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27 February 2020

Committee Secretary  
State Development, Natural Resources and  
Agricultural Industry Development Committee  
Parliament House  
George Street  
Brisbane Qld 4000

By Email: [sdnraidc@parliament.qld.gov.au](mailto:sdnraidc@parliament.qld.gov.au)

### Mineral and Energy Resources and Other Legislation Amendment Bill 2020

Westside Corporation Pty Ltd (WestSide) is a growing oil and gas explorer and producer that has been successfully exploring, developing and operating in Queensland since 2005, and in New Zealand since 2016.

WestSide is the operator of the Greater Meridian Gas Field near Moura in Queensland on behalf of itself and Mitsui E&P and the operator of gas exploration projects near Taroom and Mt Saint Martin in Queensland.

In late 2019, the Australian Petroleum Production & Exploration Association (**APPEA**) was provided with a consultation draft of the proposed industrial manslaughter provisions that have been incorporated in the *Mineral and Energy Resources and Other Legislation Amendment Bill 2020*. Following APPEA's review of the consultation draft, APPEA provided the **attached** submission to the Department of Natural Resources, Mines and Energy proposing suggested changes to the consultation draft. None of APPEA's suggested changes have been adopted in the Bill that was tabled in Parliament.

WestSide endorses the submission made by APPEA and requests the Committee to recommend that the Bill be amended to adopt APPEA's suggested changes.

Having regard to the objective for introducing the new offence into the *Petroleum and Gas (Production and Safety) Act* that is stated in the Explanatory Notes for the Bill, WestSide believes that the amendments to the Bill proposed in APPEA's submission would provide greater certainty for all involved in the industry by making the offence applicable to an officer as defined and understood in the context of the *Corporations Act 2001* (Cth).

The proposed changes would also mean that the offence will not apply to persons within an organization that do not have the ability to influence the organization as a whole. This is particularly an issue for Site Safety Managers appointed under s.692 of the Act. WestSide considers that the possible application of the new offence to a Site Safety Manager would not serve the objective stated in the Explanatory Notes because a Site Safety Manager is already exposed to a range of penalties for unsafe practices at gas operations under the Act.

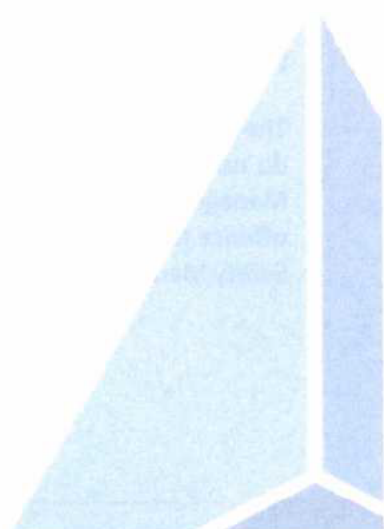
The nature of the role of Site Safety Manager also means that the person fulfilling the role is unlikely to be involved in decision-making affecting the company as a whole.

Yours sincerely,



**Matt Wallach**  
Chief Executive Officer

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9 December 2019

RSH Policy  
Resources Safety and Health  
Department of Natural Resources, Mines and Energy

Via email: [redacted]

Dear Sir/Madam,

**RE: Consultation draft of the Mineral and Energy Resources Legislation Amendment Bill 2019 (the Bill)**

I am writing to provide feedback on the above Bill.

At the outset I would like to emphasise the strong commitment to safety across the Queensland petroleum industry. The industry has an excellent track record in keeping workers safe and proactively works to ensure safety is front of mind for all workers.

Evidence of this committment can be found in *Safer Together*, a not-for-profit, member-led organisation committed to creating the leadership and collaboration needed to build a strong and consistent safety culture. *Safer Together* was formed and is operated by industry participants and contract partners.

Through *Safer Together* the industry has developed a range of initiatives to improve safety performance including common in-vehicle monitoring system specifications, specifications for light and heavy vehicles operating in the industry, common safety training requirements and competencies, safety culture toolkits, standardised safety induction training, and processes for the communication and sharing of learnings from safety incidents.

The industry is proud of its safety culture and performance. Over the past three and a half years (Q 2016 to Q3 2019 inclusive) fatality and accident data indicates the industry’s approach to safety and the existing regulatory system is producing results on a variety of metrics:

Hours worked	87.3 million (avg. 1.94 million hours per month)
Fatalities	1
LTI	52
RWC	98
MTC	112
FAR	1.14 per 100 million hours worked
LTIFR	0.59 per million hours worked
TRIFR	3.01 per million hours worked

The industry’s three year rolling average FAR of 1.14 compares closely to the global petroleum industry’s 2018 FAR of 1.01. Since Q4 2016 there have been no fatalities in the Queensland petroleum and gas industry, giving a FAR of 0.00 for 2 consecutive years which compares to the

Canberra [redacted] Adelaide [redacted] Darwin [redacted] Perth [redacted] Melbourne [redacted]



global industry FAR of 1.01, these are the lowest figures on record. A study of publicly available safety data across all sectors in Australia shows that oil and gas is typically in the upper decile in safety performance. By way of comparison, a person is approximately 20 times more likely to be killed in a road traffic accident in Queensland than a Queensland gas industry worker is to be killed at work.

Reforms to safety regulation should be evidence-based and carefully constructed to ensure they improve, and do not degrade, the safety of workers. With regard to the reforms that are the subject of the Bill we submit that evidence supporting these changes is lacking.

The independent review of Workplace Health and Safety Queensland following the tragic incidents at Dreamworld and Eagle Farm did not consider petroleum industry safety performance and procedures. The rationale for that review and consequent reforms do not exist in the context of Queensland's petroleum legislation.

While legal obligations and penalties are important, significant obligations and penalties already exist. Given the industry's excellent safety record is in part a product of the existing legislation we suggest that reforms aimed at preventing injuries (e.g. enhanced training requirements, more extensive inspection regimes) would be more effective in improving safety performance than the Bill's focus on punitive actions after a fatality has occurred.

#### **Key issue – application of industrial manslaughter offence goes beyond top-level management**

We make the following comments on the Bill.

APPEA's understanding of the intent of the Bill is to establish an offence of industrial manslaughter to apply to **persons with influence over the company as a whole**. This intent is not given effect by the Bill.

In particular, the offence is applied to:

- 'senior officers' and 'officers' which would include statutory roles, in particular site safety managers (SSMs), who have operational safety obligations under the *Petroleum and Gas (Production and Safety) Act 2004 (P&G Act)*. SSMs already have significant personal exposure and liability under existing arrangements and increased penalties would therefore not improve safety performance. Such an approach may in fact degrade industry's ability to attract the best staff given the global nature of the petroleum industry.
- 'employers' defined to include a person who employs individuals or engages labour-hire workers or independent contractors (who in turn will be considered as 'workers'), as well as the contracting entity who is the employer of a labour-hire employee.

The above positions are not positions that have influence over the company as a whole and we therefore seek amendment to the Bill as shown in **Table 1** below.

The most effective way to ensure that statutory roles under the P&G Act are not captured by the term 'senior officer' is to seek to have them specifically carved out in the drafting of the offence and the relevant definitions.



If the intention of government is that the persons who would usually fill these roles should **not** be considered 'senior officers' for the purposes of the offence, then this can be easily achieved by inserting a provision which excludes them.

The role of SSM should therefore be excluded from the definition. It is not a position held by a person with influence over the company as a whole. It is usually held at site level only and is operational in nature.

**Table 1**

Proposed provision	Recommendation
799I	<p>The term 'senior officer' and its corresponding definition be removed.</p> <p>The term 'officer' be inserted and defined as follows:</p> <p><i>officer</i> means an officer within the meaning of Section 9 of the <i>Corporations Act 2001</i> of the Commonwealth. It does not include the Site Safety Manager under this Act or any person who reports to the Site Safety Manager.</p> <hr/> <p>The term 'employer' and its corresponding definition be removed.</p> <p>The terms 'operator' and 'person holding a gas work licence' be inserted.</p> <p>The term 'person holding a gas work licence' be defined as follows:</p> <p><i>person holding a gas work licence</i> means a person who currently holds a gas work licence or gas work authorisation under Chapter 8, Part 6, Division 3 or gas device approval authority under Chapter 8, Part 6A, Division 2.</p> <hr/> <p>The definition of 'worker' be amended to include the words 'at the site of the operating plant or gas work' at the end of the definition.</p>
799L	<p>The term 'senior officer' be substituted with the term 'officer' throughout.</p>



## Further background

The rationale for the above amendments is as follows.

### *Senior officer and officer*

The definitions used in the draft Bill are identical to those which were inserted in the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) in relation to a person conducting a business or undertaking (**PCBU**) at the time of introducing the industrial manslaughter offence in 2017.<sup>1</sup>

The term 'executive officer' was previously also used in the *Work Health and Safety Act 1995* (Qld). However, during the harmonisation process, the term 'executive officer' was replaced with the term 'officer' (which incorporates the Corporations Act definition). The change was made to address specific concerns submitted to the National Review into Model Occupational Health and Safety Laws that *'the expression "concerned in the management" of the corporation was too wide and may extend to those in middle management positions with only limited ability to influence the decisions that determine the capability or performance of the corporation'*.<sup>2</sup>

Ultimately the review panel recommended that the term 'officer' be included in the model WHS laws using the *Corporations Act* definition on the basis that (among other things):

- it provided greater clarity than the definition of 'executive officer' and was *'far less likely than the latter to have unintended application to middle managers or other workers'*; and
- the definition should not *'blur the line'* between the role of *'making decisions that provide for the governance of the entity'* and the role of *'making decisions on action to be taken in relation to an item of work or specific activity'*.<sup>3</sup>

Under the *Corporations Act*, an officer of a corporation means:

- (a) *'a director or secretary of the corporation; or*
- (b) *a person:*
  - (i) *who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
  - (ii) *who has the capacity to affect significantly the corporation's financial standing; or*
  - (iii) *in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation) [...]*

<sup>1</sup> See section 34A of the WHS Act.

<sup>2</sup> National Review into Model Occupational Health and Safety Laws – Second Report to the Workplace Relations Ministers' Counsel (January 2009) at page 67.

<sup>3</sup> Ibid at pages 69-70.



Unsurprisingly, recent commentary on the WHS Act offence has focused on the difference between the definitions of 'senior officer' (and therefore, 'executive officer') and 'officer' under the WHS Act,<sup>4</sup> particularly given the commentary surrounding the term 'executive officer' during the harmonisation process.

The offence is a serious offence, and as such, liability should be reserved for those very senior persons within the organisation who by virtue of their position have the real ability influence the decisions of the organisation as a whole.

One of the key difficulties with the current definition of senior officer is that it does not provide any clarity regarding what being '*concerned with*' or '*taking part in*' the management of a corporation may entail, and whether this is reserved for the relevant senior roles within a corporation. A person who is '*concerned with, or takes part in, the management*' of a corporation may not necessarily be a person who would also (or otherwise) make or take part in making '*decisions that affect the whole, or a substantial part of the business of the corporation*'.

This was a key issue in the prosecution following the Gretley Colliery disaster in November 1996. Eight individuals with management responsibilities were prosecuted under the *Occupational Health and Safety Act 1983* (NSW) in relation to the incident. At first instance, the two mine managers and a third party surveyor were found to be sufficiently concerned in the management of the corporation to be liable under the executive liability provisions as existed at the time.<sup>5</sup>

Although the decision was partly overturned on appeal, it is a practical demonstration of the potential reach of the 'executive officer' definition and the uncertainty about the scope of its application including by the regulator.<sup>6</sup>

Accordingly, we recommend that the proposed offence be amended to apply to 'officers' as defined in the Corporations Act.

#### *Employer and worker*

The consultation draft of the Bill seeks to introduce a new concept of 'employer' into the P&G Act.

The term 'employer' is defined in proposed provision 799I to mean:

***employer***, for an operating plant or gas work, means a person who employs or otherwise engages a worker in relation to the operating plant or gas work.

The phrase 'employs or otherwise engages' has likely been included to overcome the issues encountered with the definition of employer under the pre-harmonisation *Work Health and Safety Act 1995* (Qld), which only covered the workers actually employed by the employer.

This definition is arguably narrower than the concept of a PCBU, which is the relevant entity in respect of the WHS Act offence, as it is limited to a person who employs or otherwise engages a worker in relation to the operating plant or gas work.

<sup>4</sup> See e.g. Marie Boland, *Review of the model Work Health and Safety laws – Final report* (December 2018) at page 121.

<sup>5</sup> See *McMartin v Newcastle Wallsend Coal Company Pty Ltd & Others* [2004] NSWIRComm 202.

<sup>6</sup> *Newcastle Wallsend Coal Company Pty Ltd & Others v Inspector McMartin* [2006] NSWIRComm 339



Nonetheless, an 'employer' will include a person who employs individuals or engages labour-hire workers or independent contractors (who in turn will be considered as 'workers'), as well as the contracting entity who is the employer of a labour-hire employee.

As a result employers may be liable in respect of the death of a worker employed by them or employed by a sub-contracting entity.

'Worker' is defined as:

*worker, in relation to an operating plant or gas work, means an individual who carries out an activity related to the operating plant or gas work.*

A worker under the current definition includes anyone who 'carries out an activity related to the operating plant or gas work'. It does not necessarily require a worker to be carrying out the activity at the operating plant or gas work. This appears to be very broad, as it could potentially include workers otherwise not on site at the operating plant or gas work.

The primary difficulty with the use of the term employer in the Bill is that it is not used or reflected elsewhere in the P&G Act. There is no direct link between the new obligation to be imposed on an employer and the existing obligations on operators or persons holding a gas work licence. Similarly, the definition of worker does not draw on or refer to the existing obligations towards persons at an operating plant.

We therefore seek an amendment to the definitions to the effect that the term employer and worker is substituted for:

- (a) 'operator' as defined under the P&G Act in relation to operating plant;
- (b) a person holding a gas work licence in relation to gas work; and
- (c) 'worker' be amended to include the words 'at the site of the operating plant or gas work'.

#### **Additional considerations**

**Limitation on Time for Starting Proceedings** - The draft Bill introduces Section 837 (7A) of the P&G Act *Offences under Act are summary* and in so doing it removes the limitation on time in bringing a prosecution for an offence of Industrial Manslaughter. APPEA believes that this places an unreasonable burden on all who are involved with managing an industrial fatality, including the family, the witnesses, the investigating personnel etc. We believe the original timeframe of 2 years to bring a prosecution under the P&G Act Section 837 (4) (C) limits this burden.

**Section 799J Exception** – The draft Bill in Section 799J removes the defence which has been present in Section 23 (1) *Intention – Motive* of the Criminal Code Act 1899, namely the defence of an act or omission which occurs independently of a person's will, or an event which the person does not intend or foresee as a possible consequence, or one which an ordinary person would reasonably foresee as possible. The rationale for removing this defence is not clear recognising that it has stood the test of time for 120 years and that it is based on a common law view of reasonably foreseeable consequences from acts or omissions.





**Definitions** - Unlike the WHS Act, the P&G Act has retained this same definition of 'executive officer' since its introduction, and still relies on this definition in relation to the executive liability provisions under the P&G Act.<sup>7</sup>

The term 'senior officer' will therefore need to be interpreted in a manner that is consistent with the approach taken to the term 'executive officer' in respect of these provisions.<sup>8</sup> Under ss 814 and 814A of the P&G Act, an executive officer will commit an offence against an executive liability provision if he or she:

- (a) did not take *'all reasonable steps to ensure the corporate did not engage in the conduct constituting the offence'*, which includes:
  - (i) *'whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence against the executive liability provision; and*
  - (ii) *'whether the officer was in a position to influence the corporation's conduct in relation to the offence against the executive liability provision';*
- (b) *'authorised or permitted the corporation's conduct constituting the offence';* or
- (c) *'was directly or indirectly, knowingly concerned in the corporation's conduct'.*

The context provided by the executive liability provisions demonstrates that 'executive officers' may be liable for offences under the P&G Act where they are in a position of influence or authority over the conduct of the corporation.

It is therefore arguable that, if read consistently with the executive liability provisions, the scope of proposed industrial manslaughter offence should be restricted to senior officers who are in a position to know of, influence, authorise or permit the relevant conduct of the corporation. This position would more closely align with the second part of the definition of a 'senior officer' for non-corporations, being a person who *'makes, or takes part in making, decisions affecting all, or a substantial part'* of the corporation's functions.

However, in the absence of an authoritative interpretation of the term 'executive officer' under the P&G Act,<sup>9</sup> there is still a risk that the current definition of senior officer may capture managers below the executive level as discussed above.

To ensure consistency between Acts as well as the other offences and terms used within them, it is still preferable to amend the proposed industrial manslaughter offence to use the term 'officer' (incorporating the definition from the Corporations Act), as:

- (a) it has a well-established meaning under the Corporations Act;

<sup>7</sup> See P&G Act ss 814 and 814A

<sup>8</sup> Unfortunately, we have not been able to identify any published decisions on these provisions which would assist in understanding the Court's approach to interpreting this term.

<sup>9</sup> While it is possible that the term has been considered by a Magistrate, any such decision will not be binding in relation to separate proceedings brought under the P&G Act. We have not been able to identify any binding authority on this issue.



- (b) would not likely capture lower level managers, such as SSMs; and
- (c) is already incorporated into the WHS Act and Mining Safety Acts.

On a separate note (and although it is outside of the scope of this particular Bill), we would like to discuss further amending the P&G Act to replace the executive liability provisions with officer due diligence obligations which are consistent with the WHS Act and recent amendments to the Mining Safety Acts.

I would welcome the opportunity to discuss this submission further.

Yours sincerely,

A handwritten signature in black ink that reads "Matt Paull". The signature is written in a cursive, slightly slanted style.

**Matthew Paull**  
Queensland Policy Director