

QRC Submission

State Development, Natural Resources and Agricultural Industry Development Committee

Mineral and Energy Resources and
Other Legislation Amendment Bill

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Introduction

The Queensland Resources Council (**QRC**) welcomes the opportunity to provide feedback to the State Development, Natural Resources and Agricultural Industry Development (SDNRAID) Committee on the *Mineral and Energy Resources and Other Legislation Amendment Bill 2019 (the Bill)*.

The QRC is the peak representative organisation of the Queensland minerals and energy sector, with a membership encompassing minerals and energy exploration, production and processing companies, and associated service companies. The QRC works on behalf of our members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

The amendments in the Bill raise complex and important issues around resources tenure management and health and safety. The QRC understands the intention behind the proposed amendments that relate to tenure management and administration; however, the QRC believes that the Bill exceeds the legislative intent in some instances and needs clarification in several key aspects.

For only one of the initiatives in the Bill is the QRC recommending complete abandonment of the proposal. This is the requirement for statutory positions to be appointed by a coal mine operator. This amendment is not supported because it provides no safety benefit, is an unreasonable restriction on the rights of individuals and imposes an unjustifiable regulatory burden on industry.

While the QRC remains concerned that the case for industrial manslaughter has not been made, we believe that amendments to the Bill can be made to mitigate much of the unease about its negative impact on safety culture. We also believe that such changes would focus the legislation where it will provide an equivalent outcome to what has been achieved in the broader health and safety legislation – closing a perceived gap in the Criminal Code that might prevent corporate decision-makers being held personally accountable for criminal acts of negligence causing death.

Specific recommendations are outlined throughout the submission and summarised from page 5.

PREVIOUS CONSULTATION

The QRC has been engaged in ongoing consultation on most aspects of the Bill that will affect our members, for example:

- For industrial manslaughter the QRC has had extensive engagement since the charge was proposed to be included in the Resources Acts¹ when amendments were made to the *Work Health and Safety Act 2011 (WH&S Act²)* in 2017. Most recently we provided a response to the exposure draft of the *Mineral and Energy Resources Legislation Amendment Bill 2019 (MERLA Bill)* in 2019. The QRC remains concerned that the important issues we have raised about the negative impacts on safety culture and effectiveness of the legislation have not been addressed and no explanation has been provided as to why this is the case.
- For the financial assurance and regulatory efficiency reforms the QRC had extensive engagement with the Department throughout their development and provided an extensive

¹ This paper uses the collective term "Resources Acts" to refer to the *Coal Mining Safety and Health Act 1999 (CMSH Act)*, the *Mining and Quarrying Safety and Health Act 1999 (MQSH Act)* and the *Petroleum and Gas (Production and Safety) Act 2004 (P&G Act)*; while the Bill also affects the *Explosives Act 1999* this response does not address the explosives industry.

² While the *Work Health and Safety and Other Legislation Amendment Act 2017* also introduced industrial manslaughter into the *Electrical Safety Act 2002*, and the *Safety in Recreational Water Activities Act 2011*, for brevity this paper only refers to the offence within the *Work Health and Safety Act 2011*

response on these through the MEROLA draft Bill consultation process in 2019. The QRC has residual concerns regarding some of the financial provisioning reforms which impact upon commercial decisions.

The exception to the general willingness of the Government to undertake consultation with the resources industry on matters covered by the Bill relates to the requirement for statutory officials in coal mining to be employed by the coal mine operator. While this issue was originally raised by the then DNRM in 2013, it appears to have been for a different purpose to that given for why the provisions are being proposed now. As set out in the detailed response the QRC was of the understanding that this proposal had been abandoned, and industry was completely unaware that this was back on the table until the Bill was introduced into Parliament on 4 February 2020.

The QRC believes that inadequate consideration has been provided as to whether the proposal breaches Fundamental Legislative Principles in not having sufficient regard for the rights and liberties of individuals by removing a statutory position holder's rights to enter into an employment arrangement that is mutually agreed with their employer. It is also apparent that no consideration has been given to the enormity of the impact that it will have on coal mine operators, for no demonstrated safety benefit. The requirement represents a clear example of the danger of unilaterally drafting legislation without seeking industry input to identify such impacts and decide whether there are any unintended adverse consequences.

The QRC therefore requests the Committee formally consider these matters in their report and we recommend that the requirement be removed from the Bill and not be taken back to the legislature until such time that a full regulatory impact assessment has been undertaken.

Recommendations

The QRC puts forward the following recommendations for consideration in the review of the Bill:

Recommendation 1: That the SDNRAID Committee notes that the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator represents an unreasonable and unjustified regulatory burden which was not subjected to consultation with industry.

Recommendation 2: That the SDNRAID Committee's review of the Bill address whether the proposal to require statutory officials to be employed only by the coal mine operator, in breaching Queensland's fundamental legislative principles, represents a fatal flaw in the Bill.

Recommendation 3: That the SDNRAID Committee recommend that the proposal to require statutory officials to be employed only by the coal mine operator be removed from the Bill and not be taken back to the legislature until such time a full regulatory impact assessment has been undertaken.

Recommendation 4: That the SDNRAID Committee notes that the introduction of industrial manslaughter into health and safety legislation was aimed at ensuring that corporate decision-makers can be held personally liable for criminal acts of negligence causing death.

Recommendation 5: That the SDNRAID Committee notes that workers making operational decisions on a resources site already have significant personal statutory duties with associated penalties and can potentially be imprisoned for criminal manslaughter.

Recommendation 6: That the SDNRAID Committee consider recommending that the definition of a "senior officer" who is subject to the charge of industrial manslaughter be amended to:

- (a) State in the CMSH Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a coal mine";
- (b) State in the MQSH Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a mine"; and
- (c) State in the P&G Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site safety manager for operating plant".

Recommendation 7: That the SDNRAID Committee consider whether basic legal rights are adequately provided for by the Bill in relation to the industrial manslaughter offence.

Recommendation 8: That the SDNRAID Committee consider recommending the following amendments and clarifications related to the proposed indirect change in control conditioning power:

- (a) Limiting the conditioning power to mitigating risk to the extent of any concern around technical and financial resources;
- (b) Clarifying the timeframes for the Minister to impose or vary a condition;
- (c) Amending clauses 54, 151, and 174 to limit the Minister's power to impose or vary a condition on a transfer from commencement; and
- (d) Have Government confirm that the existing provisions under the MERFPA will be relied upon for notification to the Minister and that DNRME will not be seeking additional requirements.

Recommendation 9: That the SDNRAID Committee consider recommending the following amendments and clarifications for the proposed disqualification criteria:

- (a) Redrafting section 196C(2) to ensure it is appropriately constrained and does not have unintended consequences;
- (b) Narrowing clause 2(a) to ensure it reflects the intent of the section;
- (c) Having supporting material (i.e. operational policies and explanatory notes) developed to provide clear information about the application and use of the new disqualification criteria and powers;
- (d) Redrafting section 196C(3) to ensure that the decision-maker must consider mitigating factors;
- (e) Considering the provision of a 'threshold' for satisfaction of the disqualification criteria; and
- (f) Including a section requiring the decision-maker to consider submissions made by the applicant.

Recommendation 10: That the SDNRAID Committee recommends that DNRME undertake further consultation with industry on reporting thresholds for requiring mineral proponents to submit Development Plans.

Executive Summary

The Bill is broken down into roughly three parts: health and safety, financial assurance, and regulatory efficiency. The QRC's key concerns relate to the requirement for statutory officials in coal mining to be employed by the coal mine operator, the introduction of an industrial manslaughter offence applying to site-based statutory positions³ and financial provisioning reforms that impact upon commercial decisions. Broad comments on each section are summarised below, with more detailed feedback in the body of the submission.

HEALTH AND SAFETY

Employing statutory positions in coal

The only justification for the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator provided in the Explanatory Notes for the Bill is to ensure that statutory office holders can make safety complaints, raise safety issues, or give help to an official in relation to a safety issue without fear of reprisal or impact on their employment. There is no justification given for the apparent assumption that an official who is not employed by a coal mine operator has less secure employment than one who is. This assumption is particularly hard to understand where statutory officials are employed by a related body corporate of the coal mine operator, as the argument for them having less secure employment has no possible basis.

Not only is there no clear safety case for the requirement, prohibiting the engagement of statutory officials by a major contractor in favour of an individual that has no direct relationship with that contractor could actually impose additional risk. Doing so is contrary to the principles of the CSMH Act that aim to keep the management of risk close to where that risk is being experienced.

There is also a danger that the change could result in a shortage of statutory position holders across the state, which would impact on the ability of coal mines to operate. No alternatives are available to address such impacts in the one year period that has been given for the transition.

The QRC is concerned that a large proportion of those statutory officers who do choose to remain in the role will be forced to renegotiate the terms of their employment. The QRC believes that imposing such restrictions on the rights of workers to choose how they are employed, when both parties to the employment contract agree with the choice that has been made, is a breach of Queensland's fundamental legislative principles. Clause 7.2.12 of the Queensland Legislation Handbook states that Queensland's legislators must consider the abrogation of individual rights and liberties and justify restrictions on a person's ordinary activities. The clause also states that legislative intervention should be proportionate and relevant in relation to any issue being dealt with under the legislation. This gives legislators further clarification about the legislative principles as they are set out in section 4 of the *Legislative Standards Act 1992*.

The QRC therefore maintains that the breach of fundamental legislative principles arises because:

- No proper justification for the proposal has been given;
- The proposal restricts statutory position holders in the ordinary activity of seeking or retaining employment on mutually acceptable terms; and
- The impact of forcing workers to renegotiate the current terms of their employment under those circumstances is entirely disproportionate and that a case that it is relevant to improving safety outcomes has not been properly made.

³ Collective term for site safety manager (SSM) in petroleum & gas site and senior executive (SSE) in mining and the positions they appoint

While the explanatory notes for the Bill state that the restriction “may infringe the legislative principle contained in s 4(3)(g) of the *Legislative Standards Act 1992* to not adversely affect the rights and liberties of individuals”, the representation and assessment of this issue is, in the QRC’s view, completely inadequate. Not only has no proper justification been given, the provision of a transitional period is irrelevant because it does not address the fundamental issue of whether or not there is any real justifiable reason for adversely affecting workers’ rights in this way, over any time period.

The QRC also advises that the requirement is simply incompatible with the complex organisational structure of most coal mining ventures. Joint venture arrangements, international partners, the use of employing entities, employment of statutory officials by a related body corporate of the coal mine operator and the engagement of major contractors to operate all or part of the mining operation is extremely common. Achieving the requirements set out in the Bill would involve the renegotiation of major contracts and in some cases the complete restructuring of operations. Again, the Bill provides a transitional period of just one year to achieve this. That timetable is impossible to meet, even if benefits could be demonstrated and the cost of implementing the proposal could be justified. If there is a need to renegotiate joint venture and major contractor arrangements those costs could be in the millions of dollars.

The QRC believes that triggering this kind of potential individual and commercial impact without full consultation, including releasing an exposure draft of the legislation and a Regulatory Impact Statement, is inconsistent with the Queensland Government Guide to Better Regulation.

Recommendation 1: That the SDNRAID Committee notes that the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator represents an unreasonable regulatory burden that has not been justified by any safety improvement, and that was not subjected to any consultation with industry.

Recommendation 2: That the SDNRAID Committee’s review of the Bill address whether the proposal to require statutory officials to be employed only by the coal mine operator, in breaching Queensland’s fundamental legislative principles, represents a fatal flaw in the Bill.

Recommendation 3: That the SDNRAID Committee recommend that the proposal to require statutory officials to be employed only by the coal mine operator be removed from the Bill and not taken back to the legislature until such time a full regulatory impact assessment has been undertaken.

Industrial manslaughter

The QRC raises two major concerns. The first is the need to ensure that site-based workers who hold statutory positions are not captured by the offence. The second is to ensure that the basic rights of those potentially exposed to the charge are afforded reasonable legal protections during the application, investigation and prosecution of an alleged offence.

If site-based statutory positions are not excluded from the application of the “senior officer” industrial manslaughter offence, it risks stifling the free exchange of information about serious incidents. Information sharing could be impeded in this way as a result of legally defensive behaviours in the aftermath of an incident, making it harder to identify and share causes and so improve safety outcomes. This is not a consequence that the resources industry wants to bear.

The Resources Acts impose specific duties on individual site-based statutory positions. Without an express exclusion, depending on company structures and the roles these individuals have within those structures, site-based workers could be exposed to the industrial manslaughter offence in circumstances where they are already required to comply with significant personal statutory duties and have potential exposure to significant fines and jail terms. These sanctions can be applied both under the Resources Acts and the Criminal Code. The QRC submits that this concern has the potential to significantly undermine efforts to strengthen safety culture.

The QRC believes that the Government has not taken a balanced stakeholder approach to the development of these provisions. Throughout that development process industry has taken a pragmatic approach in recommending a number of changes to the drafting of the legislation, to ensure that it does not perversely affect safety management at sites. However, without explanation, none of these changes have been made in the Bill.

Not only have these submissions by the QRC's been ignored, the Minister has ignored the advice of his own Advisory Committees on how an offence of industrial manslaughter could be introduced into the metal mining, quarrying and coal mining legislation. The mining industry representatives on the Advisory Committees aimed to ensure the Minister was advised about the implications of not taking the significant differences between the WH&S Act and the Resources Acts into account. There has been no response.

The Advisory Committees' discussion also highlighted the fact that the original rationale for introducing industrial manslaughter provisions into the WH&S Act, was to close a perceived gap in the criminal manslaughter legislation that is said to make it difficult to prosecute corporations, particularly large corporations, for general manslaughter. This arises because of problems around the attribution and aggregation of criminal conduct by a corporation's managers. It is impossible to send a corporation to jail, therefore the perception is that corporate executives cannot be held personally accountable for any acts of criminal negligence causing death.

Throughout consultation on this issue the Government has made it clear that the intention of introducing the offence of industrial manslaughter into the Resources Acts is to ensure that resources workers are afforded "the same protections"^(see p17 for full quote) as those operating under the WH&S Act. Since industrial manslaughter was introduced into the WH&S Act to address concerns about imputing individual conduct to a corporation to enable criminally negligent company executives to be charged with manslaughter, that should be the focus in the Resources Acts. The offence was not about creating an additional sanction for workers with site-based health and safety obligations – it should not achieve that outcome in the Resources Acts. If it does, then the outcome is not the same.

Normally the executive officers of a company carry out the management functions of, and speak and act, as the company. Resource workers like SSEs, SSMS, safety certificate holders and the people identified in the management structure of a mine are not executive officers of the corporation. They do not have the capacity to affect significantly the corporation's financial standing but are simply employed to work at the operation using the resources they are given. Their decisions cannot be immune to criminal prosecution by virtue of them being a decision of the corporation. These individuals are subject to clear legislative obligations to achieve an acceptable level of risk at the resources operation at which they work, and their performance should be measured against how they meet that responsibility.

Importantly in the context of any need for the provisions in the Bill, these workers are also clearly exposed to the criminal manslaughter provisions of the Queensland Criminal Code. If **any** resource worker acts in a criminally negligent way that causes another worker's death they can be charged with criminal manslaughter and potentially imprisoned. The QRC believes that having the offence capture some workers because of the way a senior officer is defined in the Bill is an anomaly created by the structure of the duties framework in the Resources Acts.

With no equivalent statutory positions under the WH&S Act no such anomaly arises for site-based workers operating under general health and safety legislation. The QRC therefore believes that achieving “the same protections” as in general work health and safety legislation, requires the statutory and management structure positions to be excluded from the offence in the resources safety legislation. For the outcome to be the same for workers the words applying the offence must accommodate that difference.

Recommendation 4: That the SDNRAID Committee notes that the introduction of industrial manslaughter into health and safety legislation was aimed at ensuring that corporate decision-makers can be held personally liable for criminal acts of negligence causing death.

Recommendation 5: That the SDNRAID Committee notes that workers making operational decisions on a resources site already have significant personal statutory duties with associated penalties and can potentially be imprisoned for criminal manslaughter.

The potential to confuse the SSE and other statutory and management structure roles with the role of Board level executives has already been recognised in the CSMH Act and the MQSH Act in the way that proactive due-diligence requirements are applied to corporate officers under Part 3 Division 3A of both of those Acts. These requirements were introduced to the mining legislation as part of the *Mines Legislation (Resources Safety) Amendment Act 2018*. The SSE and the people in positions that report to the SSE were specifically excluded from these provisions. The QRC believes that the same form of exemption from the application of the industrial manslaughter offence should be provided to statutory position holders and people within the operational management structure of resource operations.

Recommendation 6: That the SDNRAID Committee consider recommending that the definition of “senior officer” be amended to:

- (a) State in the CSMH Act that it “does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a coal mine”;
- (b) State in the MQSH Act that it “does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a mine”; and
- (c) State in the P&G Act that it “does not include a person appointed as, or whose position reports directly or indirectly to the site safety manager for operating plant”

In addition to seeking the express exclusion of site-based statutory positions from the “senior officer” industrial manslaughter offence, the QRC recommends that anyone affected by the industrial manslaughter offence should not be deprived of basic legal rights through the application, investigation and prosecution of an alleged offence. This includes ensuring:

- (i) Individuals have access to the privilege against self-incrimination or appropriate and necessary limited use immunities are provided for (as envisaged in clause 7.2.6 of the Queensland Legislation Handbook);
- (ii) Individuals have access to all available defences;
- (iii) That the standard of conduct applied is recklessness;
- (iv) That the offence is only able to be prosecuted by the Director of Public Prosecutions; and
- (v) A 12 month time limitation period applies.

Recommendation 7: That the SDNRAID Committee consider whether basic legal rights are adequately provided for by the Bill in relation to the industrial manslaughter offence.

FINANCIAL ASSURANCE

These reforms were largely articulated in the 'Achieving improved rehabilitation for Queensland: other associated risk and proposed solutions' *Discussion paper* (the **Discussion Paper**) and 'Abandoned Mines and Associated Risks' *Consultation report* (the **FP Consultation Report**). The QRC holds a number of concerns about the proposed reforms.

Change in control

The QRC understands the proposal aims to improve the assessment of the financial and technical capabilities of resource authority holders when a change of control occurs. QRC is primarily concerned with the broad conditioning power proposed to be given to the Minister. While the power is only available to be used in narrow circumstances (indirect change in control), the power to impose or vary a condition is unlimited. QRC recommends narrowing the scope of conditions that could be imposed.

Recommendation 8: That the SDNRAID Committee consider recommending the following amendments and clarification on the application of the Bill related to Change in control:

- (a) Limiting the conditioning power to mitigating risk to the extent of any concern around technical and financial resources;
- (b) Clarifying the timeframes for the Minister to impose or vary a condition; and
- (c) Amending clauses 54, 151, and 174 to limit the Minister's power to impose or vary a condition on a transfer from commencement; and
- (d) Have Government confirm that the existing provisions under the MERFPA will be relied upon for notification to the Minister and that DNRME will not be seeking additional requirements.

Disqualification criteria

The QRC understands and appreciates the intent of these new provisions; to ensure that decision-makers can take into account the qualities of the applicant prior to undertaking the entire application process. However, the disqualification criteria outlined in the Bill are not appropriately limited, and as drafted, could effectively capture the entire industry. Further, the legislation does not require the decision-maker to take into account mitigating factors, only that they 'may disregard' certain criteria. This is of great concern to QRC.

Recommendation 9: That the SDNRAID Committee consider recommending the following amendments and clarification on the application of the Bill related to Disqualification Criteria:

- (a) Redrafting section 196C(2) to ensure it is appropriately constrained and does not have unintended consequences;
- (b) Narrowing clause 2(a) to ensure it reflects the intent of the section;
- (c) Having supporting material (i.e. operational policies and explanatory notes) developed to provide clear information about the application and use of the new disqualification criteria and powers;
- (d) Redrafting section 196C(3) to ensure that the decision-maker must consider mitigating factors;
- (e) Considering the provision of a 'threshold' for satisfaction of the disqualification criteria; and

- (f) Including a section requiring the decision-maker to consider submissions made by the applicant.

Care and Maintenance

QRC understands the rationale behind the new requirement for minerals proponents with significant production to provide a development plan. QRC recommends that further consultation is undertaken with minerals resource authority holders to effectively manage the transition to this new condition.

Recommendation 10: That the SDNRAID Committee recommends that DNRME undertake further consultation with industry on reporting thresholds for requiring mineral proponents to submit Development Plans related to Care and Maintenance.

REGULATORY EFFICIENCY

These reforms have eventuated from the Department's work throughout 2018 investigating opportunities to improve the efficiency and timeliness of resource assessment processes, briefly outlined in the 'Resource Authority regulatory efficiency and duplication' *Consultation report* (the RA Consultation Report). QRC broadly supports the reforms proposed.

Health and Safety reforms – detailed submission

EMPLOYING STATUTORY POSITIONS IN COAL

The reaction to QRC from our coal mining member companies upon hearing about this proposal can only be described as extreme shock, confusion and concern. Neither they, nor the QRC as their representative organisation, had any knowledge of this proposal prior to the introduction of the Bill into Parliament on 4 February 2020.

While this issue was canvassed in the National Mine Safety Framework Regulatory Impact Statement that was released in 2013, the QRCs understanding was that the intent at that time was to address employment issues in a very buoyant market, not to address concerns over reprisals. The proposal was not supported by the QRC in 2013 and no further discussion has occurred since that time. Now we are being given the opportunity we raise the following significant issues.

Lack of justification or need

The only justification for the proposal given in the Explanatory Notes for the Bill is to ensure that statutory office holders can “make safety complaints, raise safety issues, or give help to an official in relation to a safety issue without fear of reprisal or impact on their employment”. The title in the Explanatory Notes “Clarification of appointment requirements for statutory office holders” is an interesting choice, since the notes do not actually provide any clarity about the problem the proposal will address, nor how it provides a genuine improvement in safety.

There is no justification given for the apparent assumption that an official who is not employed by a coal mine operator has less secure employment than one who is. Statutory officials are Coal Mine Workers and any one making a complaint is subject to existing statutory protections directed towards reprisal, both within the CSMH Act (in relation to the specific protections this proposal allegedly seeks to address) as well as in Federal legislation⁴.

Preliminary advice from our coal members indicates that in many cases the proportion of safety issues raised by contractor statutory position holders equals or exceeds the proportion raised by embedded employees. Unfortunately, due to the very short time available the QRC has been unable to collect and collate this information. The QRC suggests that DNRME should review their complaints database to determine how many statutory position holders have made complaints in the past, the nature of their engagement, and what the outcome was.

In addition to the lack of evidence of a problem, where a statutory official is already employed by a related body corporate of the coal mine operator, there appears absolutely no justification for having to go through the time consuming and expensive process of moving their employment to the coal mine operator.

The QRC is also concerned that prohibiting the engagement of statutory officials directly by a major contractor in favour of an individual that has no direct relationship with that contractor could impose additional significant risk to mining operations. It is contrary to the structure of the legislation that aims to keep the management of risk close to where the risk is being experienced.

Contractors are often engaged to undertake specialised or unusual tasks at a coal mine that the mine may be unfamiliar with or not have the current skills. Examples include the application of polymeric chemicals, secondary support of roadways; or to assist with peaks and troughs in workload to provide short term labour coverage, such as during longwall relocations. Such tasks

⁴ Including the *Fair Work Act 2009* (Part 3-1 General Protections) and the *Corporations Act 2001* (Part 9.4AAA Protection for Whistleblowers).

and work arrangements require competent, knowledgeable statutory officials to both supervise the work and to ensure statutory compliance on behalf of the mine. In a similar vein, the lack of direct supervision of work groups has been sighted as a contributing factor in a number of recent incidents. To remove the option of increasing the number of statutory officials for short term and/or peak workload conditions, is impractical.

Industry has already expressed significant concern over current difficulties in attracting candidates to undertake statutory positions, and there is a risk that any further disincentive could result in a shortage of statutory position holders across the State. Such a shortage has the real potential to impact on the ability of coal mines to operate effectively and safely.

With the reducing labour pool, aging demographic and reducing attraction of persons to higher level statutory positions such as Ventilation Officer, Mine Manager and Site Senior Executive, many mines do not have more than one person at a site with these qualifications. The requirement to directly employ such persons will create the requirement to employ at least two, to cover periods of absence due to leave entitlements.

Recommendation 1: That the SDNRAID Committee notes that the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator represents an unreasonable and unjustified regulatory burden which was not subjected to consultation with industry.

Impact on individual rights

At an individual level, statutory officers who have chosen to be engaged as contractors or consultants, be that for higher incomes, greater flexibility or some other reason, are likely to consider leaving the role if that choice is removed. This outcome, coupled with concerns over greater liability under the industrial manslaughter proposal, will further exacerbate current shortages of people holding a number of statutory certificates. This will become even more significant if current employment structures have to be reconfigured, causing even more workers to be inadvertently exposed to the industrial manslaughter charge.

If they choose to remain in the role, a large proportion of statutory position holders will be forced to renegotiate their employment with a completely different entity. As a result, some workers may be worse off financially, or might unwillingly fall within the coverage of an enterprise agreement they do not support.

The QRC believes that imposing such restrictions on the rights of workers to choose how they are employed, when both parties to the employment contract agree with the choice that has been made, is a breach of Queensland's fundamental legislative principles. Section 4 of the *Legislative Standards Act 1992* provides guidance for the application of the fundamental legislative principles, and these are further described in the Queensland Legislation Handbook⁵. Clause 7.2.12 of the Handbook states that Queensland's legislators should take an "expansive approach" in identifying where rights and liberties might be adversely affected by proposed legislation. The Handbook lists the following amongst the broad principles that should be applied:

- Abrogation of rights and liberties (in the broadest sense of those words) from any source must be justified, whether the rights and liberties are under the common law, statute law or otherwise.
- Restrictions on ordinary activities must be justified.

⁵ <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx#7.2.12>

- Legislative intervention should be proportionate and relevant in relation to any issue dealt with under the legislation.

The Explanatory Notes for the Bill deal with the issue of individuals' rights in the most cursory of manners, stating:

"These amendments may infringe the legislative principle contained in s 4(3)(g) of the Legislative Standards Act 1992 to not adversely affect the rights and liberties of individuals.

These amendments aim to provide employment security for critical safety statutory officer holders so that they feel that they can raise safety issues and make reports about dangerous conditions without fear of reprisal or impact on their employment. This will in turn protect the safety and health of workers more broadly. A transitional period of 12 months for compliance has been adopted and this will ameliorate the impacts on any existing statutory office holders who currently have a different employment status such as those who are contractors."

The QRC maintains that:

- This does not represent a proper justification for the provision;
- The use of the qualifier "may" is entirely inappropriate – the impact is clear;
- The provision restricts the ordinary activity of engaging in employment on mutually acceptable terms; and
- The impact of forcing workers to renegotiate the current terms of their employment is entirely disproportionate under those circumstances.

The QRC therefore formally requests that the SDNRAID Committee review of the Bill addresses whether the proposal to require statutory officials to be employed by the coal mine operator breaches Queensland's fundamental legislative principles, and whether such a breach is justified.

Recommendation 2: That the SDNRAID Committee's review of the Bill address whether the proposal to require statutory officials to be employed only by the coal mine operator, in breaching Queensland's fundamental legislative principles, represents a fatal flaw in the Bill.

Incompatibility with current commercial arrangements

Changing current employment structures as discussed above may also have industrial relations implications for companies more broadly, triggering the transfer of business provisions in the Fair Work Act, and the transfer of industrial instruments in circumstances where such a transfer would be undesirable or inappropriate. The cost implications of dealing with such issues have not been contemplated.

More broadly still, the QRC believes that the proposal is simply incompatible with the complex organisational structure that applies to most Queensland coal mining operations. Joint venture arrangements, international partners, the use of employing entities⁶ and the engagement of major contractors to operate all or part of a coal mining operation is extremely common. Some further explanation of the extent of these issues is provided below.

⁶ Employing entities are set up for entirely legitimate reasons to pay workers' wages, taxes and superannuation; including at times by the Queensland Government (for example the Employment Office that will be created by the Resources Safety and Health Queensland Bill currently before the Parliament, meaning people working for RSHQ will not be employed by RSHQ).

Forcing the proposed changes to employment arrangements would deny Operators the right to structure and operate their mines as they see fit and best designed to ensure compliance with all applicable statutory requirements. Where the Operator is not currently the employing entity for a statutory officer changes will need to be made to either:

- Appoint the current employing entity as the Operator;
- Transfer the employment of statutory officers to the Operator; or
- Appoint another entity as Operator and transfer the employment of statutory officers to that entity.

Appointing a new entity as the Operator and/or requiring the Operator to become an employing entity may have the following consequences.

- It may be inconsistent with current commercial arrangements and is likely to require the unwinding of longstanding existing structures, potentially triggering renegotiation of the commercial terms of longstanding joint ventures and contractual arrangements;
- It will potentially limit the ability for statutory officers to move between operations as each time they move, their employment will need to be changed;
- It may not be appropriate where various statutory officers for one operation are employed by different employing entities; and
- It could result in having multiple Operators for a range of sites which are currently part of a joint venture or major contractor arrangement and currently have one Operator.

Again, no consideration has been given to the cost implications of restructuring operations in this way to meet the new requirements. Due to the commercial in-confidence nature of these kinds of matters, coupled with the fact that it will trigger negotiations with uncertain outcomes, it is impossible to provide a reliable estimate of the full cost impact. The advice to QRC from our members however, is if the solution involves the renegotiation of joint venture and major contractor arrangements, the cost associated with the proposal could run into many millions of dollars.

The QRC believes that triggering that kind of potential impact without full consultation, including releasing an exposure draft and a Regulatory Impact Statement, is inconsistent with the Queensland Government Guide to Better Regulation⁷. The Guide provides for an exemption to full impact assessments and a RIS where detailed analysis is unlikely to be beneficial because of one of the following three reasons:

- The regulatory changes are very minor;
- Sufficient analysis has already been undertaken; and
- Swift action is required to protect property or prevent injury to persons.

Given the concerns that have been raised with the QRC, it is clear that none of these reasons for exemption could be applied to the proposal. Some further examples of operator arrangements that make the implementation of the proposal problematic are included as Attachment A.

Penalty

The QRC also notes that a significantly severe penalty is proposed, and that the quantum of this penalty does not appear consistent with other penalties in the Act. Given the existing penalties for not appointing a statutory position holder correctly are 200 penalty units, 500 penalty units for the new offence appears disproportionate.

⁷ <https://s3.treasury.qld.gov.au/files/guide-to-better-regulation.pdf>

Recommendation 3: That the SDNRAID Committee recommend that the proposal to require statutory officials to be employed only by the coal mine operator be removed from the Bill until a full regulatory impact assessment can be undertaken.

INDUSTRIAL MANSLAUGHTER

The Minister for Natural Resources, Mines, Energy and Water the Honourable Dr Anthony Lynham told State Parliament on 27 November 2019 that:

“Queensland already has the toughest mine safety and health laws in the world. However, when it comes to protecting life and limb, there is no end point. That is why next year I will bring legislation into this House that will create the offence of industrial manslaughter. That offence already exists in other Queensland workplaces, and our mine and quarry workers will have the same protections. Currently the government is consulting with stakeholders, including the QRC, mining companies and unions on the introduction of legislation into this House. There is also legislation before the House to establish a new independent resources safety and health regulator. I look forward to the support of all members of this House on those crucial reforms.”

This is an important statement because it clearly sets out the Minister's intention of ensuring that resources workers have the “same protections” as other workers in the State. The QRC does not believe that the Bill will provide the Minister with that outcome because of fundamental differences between the relevant legislative frameworks that remain unresolved.

The QRC agrees that Queensland has an effective resources safety and health legislative framework – many would argue that some of the differences between that framework and other safety legislation might in some ways provide resource workers greater protections than other workers have. The resources legislation takes an overtly risk-based approach with the clear intention of involving workers in decisions about how to manage the risks that they are exposed to.

However, rather than trying to make the fundamental changes to Resources and/or other safety legislation that would be required to obtain proper alignment, the QRC proposes that the structure of the Bill should instead be amended to achieve “equivalence” in the application of the industrial manslaughter offence. This is an alternative approach to adopting the Bill as tabled just because its words are the “same” as those in the general workplace safety legislation and therefore mistakenly believing that those words provide the same outcome.

The QRC is greatly saddened by the recent fatalities in the coal mining industry. All of those incidents must be fully investigated and where there has been a breach of duty, those responsible should be prosecuted under the Resources Acts. The Resources Acts already carry significant penalties for failures to ensure the health and safety of workers, including up to three years imprisonment where there is a fatality. This is why Minister Lynham commented that “Queensland already has the toughest mine safety and health laws in the world.” If there is any evidence of criminal negligence by any worker, then existing offences and penalties under the Criminal Code could also be applied. The prosecution of electrical contractor Nathan Day for the death of his employee, Jason Garrels in Clermont in 2012, and his sentence of seven years' jail, proves this.

The QRC has repeatedly expressed concern over the potential for industrial manslaughter to have adverse safety and health outcomes, requesting that the Government demonstrate any evidence of a fatality risk arising from corporate wrongdoing in the resources industry, or any evidence that an offence of industrial manslaughter would be the best way to address such a risk if it did exist. No such evidence has been provided.

The approach being used in the Bill is deficient because it has no regard for the very significant differences between the WH&S Act and the Resources Acts. In doing so, it threatens to reverse the proactive risk management approach to safety in the existing resources sector legislation, to one of compliance only. It also risks diminishing the effectiveness of the proposed offence to

target executives. A cut and paste of the provisions from the WH&S Act has the potential to result in unjust and, the QRC believes, unintended consequences.

We regard it as very disappointing that our last remaining hope of having these differences acknowledged and this potential addressed is through the Parliamentary Committee scrutiny process for the Bill.

Not only have the QRC's submissions been ignored, but the Minister has ignored the advice of his own Advisory Committees⁸ on how an offence of industrial manslaughter could be introduced into the metal mining, quarrying and coal mining legislation. It should be noted that the advice requested was not on **if** industrial manslaughter should be introduced but **how**.

The mining industry representatives on the Advisory Committees attended a joint meeting of the Committees in good faith, with the intent of ensuring the Minister was advised about the implications of not taking the significant differences between the WH&S Act and the Resources Acts into account. The discussions at the Advisory Committees' meeting were informed by a presentation from Crown Law. Based on that presentation, and constrained by the question they had been asked, QRC's representatives settled on a package of measures that were based on the concept that industrial manslaughter would be a **crime**.

The discussion at the Advisory Committees' meeting also highlighted the fact that the original rationale for introducing industrial manslaughter provisions into the WH&S Act, was to close a perceived gap in the criminal manslaughter legislation that is said to make it difficult to prosecute corporations, particularly large corporations, for general manslaughter. This arises because of problems around the attribution and aggregation of criminal conduct by a corporation's managers.

In the Advisory Committees' discussion, it was acknowledged by most stakeholders that the only gap in the current legislative framework is that it is not possible to send a corporation to jail; jailing an executive for criminal negligence resulting in a work-related fatality would require the ability to hold an individual responsible for the criminal acts of their company. The Criminal Code does not provide that opportunity and the industrial manslaughter provisions in the WH&S Act close that gap.

The following text boxes represent the position on key elements of a potential industrial manslaughter charge outlined by QRC Members at the Advisory Committees' meeting. The QRC subsequently restated these elements in a letter to the Minister dated 12 September 2019; in some cases, some further minor clarification is also provided below.

Who the legislation should apply to

The legislation should only apply to corporations and executive officers. The legislation should not apply to a person who is appointed as, or whose position reports directly or indirectly to, the site senior executive.

The QRC believes that the definition of an executive officer of a resources corporation should be consistent throughout the legislation by reflecting the definition of the *Corporations Act 2001*.

The *Work Health and Safety Amendment Bill 2017* definition of "senior officer" is:

⁸ This paper uses the collective term "Advisory Committees" to refer to the Coal Mining Safety and Health Act Advisory Committee (CMSHAC) and the Mining Safety and Health Advisory Committee (MSHAC).

- an executive officer of a corporation (i.e. a person who is concerned with, or takes part in, the corporation's management); or
- for a non-corporation, the holder of an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of a PCBU's functions.

Unlike the Resources Acts, the WH&S Act does not have certified positions, such as "site senior executive" and other site-based statutory positions.

While not the subject of discussion at the Advisory Committees' meeting, the issue of applying industrial manslaughter to the SSE and appointed positions also applies to the Site Safety Manger statutory role under the P&G Act. The implications for these positions and for other site-based management positions in the mining legislation is further discussed from page 20 of this submission.

What defences should apply

Because industrial manslaughter is a criminal offence then all of the defences that apply to criminal negligence should be available.

This relates specifically to the exclusion of the defence of intention-motive under section 23 of the *Criminal Code Act 1899*, which states that a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will; or for an event that the person does not intend nor could have foreseen as a possible consequence.

What the test for industrial manslaughter should be

The test should be equivalent to that which applies under the Criminal Code for manslaughter; the Criminal Code imposes the test of criminal negligence. A key aspect of this test is that it must be proven that the acts or omissions of a person charged with industrial manslaughter caused the death of a worker.

Who determines whether to pursue an industrial manslaughter charge

Because industrial manslaughter is a criminal offence, it should be prosecuted by the entity that has the greatest level of expertise in this area; this is the Director of Public Prosecutions.

What the time limitation should be

Because of the seriousness of the charge the time provided for bringing a prosecution, and thus the uncertainty for the implicated officer, should be minimised. The QRC believes that 12 months should be adequate to assess whether the charge is likely to be warranted.

The QRC remains concerned that the Bill fails to properly treat the charge of industrial manslaughter as a crime, and that the offence has an application far broader than is needed to meet the aim of holding company executives accountable for criminally negligent behaviour. If the Bill retains this current broad application and denies accused persons access to all the available criminal defences and protections (such as protection from self-incrimination), then the QRC believes the only way that a charge of "industrial manslaughter" could possibly be justified would be if the test of culpability is the test of **recklessness**.

In saying this, it is important to note that the QRC is not supporting the broad application of a manslaughter charge to the holders of on-site statutory positions, regardless of the culpability test applied. The QRC believes that this aspect of the proposal poses the single greatest threat of any

component of the Bill to the mature safety culture of our industry and is a clear consequence of the failure to address the differences between the construct of the WH&S Act and the Resources Acts. This issue is therefore dealt with at length in the following section of this submission.

Why on-site positions must be excluded

Damage to safety outcomes

In its earlier submissions on this issue the QRC has referred to the finding of the South Australian Coroner Mark Johns in his inquest into the death of Jorge Alberto Castillo-Riffo. In response to a request from the CFMEU, Coroner Johns considered the possible effectiveness of introducing an offence of industrial manslaughter into the South Australian statutes and stated:

"The present case has demonstrated that the present laws relating to prosecution for workplace injuries cause defensive litigious strategies on the part of employers and regulators. To raise the stakes even higher by the introduction of an indictable offence such as manslaughter would only exacerbate those tendencies. Those tendencies are not conducive to the public exposure and bringing to light of the full facts surrounding an industrial tragedy such as Mr Castillo-Riffo's."

It is easy to be cynical about the motivation for such "tendencies", however viewing them as proof that all some companies want to do is to cover up their wrongdoings is simplistic – they can actually be a manifestation of a company demonstrating its responsibility to its employees. Corporately responsible resources companies will inevitably be aware of any personal liability under industrial manslaughter provisions that their people holding site-based statutory positions will be exposed to. Legal advisors attending those companies in the event of a fatality or near fatality will be ethically bound to advise that there could be a risk of a lengthy custodial sentence for those individuals. Legal advisors would also have to advise that there are reduced legal protections in the form of the available defences. They would inevitably have to advise of the measures that are available to individuals to mitigate that risk – that is, the employment of the defensive litigious strategies the Coroner refers to.

It is also worth noting that, even without such legal advice, workers would also be less likely to want to participate openly in company investigations where there is a perception of a heightened risk of personal prosecution. To expect otherwise is simply unrealistic.

Corporately responsible resources companies and their employees aim to have a mature safety culture. They do not want punitive legislation with an unintended adverse consequence that acts against that aim. The QRC fears that the outcome of a broadly applicable industrial manslaughter charge as proposed would be something that no-one working in our industry wants – the stifling of the free exchange of information about serious incidents.

While it is important to deter non-compliance with safety legislation, and to punish those that wilfully breach their safety obligations, one of the most important purposes of an accident investigation is to determine its cause, and to share that information widely to ensure that similar incidents do not occur elsewhere.

To take the risk of driving defensive behaviour with an indictable offence when there is no evidence that there is a problem it is likely to solve is, to the QRC, contrary to the goal of improving safety and health. It is certainly contrary to the goal of improving safety culture because it promotes a culture of blame and secrecy. It is contrary to the very principles on which the legislation is founded. This matter is further examined below.

Damage to the resources legislative framework

To understand the potential damage to the resources legislative framework it is important to recognise the fundamental differences between components of that legislation, as well as how it differs with the WH&S Act.

The current resources safety legislation stems from a review process that was undertaken for the mining Acts following the 1994 Moura mine disaster. At that time there was overwhelming agreement by all mining industry stakeholders that every effort should be made to prevent any recurrence, and the existing framework was introduced after a lengthy process of consultation and development. Some of the factors introduced for mining have subsequently flowed through to the Petroleum and Gas legislation, although not all have. The P&G Act retains some aspects that stem from the approach taken by the petroleum industry globally.

The existing resources legislative framework has the following key characteristics:

Defined level of risk

The Queensland Resources Acts are based on a risk management model that uses the concept of an acceptable level of risk, which was influenced by the safety culture theories of Professor James Reason. Professor Reason suggested that an effective safety culture consists of these elements:

An informed culture where the organization collects and analyses relevant data, and actively disseminates safety information.

A reporting culture that promotes confidence to report safety concerns without fear of blame.

A learning culture where an organization is able to learn from its mistakes and make changes. It will also ensure that people understand the SMS processes at a personal level.

A just culture where errors and unsafe acts will not be punished if the error was unintentional.

The basis of the risk management approach championed by Professor Reason is that safety and health problems should be anticipated based on risk assessment before they arise, to ensure that risk is "as low as reasonably achievable" (ALARA). Risk must be "controlled and managed". This is the basis for using ALARA in the CSMH Act and the MQSH Act.

On the other hand, while the P&G Act also requires an acceptable level of risk to be achieved, how that level is measured is subject to the legal concept of "as low as reasonably practicable" (ALARP). This reflects the standard adopted by many major hazard industries globally including Transportation, Nuclear and Petroleum & Gas. The concept arises from UK case law (Edwards vs National Coal Board (1949) 1 All ER 743) in which the term "reasonably practicable" was first defined in the Appeal Court⁹, later going on to form a foundational principle of the UK Health & Safety at Work etc Act 1974 which remains in force in the UK to this day.

The WH&S Act is also based around the ALARP principle, and it states that reasonably practicable means "that which is ... reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters...".

The effect of these different measures is that the bar for prosecuting industrial manslaughter may differ under the respective legislative frameworks, because there is a different burden of culpability on someone charged with industrial manslaughter under the different frameworks.

Workers' duties

⁹ The Appeal Court stated: "'Reasonably practicable' is a narrower term than 'physically possible' ... a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them."

Embedded in the Resources Acts is the principle of involving workers in the management of the risk they are exposed to, consistent with the Reason model. The Resources Acts have a duties section that places obligations on persons generally, as well as specific duties for statutory position holders. The general duty includes a requirement for all persons to ensure, to the extent of the responsibilities and duties allocated, that the work and activities under the person's control, supervision and leadership are conducted in a way that does not expose the person or someone else to an unacceptable level of risk. Specific duty holders in mining are also required to "control and manage" relevant risks.

In contrast, the WH&S Act excludes the concept of "control" of risk from its duty of care framework. This too is likely to create a greater burden of culpability on someone who is charged with industrial manslaughter under the Resources Acts compared to someone charged under the WH&S Act.

Safety and Health Management Systems

The Queensland Resources Acts also focus on the importance of a single integrated safe system of work. This is referred to as the safety and health management system (SHMS) in mining and the safety management system (SMS) for petroleum and gas operating plant. These systems mean that contractors who periodically work at a resources site must follow the essential strict safety risk management controls required of all permanent workers at that site. The ongoing requirement that there be only one safety system is intended to ensure that all workers, regardless of rank or employment type, operate under the one safe system of work.

This is very different to the PCBU model in the WH&S Act, which again will alter the way the offence is applied through contractors and employers. This matter is further discussed below in relation to the statutory positions that develop and implement these safe systems of work.

Recommendation 4: That the SDNRAID Committee notes that the introduction of industrial manslaughter into health and safety legislation was aimed at ensuring that corporate decision-makers can be held personally liable for criminal acts of negligence causing death.

Statutory positions and Mine Management Structures

Statutory positions are an important component of the resources safety framework. While many of these positions have a long-standing history, the position of SSE was created following the Moura mine disaster to identify a single point of accountability for establishing and implementing the SHMS at a mine site. This principle was later expanded into the Petroleum and Gas legislation with the creation of the positions of Operator, Executive Safety Manager and Site Safety Manager.

Under the CSMH Act and associated Regulations there are 21 positions with recognised competencies set by CSMHAC. The Underground Mine Manager, Deputy and Open Cut Examiner positions also require practising certificates issued by the Queensland Board of Examiners, and SSEs are required to pass a written examination on Queensland coal mining safety legislation. Under the MQSHA and associated Regulations there are eight positions with competencies set by the Mining Safety and Health Advisory Committee, with the position of Mine Manager requiring a practising certificate.

This vertical control system at mines is an important distinction from the WH&S Act's Person Conducting a Business or Undertaking (PCBU) concept, which introduces a horizontal control structure in which there can be multiple PCBUs on one site. This alternative approach is based on the principle that safety is best served by placing responsibility closest to the locus of control.

Compared with the PCBU model, statutory positions under resources safety legislation serve to centralise onerous and broad safety responsibilities and create the situation where an SSE for example may be responsible for risks in which they have little or no personal expertise, and often over which they can exercise little or no cultural influence. Under the definition of senior officer used in the Bill, it is highly likely that these statutory positions would be captured by the proposed industrial manslaughter charge. When post incident investigations are occurring it would have to be assumed by their employer that those positions are captured by the definition.

Such positions with this level of explicit responsibility do not exist in the WH&S Act, so this was not an issue that had to be addressed when the offence was introduced into that Act in 2017.

Capturing these positions is therefore inconsistent with the stated intent of mirroring the WH&S Act amendments and may actually serve to limit the effectiveness and likelihood of charges being applied to resource sector company Executive Officers.

This unintended consequence should be redressed by excluding all site-based statutory position holders from the proposed legislation.

The vertical control structure in mining is further expanded in the mining legislation by a requirement that the SSE of a mine develop and maintain a management structure for the mine in a way that allows development and implementation of the SHMS.¹⁰

It has always been important to balance the benefits of clear duties and accountability under the statutory position and management structure approach with the potential for those positions to simply make it easier to find an individual to blame for an incident. Getting this balance right is an important aspect of promoting a mature safety culture in the resources industry. People need to be accountable, but there also needs to be sufficient incentive for people to take on these important roles.

The Board of Examiners has recently raised concerns about a reduction in the number of people applying for and obtaining practising certificates to take up statutory positions in Queensland's mining industry. This concern is highlighted by Figure 1 which shows that almost 50% of Deputy certificate holders in underground coal mining are 60 years or older, and that almost 60% of OCE certificate holders in open cut coal mining are 60 years or older.

In 2018 the QRC undertook a survey across the Queensland mining industry to determine the implications of and reasons behind the BoE's report of a decline in people obtaining practising certificates. One of the primary reasons identified by survey participants was that the statutory responsibility attached to certified positions has reduced the level of interest. Respondents commented that the reward is not commensurate with the level of responsibility when compared to other available positions, noting that people do not want the additional accountability because there is insufficient advantage for taking on the responsibility of the role.

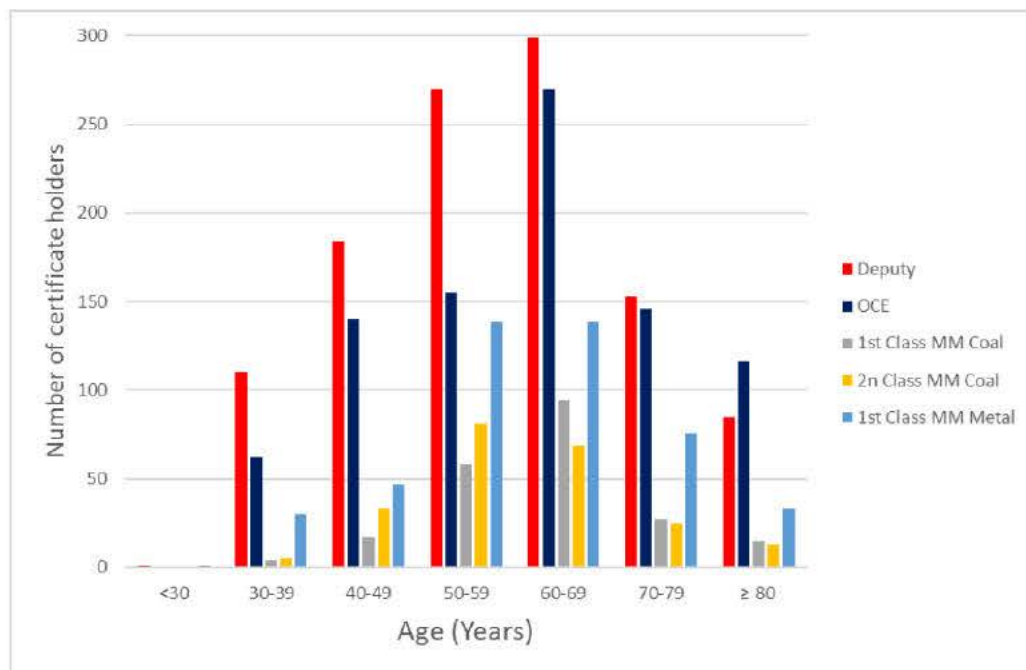
In reporting these findings to DNRME the QRC expressed the concern that any increase in responsibility and liability attached to statutory positions would further disincentivise people from taking on these roles. Since the release of the draft MERLA Bill in 2019 the QRC has been contacted by numerous SSEs who have stated that the introduction of an industrial manslaughter charge would result in them relinquishing their statutory position. This risk has been further confirmed by a letter from the Australian Mine Managers Association, which is included as Attachment B to this submission. In part that letter states:

¹⁰ s55 CSMH Act and s50 MQSH Act

“...one of the concerns we will be raising is the number of senior mine site personnel that are actively considering their positions should this ...amendment be introduced”.

The QRC is also aware that a number of practising certificate holders are taking the opportunity to make both individual and other collective submissions on this issue.

Figure 1. Age distribution of holders of Queensland mining certificates of competency



The level of concern from practising certificate holders fully supports the fears of the QRC; a failure to attract good people to these roles poses a significant threat to the ability of resources operations to operate safely into the future unless the legislative framework is significantly revised. Under the current requirements, only a small reduction in the number of available practising certificate holders could affect the ability of mines to operate effectively, which would have significant consequences for the Queensland economy.

Revising the Resources Acts to remove the reliance on statutory positions and address this risk would be a very significant undertaking that would require extensive consultation with all affected stakeholders.

Recommendation 5: That the SDNRAID Committee notes that workers making operational decisions on a resources site already have significant personal statutory duties with associated penalties and can potentially be imprisoned for criminal manslaughter.

Consistency with the WH&S Act

In his statement to Parliament repeated at page 10 of this submission, the Minister has made it clear that one of the most important intentions of introducing an offence of industrial manslaughter into the Resources Acts is to ensure that resources workers are afforded an equivalent level of “protection” to those operating under the WH&S Act. While not endorsing the belief that industrial manslaughter is in any way an improvement, the QRC can at least appreciate this perception.

While acknowledging that this perception exists, it is also important to remember the primary aim of introducing industrial manslaughter into the WH&S Act. In his review of workplace health and

Safety Queensland, Tim Lyons (2017) recommended the creation of the offence of industrial manslaughter commenting:

"In terms of the design and statutory location of the offence, as previously stated, the Review considers the offence would be best placed in the WH&S Act 2011 on the basis that it would send a clear message to PCBU's about the standard of safety required and the expectation on senior management to proactively manage health and safety risks. Additionally, the provisions under the WH&S Act 2011 relating to the imputation of an individual's conduct to a corporation will ensure corporations are liable and reduce barriers to attributing criminal liability to a corporation in instances involving the most serious health and safety breaches."

Lyons' concern about imputing an individual's conduct to a corporation has a long history. The first case seeking to lay criminal offences against a corporation and its officers related to the Herald of Free Enterprise shipping disaster¹¹. This case demonstrated that a manslaughter prosecution against a company was not possible because the various acts of negligence that were found could not be attributed to any individual who was the so-called "controlling mind" of the company.

Normally the board of directors, the managing director and perhaps other superior officers of a company who carry out the functions of management speak and act as the company. Their on-site subordinates do not speak and act as the company, therefore the actions of those subordinates are the actions of an individual who could be charged with criminal manslaughter. Some twenty years later this was corrected in the UK by introducing the *Corporate Manslaughter and Corporate Homicide Act 2007* which applies corporate manslaughter sanctions to organisations (e.g. Corporations), but not to specified positions within those organisations.

SSEs, SSMs, practicing certificate holders and individuals identified in the management structure of a mine are not senior officers of the corporation. They are employed or otherwise engaged to work at a resources operation. They are subject to clear obligations and responsibilities and their performance should be measured against the way in which they meet those responsibilities. In addition, these workers are subject to the criminal manslaughter provisions of the Queensland Criminal Code. They are not the class of people that an industrial manslaughter offence was ever intended to capture.

The significant existing differences between the WH&S Act and the Resources Acts mean the pursuit of "pure" consistency between those legislative frameworks is not possible without major legislative reform. Simply bolting the industrial manslaughter offence onto the Resources Acts as proposed without addressing those differences will result in unintended consequences which will be detrimental to safety culture and safety outcomes.

With no equivalent statutory positions under the WH&S Act no such anomaly arises for individuals operating under that legislation.

As discussed previously, there is also a difference in the standard to which risk must be managed under the WH&S Act compared to the mining safety Acts. The mining safety Acts require the level of risk to be "as low as reasonably achievable" while the WH&S Act requires risk to be "as low as reasonably practicable". The WH&S Act states that reasonably practicable means "that which is ... reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters...".

Reasonably achievable is not equivalently defined in the Queensland mining safety Acts, so a wider range of actions might be deemed to be "achievable" following a mining accident,

¹¹ Sheen, 1987. MV Herald of Free Enterprise, Court Report No. 8074 Formal investigation ISBN 0 11 550828 7.

compared to what might have been found to be “practicable” under the WH&S Act. This difference could further increase the level of exposure of the SSE in the mining Acts because they are specifically tasked with ensuring that risk is at an acceptable level, which requires making risk as low as reasonably achievable.

Any resulting increase in exposure to the penalty associated with industrial manslaughter is another source of inconsistency with the WH&S Act that provides even greater reason for exempting resources statutory and management structure positions from the offence.

Achieving proper consistency therefore requires the resources statutory and management structure positions to be excluded from the offence.

The potential to confuse the SSE and other statutory and management structure roles with the role of Board level executives is currently recognised in the mining safety acts in the way that proactive due-diligence requirements are applied to corporate officers under Part 3 Div 3A of both Acts. The SSE and the people in positions that report to the SSE have been specifically excluded from these provisions as shown in the example below, drawn from the CSMH Act.

47A Obligation of officers of corporations

(4) In this section—

officer, of a corporation, does not include a person appointed as, or whose position reports directly or indirectly to, the site senior executive for a coal mine.

The QRC is strongly of the opinion that the same exemption must be provided from the application of the industrial manslaughter offence.

Summary

The QRC believes that the failure to expressly exclude site-based statutory position holders from the application of the “senior officer” industrial manslaughter offence poses the single greatest threat of any component of the MEROLA Bill to the mature safety culture of our industry. The QRC fears that the outcome of a potentially broadly applicable industrial manslaughter charge as proposed would be something that no-one working in our industry wants – the stifling of the free exchange of information about serious incidents. Information sharing could be stifled in this way as a result of legally defensive behaviours in the aftermath of an incident, making it harder to learn and so improve safety outcomes.

In the QRC’s view, the failure to expressly exclude site-based statutory position holders arises because the legislative framework within which the proposed industrial manslaughter offences will sit has not been properly considered. The unique nature of the Resources Acts imposes specific and onerous duties on certain individual statutory positions. Without an express exclusion, depending on company structures and the roles these individuals have within those structures, site-based workers could be exposed to the industrial manslaughter offence, in circumstances where they already are required to comply with significant personal statutory duties and have potential exposure to significant fines and jail terms, both under the Resources Acts and the Criminal Code. The QRC submits that such an outcome would be undesirable, with the potential to significantly undermine efforts to strengthen safety culture.

On this basis the QRC believes that site-based statutory positions should be expressly excluded from the industrial manslaughter offence. The “senior officer” offence should only apply to individuals at the highest levels in an organisation, consistent with the definition of “officer” in the

Corporations Act, with the express exclusion for SSEs and those reporting to them as already exists in [s47A CMSHA].

Recommendation 6: That the SDNRAID Committee consider recommending that the definition of "senior officer" be amended to:

- (g) State in the CMSH Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a coal mine";
- (h) State in the MQSH Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site senior executive for a mine"; and
- (i) State in the P&G Act that it "does not include a person appointed as, or whose position reports directly or indirectly to the site safety manager for operating plant"

In addition to seeking the express exclusion of site-based statutory positions from the "senior officer" industrial manslaughter offence, the QRC recommends that individuals are not deprived of basic legal rights as a result of the application, investigation and prosecution of an industrial manslaughter offence. This includes ensuring:

- (i) individuals have access to the privilege against self-incrimination or appropriate and necessary limited use immunities are provided for (as envisaged in clause 7.2.6 of the Queensland Legislation Handbook);
- (ii) individuals have access to all available defences;
- (iii) that the standard of conduct applied is recklessness;
- (iv) that the offence is only able to be prosecuted by the Director of Public Prosecutions; and
- (v) a 12 month time limitation period applies.

Recommendation 7: That the SDNRAID Committee consider whether basic legal rights are adequately provided for by the Bill in relation to the industrial manslaughter offence.

Financial assurance – detailed submission

QRC participated in the open consultation process for the Discussion Paper and FP Consultation Report, which outlined a series of ideas to address risks identified in the Queensland Treasury Corporation's review of the financial assurance system. Overall, QRC and our members supported the direction of both papers but highlighted several significant issues with the ideas proposed. A number of those concerns remain in the Bill as introduced.

CHANGE IN CONTROL

The proposed amendments are designed to strengthen State oversight over changes of control of a resource authority, and to mitigate the risks associated with such changes of control. QRC understands the policy intent behind this proposal and agrees that the Department should take steps to mitigate the risk of a site being disclaimed.

There are two types of changes of control, 'direct' and 'indirect' changes of control. At the moment, Government can assess the financial and technical capability of a new owner where there has been a direct change of control, but not when there has been an indirect change of control.

Direct Transfers

There are two main changes in the Bill for direct changes in control:

1. The increase in Ministerial considerations (when assessing a prescribed dealing) to include whether the proposed transferee has the financial resources to fund the estimated rehabilitation cost for the resource activity as stated in the ERC decision.¹²
2. The narrowing of the definition of **prescribed dealings** and the establishment of the new term **notifiable dealings**. The prescribed dealings definition has been narrowed so that it doesn't include non-assessable dealings.

QRC is of the view that the amendments for direct transfers are an appropriate extension of the financial provisioning reforms under the *Minerals and Energy Resources (Financial Provisioning) Act 2018 (MERFPA)*. However, QRC has concerns with some aspects of the amendments for indirect transfers.

Indirect Transfers

Currently, an applicant for a resource authority in Queensland must demonstrate that they have human, technical and financial resources to comply with the conditions of the resource authority.¹³ This becomes an issue when a controlling interest in a company is divested, and therefore the entity responsible for compliance with the resource authority changes.

Legislative amendments are included in the draft Bill to provide that:

- Where the Minister becomes aware that there has been an indirect change of control, the Minister may assess the changed holder's financial and technical capacity to comply with the conditions of the resource authority.

¹² This is in clause 89 of the Bill, to be inserted into s 10 of the MERCP Regulations.

¹³ *Mineral and Energy Resources (Common Provisions) Regulation 2016* s 10.

- If the Minister considers the resource authority holder does not have the technical and financial resources to comply with the conditions of the lease, the Minister may impose an additional condition, or vary an existing condition, of the resource authority.¹⁴
- Information request powers, as well as natural justice processes, will apply to the changed holder prior to any condition being imposed.

The explanatory notes outline that this process will apply when the Minister is notified or made aware that there has been a change in control of the entity holding the resource authority but no transfer of the resource authority has taken place. If a significant risk in relation to the holder's financial and technical resources is identified, the Minister may impose or vary conditions on the authority.

QRC is concerned by the introduction a power to impose or vary conditions without limitation. While the proposed powers would only apply in narrow circumstances (changes to control or subsidiaries under the *Corporations Act 2001 (Cth)* ss 50AA and 46), the condition power is very broad. There is no link between the risk identified and the conditioning power.

On a plain text reading, the proposal introduces significant regulatory uncertainty for proponents given a condition could be imposed which is unrelated to the risk being mitigated. QRC is concerned that such a broad condition may introduce further risk unintentionally and dampen the investment environment for resources unnecessarily.

Recommendation: Conditioning power should be limited to mitigating risk to the extent of the concern around technical and financial resources.

Timelines

QRC would suggest that there should be some guidance in legislation or regulation in terms of timelines for when the Minister can impose or vary a condition related to a transfer. It would be beneficial for business certainty if there were timeframes regarding both how long the conditioning power is available to the Minister following a transfer, and how long the Minister will take to make that decision.

Recommendation: Clarity to be provided around timeframes for the Minister to impose or vary a condition.

Retrospectivity

Clause 54, 151, and 174 insert transitional provisions that extend the ability for the Minister to impose or vary a condition of a lease or permit or particular resource authorities whether the lease, permit or resource authority was granted **before** or after commencement. The Bill should clarify that the Minister only has the power to apply or vary conditions on transfers that have occurred after commencement.

Recommendation: These sections be amended to limit the Minister's power to impose a or vary a condition on a transfer from commencement.

¹⁴ Clause 132, s276C; clause 172, s74TA; clause 181, s80A; clause 186, s160A; clause 194, s424A; clause 197, s455A.

Notification

In terms of notification, clause 102 outlines that proponents must notify the scheme manager in the event that an indirect (or direct) transfer has occurred. This is an existing requirement under section 42 of MERFPA. QRC understands that this existing notification will also be used (by the scheme manager) to notify the Minister. As such, QRC understands that there is no need for an additional obligation on the resource authority holder to also notify the Minister.

Recommendation: Government confirm that the existing provisions under the MERFPA will be relied upon for notification to the Minister and that DNRME will not be seeking additional requirements.

DISQUALIFICATION CRITERIA

The Bill proposes 'disqualification criteria' for resource authority applicants. If an applicant (or their associate) meets these criteria, the decision-maker can decide that they are disqualified from being granted or transferred tenure. The explanatory notes outline that the intent behind these provisions is to ensure that the State can better assess the risk associated with applicants for a resource authority. QRC believes that the criteria are too broad, and the decision-makers ability to consider mitigating factors is too limited.

Applicant or associate

The definitions for applicant and associate are outlined in clause 45. An **applicant** is an applicant for grant, tender or transfer. The definition of associate is very broad. **Associate** means:

- (a) An entity the decision-maker considers is in a position to control or substantially influence the applicant's affairs in connect with the resource authority; or
- (b) If the applicant is a body corporate – a director; if the applicant is a subsidiary – the parent company or director of parent company.

QRC would query whether there is a threshold requirement to prove an entity has 'control or substantial influence' over the applicant. What does this entail, and will it be outlined in supporting materials?

Criteria

Clause 79 inserts new section 196C in the *Mineral and Energy Resources (Common Provisions) Act 2014 (MERCPA)*. The section outlines that a decision-maker for the grant or transfer of a resource authority may decide that the applicant for the tender is disqualified from being granted (or transferred) the authority. Subsection (2) outlines the decision-maker must consider the following matters:

- a) Whether the applicant, or an associate of the applicant, has **contravened a Resource Act**;
- b) Whether the applicant, or an associate of the applicant, has been **convicted of an offence** against a Resources Act, Coal Mining Safety and Health Act 1999, Environmental Protection Act 1994, Mining and Quarrying Safety and Health Act 1999, or Water Act 2000;
- c) Whether the applicant or associate has been convicted of an **offence against a corresponding law**;
- d) Whether the applicant or associate has, within 10 years before the application was made, been convicted of an offence involving **fraud or dishonesty**;
- e) Whether the applicant or associate is an **insolvent under administration**;

- f) Whether the applicant or associate is or was a director of a body corporate that is the subject of a **winding-up order** or for which a **controller or administrator** was, within 10 years before the application was made, appointed;
- g) Whether the applicant or associate is **disqualified from managing corporations** because of the Corporations Act part 2D.6;
- h) Submissions, if any, made under section 196G;
- i) Any other matter the decision-maker considers relevant to making the decision.

The criteria are very broad. In fact, they are so broad that they would almost certainly capture the entire industry. For example:

- Subsection (a) - Contravention of a Resources Act could include turning in a report late. Few, if any proponents will have a 100% compliant record.
- Subsection (b) - What is considered an 'offence' under these Acts? Does it mean being prosecuted in Court, or are there specific offences which apply?
- Subsection (c) - Subsection (4) outlines that corresponding law means a law of another State. Will the Department assess if the corresponding laws are substantially similar?
- Subsection (f) - Depending on the construction of the company and the amount of directors, it may be likely that some person or associate has been a director of a body corporate in administration. These are not incredibly uncommon events that automatically evidence maladministration.

QRC understands that it is not the Government's intent to have insignificant or immaterial contraventions or offences affecting the outcome of a grant or transfer. However, as the Bill currently reads, there is uncertainty as to what may result in a disqualification. There is a need for greater clarity in the Bill to reflect the scope and extent to which the disqualification criteria apply.

The explanatory notes state that the criteria 'are considered to be sufficiently defined in the Bill'.¹⁵ This is used as a reason why the section's breach of fundamental legislative principles is acceptable. It is concerning that such broad criteria are seen as 'sufficiently defined'.

In addition, QRC is interested in how these amendments will be managed and implemented. Will there be some form of register of disqualified/pre-qualified parties? Presumably the operational teams will need significant guidance as to what satisfies such broad criteria.

Recommendations:

- (a) Re-draft 196C(2) to ensure it is appropriately constrained and does not have unintended consequences.
- (b) Narrow clause 2(a) to ensure it reflects the intent of this section.
- (c) Supporting material (i.e. operational policies and explanatory notes) be developed to provide clear information about the application and use of the new disqualification criteria and powers.

¹⁵ Explanatory Notes, Minerals, Energy Resources and Other Legislation Amendment Bill 2020 (Qld), p 14.

Discretion

QRC understands that the purpose of subsection 196C(3) is to provide discretion to the decision maker, particularly as the criteria are so broad. However, the discretion provided at (3) is unclear. The section reads:

...the decision-maker **may** disregard a conviction for an offence, or contravention, mentioned in subsection (2) having regard to –

- a) The degree of seriousness of the offence or contravention; and
- b) The degree of harm caused by the offence or contravention; and
- c) The length of time that has elapsed from the commission of the offence or contravention; and
- d) The extent to which the applicant or associate was involved in the commission of the offence or contravention; and
- e) Any other matter the decision-maker considers relevant (emphasis added)

Reference to “a conviction for an offence, or contravention” creates the impression that discretion only applies to those specific criteria (i.e. s 196C(2)(a)-(d)). If so, why doesn't the discretion apply to the whole of subsection (2)? Excluding sections from the Ministers discretion would seem to imply that satisfaction of those disqualification criteria (presumably (e) – (g)) is a *fait accompli*, creating an automatic disqualification.

This is also incompatible with the explanatory notes, which state:

“Where an applicant may trigger the disqualification criteria, the Bill establishes an administrative process that provides the decision-maker with the power to consider the nature and seriousness of the disqualification criteria matter.”¹⁶

This is used as a reason as to why the reform's breach of fundamental principles is appropriate, however the Bill itself does not reflect this. On a plain-text reading, the decision-maker cannot consider mitigating factors for criteria that do not relate to 'an offence or contravention'.

QRC also is concerned by the use of the word 'may' in this section. The section outlines that the decision-maker **may** disregard satisfaction of disqualification criteria by considering mitigating factors. Use of the word 'may' creates discretion for the decision-maker. The decision-maker can disqualify an applicant for satisfaction of the criteria and isn't obligated to consider how serious the offence/contravention was.

Given the broad catch of the disqualification criteria the decision-maker should be obligated to consider mitigating factors for all criteria. Otherwise, on a plain text reading it is entirely possible that the decision-maker could disqualify an applicant based simply on the fact that they had turned in a report late or have an associate who was involved in an insolvent company. Furthermore, any challenge via judicial review of such a decision is unlikely to be successful as the legislation is clear. There would be no need for a judicial officer to look beyond the legislation to extrinsic materials such as the explanatory notes.

¹⁶ Ibid.

In addition to clarifying changes to the legislation, it would be beneficial if substantial guidance is given to the decision-maker. QRC understands that these sections will be supported by an operational policy. The legislation and policy should outline a threshold for seriousness of a breach/contravention in order for it to be considered a disqualifying factor. I.e. offence/contravention would have to be sufficiently serious; evidencing a pattern of high-risk commercial behaviour (e.g. substantial non-compliance or maladministration).

Recommendations:

- (d) Redraft s 196C(3) to ensure that the decision-maker must consider mitigating factors.
- (e) Consider the provision of a 'threshold' for satisfaction of the disqualification criteria.

Natural justice

Prior to an applicant being disqualified, a natural justice process will be applied. New section 196G outlines that an applicant may make a submission in response to a notice of intended disqualification. However, the legislation does not give guidance as to what happens after the applicant make submissions. Is the decision-maker allowed (or obligated) to consider the submission? This is not outlined in the Bill, but it is in the explanatory notes.

The explanatory notes state:

*"Before an applicant can be disqualified, they must be issued a notice outlining the proposed decision and reasons why the applicant has triggered the disqualification criteria. The applicant has the opportunity to make submissions about the notice and the **decision-maker is required to consider the submission** in determining whether the application will proceed or be refused."¹⁷*

This requirement needs to be reflected in the Bill, particularly as it is used as evidence as to why the amendment's breach of fundamental legislative principles is appropriate.

Other aspects of the Bill give the decision-maker the ability to consider submissions made, for example section 132(9)(a) of the *Petroleum and Gas (Production and Safety) Act 2004 (P&G Act)*:

*In deciding whether to impose another condition on, or vary a condition of, the authority to prospect under subsection (3), the Minister **must** consider information or a document, if any, given under subsection (6)(b) or (7)(c).*

Recommendation: Include a section requiring the decision-maker to consider submissions made by the applicant.

Retrospectivity

Clause 80 inserts section 248 of MERCPA. This outlines that the disqualification criteria cannot be used retrospectively. New powers apply only if the application for the grant or transfer of the prescribed resource authority was made after the commencement. QRC supports this clear drafting against retrospective use of the criteria.

¹⁷ Ibid.

CARE AND MAINTENANCE

The FP Consultation Report outlined that stakeholders were supportive of implementing a framework to introduce a monitoring and reporting regime for projects in care and maintenance (**C&M**). QRC's feedback on the ideas proposed in the Discussion Paper outlined that members supported the proposals for improving the current reporting and management of C&M sites. QRC's primary concern was, and continues to be, the minimisation of regulatory burden on proponents.

Development Plans

Currently, mining leases for minerals other than coal or oil shale are not required to submit development plans. To assist DNRME to ensure that the resource authority holder is complying with relevant obligations, the Bill creates a requirement for mineral mining leases (above certain production thresholds) to develop and submit development plans.

New section 317B of the *Mineral Resources Act 1989* (**MRA**) outlines that development plans for mineral proponents will give detailed information about the nature and extent of activities to be carried out under the lease. This will assist the Department in monitoring C&M sites, as proponents will be required to amend their development plan to reflect the changed activities. There is an existing requirement to lodge a Later Development Plan for a significant change in activities (such as cessation of activities).

QRC does not oppose the introduction of requirements for mineral mining leases to submit development plans, however further consultation should be undertaken directly with the holders of metals resource authorities.

Projects

Proponents will only have to provide one development plan per project. New section 246(3) in the MRA states that if the proponent has several leases that are part of a resource project (as defined in the *Environmental Protection Act 1994*) the development plan may also relate to one or more of the prescribed leases that comprise the project. QRC supports the concept of one 'project' development plan. This will minimise regulatory burden on proponents.

Thresholds

Development plans will be required for mineral proponents where they either propose mining the threshold amount,¹⁸ or actually mine the threshold amount in any one year. If part of a mining project, the amount mined is measured as an aggregate for the entire resource project. The production thresholds are outlined in the amendments to the *Mineral Resources Regulation 2013*; insertion of new Schedule 2A.

The QRC has not had the opportunity to thoroughly engage with its mineral membership in regard to the above thresholds. Further work will be required to reality-check these production levels.

Mineral	Threshold amount
Bauxite	500,000t
Clays	50,000t
Copper	1,000t
Diatomite	10,000t
Dimension stone	50,000t

¹⁸ Clause 127, new section 246 of the MRA.

Gold	100kg
Gypsum	50,000t
Lead	5,000t
Limestone	100,000t
Magnesium rich materials	250,000t
Phosphate rock	10,000t
Silica	100,000t
Silver	5,000kg
Tin	100t
Titanium minerals	50,000t
Zinc	5,000t
Zircon	1,000t

Recommendation: Further consultation with industry on reporting thresholds.

Transitionals

QRC supports there will be a three-year transitional period for existing mines to provide development plans. It is recognised that any applications to renew a mining lease must include a proposed initial development plan (if the mine meets the threshold) and new mines will need to provide development plans from the grant of the mining lease.

ABANDONED MINES

The Bill proposes the broadening of DNRME abandoned mines remediation powers. The broadening of these powers reflect the activities required to remediate a site. Additional changes will also be made to outline how authorised persons can access land that is outside of the original tenure boundary to carry out remediation activities.

QRC does not have concerns with the amendments to DNRME's abandoned mine remediation powers. QRC fully supports the Queensland Government's policy position of making sites safe, secure, durable and, where possible, productive.

MINING LEASE TENDERING PROCESS

The Bill proposes amendments to the MRA to introduce a competitive tender process for mining leases. This would allow a successful tenderer to apply directly for a mining lease where appropriate, for example on an abandoned mine. Existing requirements for mining lease applications remain, save for the pre-requisite requirement to hold the exploration tenure.

Through this initiative, the Government hopes to expedite mining and therefore financial return to the State by testing the market value of the opportunity being offered. QRC supports these amendments and understands they are intended to apply to mineral mining leases however if desired, could apply to a coal mining lease.

In the event the process is used for a coal mining lease, QRC suggests careful consideration be given prior to the release for tender. QRC would expect an assessment of overlapping gas tenure be undertaken given the overlapping tenure framework in MERCPA outlines a 10 year notice period to an overlapping gas party that could trigger significant compensation if mining commences within that 10 year notice period.

As recommencement of mining might involve new mining, metallurgical, resource, infrastructure and feasibility studies (often over an extended period) it would be beneficial for the MRA to have a facility that the holder of a mining lease may apply for the grant of a Mineral Development Licence for the same mineral over the same or part area. This is not currently provided for in MRA section 179.

Efficiency and Duplication reforms – detailed submission

The explanatory notes outline that these amendments are aimed at improving the administration and effectiveness of the regulatory framework applying to resource projects. These amendments were a result of a 2017 election commitment to the Association of Mining and Exploration Company (AMEC) to investigate opportunities to improve the efficiency and timeliness of the resource authority approval process. QRC is broadly supportive of these amendments.

DISPUTE RESOLUTION FRAMEWORK FOR OVERLAPPING TENURE APPLICATIONS OR ACTIVITIES

The Department have identified a few instances in the Resource Acts where pre-existing tenure holders effectively have a right of veto of subsequent applications for other leases that overlap their tenure. The Bill proposes legislative amendments to create a dispute resolution framework for circumstances where the consent of the pre-existing tenure holder has not been obtained.

QRC understands that while these new sections are modelled on the dispute resolution processes in the overlapping tenure framework, they will not impact or change the existing overlapping tenure framework. This is because the instances identified are where both leases are targeting the same commodity.

Clause 75 outlines that Part 6, Division 4 of MERCPA¹⁹ (the overlapping tenure dispute resolution processes) will apply to disputes between:

- (j) Later mining lease holder (specific purpose mining lease or transportation mining lease)²⁰ and the existing authority holder;²¹
- (k) Pipeline licence holder and existing lease holder;²² and
- (l) Petroleum facility licence holder and the existing lease holder.²³

Parties will be required to provide information, negotiate in good faith and use all reasonable endeavours to agree. Parties must also carry out activities in compliance with an agreed co-existence plan.

If the parties cannot agree on a co-existence plan within three months after the grant of the new lease (or within a longer period agreed to), the new lease holder must apply for arbitration of the

¹⁹ Amends section 175 of MERCPA

²⁰ New section 271AB into the MRA

²¹ New section 271AB(9) of the MRA.

²² New section 400(7) of the P&G Act.

²³ New section 440(7) of the P&G Act.

dispute. Arbitration will be conducted in the same manner as it is for disputes between parties within the overlapping tenure framework.

QRC supports these amendments.

COUNTING PETROLEUM LEASE AREAS TOWARDS RELINQUISHMENT

This section introduces amendments to ensure equity with other commodities in terms of what contributes towards satisfaction of relinquishment requirements. The recent *Natural Resources and Other Legislation Amendment Act 2019 (NROLA)* allowed coal and mineral exploration tenures progressed to higher tenure to count towards relinquishment requirements.

The amendments will introduce the same provisions for petroleum proponents. Key changes are:

- Exploration areas (authority to prospect) converted to higher tenure (petroleum lease) will count towards relinquishment requirements;
- Exploration areas under application for higher tenure (petroleum lease) will proportionally defer relinquishment requirements until the department assesses the application and makes a decision to either grant or not approve; and
- If the petroleum lease application is withdrawn or refused, the resource authority holder has 20 business days to meet the deferred relinquishment requirement.

QRC strongly supports these amendments. QRC has requested that the Department provide clear guidance on the last dot point. The process for relinquishment where an application is unsuccessful or withdrawn should be explicit prior to any change being implemented.

ALLOW AMALGAMATION OF TENURES ON REPLACEMENT FROM THE 1923 ACT TO THE P&G ACT

NROLA introduced amendments to allow amalgamation of petroleum leases under the P&G Act, but not leases under the *Petroleum Act 1923 (1923 Act)*. This Bill includes amendments to allow the amalgamation of tenures on replacement from the 1923 Act to the P&G Act. This will allow these two processes (replacement and amalgamation) to occur simultaneously. QRC supports these amendments.

ATTACHMENT A – Example operator impacts

Examples of impacts on contracting arrangements from the proposal that statutory positions must be appointed by the coal mine operator.

Example 1:

A local entity nominated as the Operator of a coal mine is a separate to a large mining company that holds the lease, and a contractor is appointed to undertake a certain task on the mine. The contract applies to that task at the mine only, and is between the Operator and the contractor only, not the bigger mining house. The Operator has its own SSE and Mining Manager but the contractor appoints an OCE assuming accountability in the contract to keep the mine inspected and safe consistent with the responsibilities of an OCE. The contract also sets out linkages to the Operator's systems and processes.

In this arrangement, since they are not currently required to be employed by the Operator there could be more than one OCE, with the safety benefit that the contract OCE will have a greater focus on their specific area. Changing this arrangement and putting greater responsibility on a single individual reporting to the Operator could increase risk.

Example 2:

A local entity nominated as the Operator of a coal mine is appointed to operate a coal mine by a joint venture that holds the lease. The Operator is a company owned by a large mining company, which operates a number of mines, so a number of senior coal mine workers are employed through a separate central management company owned by the large mining company and are then seconded to the Operator to fill the statutory positions. This arrangement allows the mining company the flexibility to move people around its various operations, including to enable the best of its people to be promoted into positions as they become available. The requirement to have statutory positions employed by the Operator would reduce this flexibility and mean that the ability to promote the best people into available positions may be compromised.

Example 3:

An Operator is in the position where they may be undertaking the following:

- Start-up of a mine;
- Project Work i.e. CHPP expansion, building regulated dam; and
- Care and maintenance of a mine.

Operationally they would have to look at a different management structure to fulfil the roles in the structure. Often these Statutory positions will not be a full time role or if they are, it is for a defined period of time with an end date as in relation to Project Expansion e.g. CHPP upgrade. Currently the usage of contracted Statutory Positions are how mine Operators manage their flux with their labour pool without employing the positions directly. This also ensures that the operator gets highly skilled professionals because they can pay them only for the hours that they work. The same amount of accountability for the role has been enforced and defined in the site s55 Management Structure.

Example 4:

A contractor provides specialist services such as injection of polyurethane for strata control in a longwall or sealing of ventilation control devices. Due to the nature of the chemical being used and the requirements of Recognised Standard 16 for the use of polymeric chemicals, the ERZ Controller for the zone of application must understand both the hazards and controls of the

process and undertake the required medical assessments on an ongoing basis. This is often impractical for the mine operator as such applications may be sporadic in nature and unworkable to employ and maintain competency of multiple ERZ Controllers at the mine. It is typically a skill that is contracted out.

Example 5:

A contractor is engaged to provide additional labour and inspection capability for peak workload periods such as longwall relocations. Such tasks can increase the workforce by 60-80 miners with the associated ERZ Controllers to control and manage the affected work areas. Often times, these work teams and ERZC are skilled in longwall relocations and heavy relocation equipment operation, as different to the employed workforce who operate the longwall equipment.

Example 6:

A contractor is engaged to provide secondary roof support installation in a remote area of the mine, often many kilometres away from operating mining areas, but in preparation for accessing such future areas. Mines will typically employ outbye ERZ Controllers for the usual outbye inspections at a mine and will often be stretched to cover contractors who are interfering with the roof and sides in a remote area. The contractor will typically provide ERZ Controller coverage and direct supervision of the remote location.

ATTACHMENT B – MMAA letter



Secretary: Ray Robinson



Phone: [REDACTED]



www.collierymanagers.org.au

Queensland Resources Council
 Level 13
 133 Mary Street
 BRISBANE 4000

Attention: Mr Ian Macfarlane, Chief Executive

Dear Sir

Subject: RSHQ proposal to introduce industrial manslaughter provisions in to the Resource Acts

I write on behalf of the Mine Managers' Association of Australia (the Association) and before addressing the issue I wish to communicate it is perhaps appropriate to introduce the Association.

The Association's predecessor, the Colliery Managers' Association of New South Wales, was constituted in the Hunter Valley in 1942. Since its inception the Association has grown to represent members in most states of the Commonwealth and New Zealand. Our membership has grown to over 420 members and membership, whilst mainly directed to practising mine managers, also includes a diverse range of senior management in the coal mining industry; from chairmen and directors of companies, mines inspectors, academics, consultants and senior technical managers. To our knowledge all practising underground mine managers (UMMs) in Queensland are members of the Association, as are a significant number of Site Senior Executives (SSEs).

The objects of the Association are:

- To advance the interests, and raise the status of members,
- to maintain members' competencies and continue their professional development,
- to improve health and safety in the workplace,
- to provide support to members in employment related issues,
- to contribute to sustainable mine development and industry growth, and
- to assist members with legal issues relevant to their work in the industry.

The Executive of the Association, following representation from a significant number of our Queensland members, are extremely concerned over a number of matters relating to the proposed introduction of industrial manslaughter provisions in the Coal Mining Safety and Health legislation and we are led to believe those concerns are also shared by a number of operators that your organisation represents.

We, like your organisation, will be submitting a response to the RSHQ on the proposals and one of the concerns we will be raising is the number of senior mine site personnel that are actively considering their positions should this, in our opinion, discriminatory and draconian amendment be introduced. Thus, the reason for this communication, I believe some of your

Industrial Manslaughter Provisions in Resource Acts

member companies, but perhaps not all, are aware of the consideration being given by some senior mine site managers (SSEs and UMMs) to resign their positions should the industrial manslaughter provisions be promulgated to include senior mine site management. We wish to ensure all stakeholders are aware of the potential consequences of this ill thought out and knee jerk legislation.

From our discussions this is not an idle threat. In my time as a member of the Association and certainly in the last 6 years as President I cannot recall a proposal in the coal industry that has elicited such angst and ire amongst the membership.

This should be of great concern to your members and the Government. As it is, the industry is bereft of quality management and to lose more would create significant efficiency and safety concerns particularly when some of those considering their options, in my opinion, are the better quality managers.

Should you wish to discuss the contents of this letter we would be more than pleased to do so. Our Secretary, Ray Robinson, can be contacted on [REDACTED] and I can be contacted on [REDACTED]

Yours sincerely



Gavin Taylor
President
MMAA

Cc: Shayne Hansford, Policy Manager, Safety and Health.

