection (3)(a) of the above new sections; the government's intention if the investigation is not complete is unclear, i.e. would an incomplete investigation preclude a request to prosecute being granted? Could a matter still be referred to the DPP if a final decision on a prosecution has not been made?

For unamended sections 257(b) CMSH Act, section 236(b) MQSH Act and section 837(4)(a) P&G Act, it is unclear who would be considered the complainant; would it be the WHS prosecutor? The CEO for non-serious offences? Another person who has requested a prosecution to commence? While not supporting the proposal, the QRC believes that if it is pursued, then the Bill would be enhanced by clarifying these issues.