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Office of the President

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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

Dear Committee Secretary

Mineral and Energy Resources and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide comments on the Mineral and Energy Resources and Other Legislation Amendment Bill 2020 (**Bill**).

Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Industrial manslaughter

This response has been compiled with the assistance of members of the Mining and Resources Law, Industrial Law and Criminal Law Committees who have substantial expertise in this area.

QLS is a strong advocate for effective work health and safety laws that promote safety and prevent workplace injuries.

Background

In October 2017, the Queensland Parliament introduced "industrial manslaughter" provisions into the *Work Health and Safety Act 2011* (**WHS Act**), *Electrical Safety Act 2002* (**ES Act**), and *Safety in Recreational Water Activities Act 2011* (**SRWA Act**) (collectively, the **WHS Legislation**).

This Bill amends the *Coal Mining Safety and Health Act 1999* (**CMSHA**), the *Mining and Quarrying Safety and Health Act 1999* (**MQSHA**) and the *Petroleum and Gas (Production and Safety) Act 2004* (**P&G Act**) (collectively, '**the Resources Safety Acts**').

The Explanatory Notes to this Bill outline the consultation that has taken place with respect to these amendments including through a discussion paper in November 2018 and an

information paper and draft bill in 2019. The information paper refers to the introduction of industrial manslaughter offences in the WHS Act in 2017 and states that at this time, the government stated it would not move to introduce these offences into the Resources Safety Acts until appropriate consultation occurred with the resources industries.

The notes state that stakeholders had polarised views about the introduction of the offences, with unequivocal support being given by the unions and industry stakeholders are either not supporting, or raising concerns with, some other details of the proposal. QLS has not otherwise been made aware of the outcome of the consultation process including what evidence exists to demonstrate the need for the amendments.

Our comments on the "industrial manslaughter offences" are made in respect of the amendments to each Resources Safety Act (clauses 11-17, 30-34 and 157-163), unless otherwise stated.

Key issues of concern

No need for a new offence

QLS opposes the introduction of new criminal offences without cogent evidence to demonstrate their need and evidence that existing laws are not capable of capturing the conduct which is the target of the offence. Offences addressing fatalities in the resources sector already exist in the Resources Safety Acts[1] and within the Criminal Code[2]. Neither the consultation papers nor the Explanatory Notes provide any evidence to suggest that there have been incidents where deaths have occurred that have been unable to be successfully prosecuted under these existing provisions. If there are these instances, then this information should be provided in the explanatory material.

Exclusion of section 23 of the Criminal Code, penalties and standard of care

The Bill explicitly excludes the operation of section 23 of the Criminal Code. QLS is particularly concerned that an accused will therefore not be able to plead circumstances of accident, involuntariness or acts independent of their will. In the absence of appropriate defence or excuse provisions, these provisions essentially become strict liability offences, which infringe and deny fundamental rights given to those accused of homicide offences which carry an extremely high maximum penalty. It is the Society's view that this infringement of a cornerstone principle of our justice system is not justified by the objects and purposes of the legislation.

It is also a significant concern that only custodial penalties are contemplated for individuals, which removes judicial discretion to apply financial penalties where that may be a more appropriate alternative.

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[1] Refer to sections 34 - Discharge of obligations and 47A - Obligation of officers of corporations of the CMSHA; sections 31 - Discharge of obligations and 44A - Obligation of officers of corporations of the MQSHA and sections 732 - Increase in maximum penalties in circumstances of aggravation and 814A - Executive officer may be taken to have committed offence of the P&G Act.

[2] Refer to sections 300 - Unlawful homicide and 328 - Negligent acts causing harm.

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In addition we note the proposed offence provisions only apply if the employer or senior officer is *negligent* in causing the death. To avoid any doubt, we submit that the term "criminal negligence" should be used instead to ensure the affected parties are aware of the standard of care required by the employer or senior officer. If an industrial manslaughter provision is to be introduced into the Resources Acts, then such an offence must have its basis in criminal negligence. To weaken that level of criminal culpability has the potential to unfairly and unreasonably expose persons to conviction and punishment for an unintentional omission or momentary inadvertence relating to the management of a safety and health management system. This would also occur in circumstances where more appropriate and proportionate offences and penalties could apply.

Employers and senior officers

We hold some concerns with the use of the term, "employer". This is a new term for much of the legislation being amended by this Bill. Operators within these industries understand their functions by reference to the terminology/roles set out in the existing legislation. "Employer" is a new and very broad term and it is potentially unclear as to who it is intended to apply to in a modern mining operation. The effect of this definition could mean that more people are captured by this offence than is the case under the general WHS legislation. If this is not the policy intent behind the definition, then we recommend that this definition be amended to give certainty to these industries.

Additionally, we are concerned that the definition of "senior officer" is too broad and will have unintended consequences. The offences, as currently drafted, only apply to the employer and senior officers and not to any other worker or employee. This was obviously a policy decision. However, due to the broad definition of "senior officer" any person who "takes part" in making a decision affecting a substantial part of the employer's function will be captured and, if the employer is a corporation, a person who is concerned in, or takes part in, the management of the body (regardless of the person's designation and whether or not the person is a director of the body) will also be captured.[3] The health and safety laws applicable to the resources industry have been distinguished from those applying to other workplaces. The former involves a number of industry-specific roles and regulatory requirements. The way the provisions are currently drafted, it is possible that a person holding any of these roles could be exposed to this offence. Great care should be exercised in imposing a new offence, with such a significant penalty, on individuals who will be classed as being an "executive officer" or a "senior officer" by virtue of their statutorily imposed role, only.

It is also important to consider that the particular framing of obligations imposed on individual duty-holders under the Resources Safety Acts have the potential to make proposed industrial manslaughter laws particularly harsh and unjust. The approach of the Resources Safety Acts to duties and duty-holders is very different from the WHS Legislation. Most significantly, under the CMSHA and MQSHA, onerous duties of care are imposed on "site senior executives" (**SSEs**), who have an overarching duty to ensure the risk to persons and coal mine workers, "is at an acceptable level", along with numerous other specific duties. The framing of the duty in this way effectively means that, where a fatal incident occurs, there is an implied assumption that an acceptable level of risk was not achieved, which effectively places a

[3] See definition of "executive officer" – section 9 – Dictionary of the *Corporations Act 2001 (Cth)*.

reverse onus of proof on the SSE. Similarly, onerous obligations are also imposed on other specific duty holders (for example Underground Mine Managers). The framing of these duties has the potential to make the "strict liability" effects of the industrial manslaughter provisions even more harsh and unjust in the context of the risk-based Resources Safety Acts.

Other unintended consequences

In addition to the above, the introduction of industrial manslaughter provisions may also have the unintended consequence of compromising individuals' willingness to participate in safety investigations following fatal accidents, including investigations which SSEs are obliged to undertake. These investigations are critical to improving safety by enabling causes to be identified and lessons to be openly shared and implemented following such accidents. Unless additional privileges and legal protections were to be provided to individuals in connection with the evidence given and findings of these investigations, the outcome of implementing the industrial manslaughter laws may lead to a decrease in participation and quality of these investigations, which would be contrary to the public interest.

Summary

1. For the reasons outlined in this submission, the Society considers the new offences of industrial manslaughter should not be introduced into the Resources Safety Acts.

2. If the the proposed 'industrial manslaughter' offences remain in the Bill, we call for the following amendmentsl:

   a) the standard of proof should be higher, to align with the standard of proof for criminal manslaughter under the Criminal Code;

   b) defences should be available (again, consistent with the Criminal Code) to account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will; additional consideration should be given to defences for specific duty holders who have exercised due diligence, given the framing of duties under the Resources Safety Acts;

   c) the penalties for individuals should not be limited to custodial sentences, and there should be judicial discretion (as there is with most offences) for financial penalties to be imposed in the alternative if appropriate.

   d) Significant consideration including further consultation should also be given to ensuring that there is appropriate and adequate separation between the regulatory, investigatory and prosecutorial arms of the investigating body to protect individual rights and preserve the principles of natural justice.

Finally, additional protections should be provided to ensure that SSE reports and associated documents created for the purposes of or in connection with SSE's statutory obligations are not admissible in any criminal proceeding.

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Financial Assurance and Regulatory Efficiency

This portion of the submission has been prepared by the QLS Mining and Resources Law Committee.

Change of control

QLS has considered the various clauses of the Bill relating to new and amended provisions around the ability to impose or vary conditions where there are changes of control of the tenure holders[4] and notes the following proposed key changes:

- Consideration of transferee's *"financial resources to fund the estimated rehabilitation cost"* when determining applications for assessable transfer of resource authorities (**RAs**); and
- Proposal to create a power to introduce new or amended tenement conditions if tenure holder is subject to a change of control, and the Minister considers that the holder may not have the *"financial and technical resources to comply with conditions of the [relevant] tenure"*.

QLS submits the following concerns regarding the amendments:

a) Uncertainty as to the meaning of "financial resources"

The reference to *financial resources* is undefined, and will give rise to uncertainty in the application of the proposed provisions.

For example, will the decision-maker take into account the financial resources of all authority holders in circumstances where the RA is held by multiple holders? Will anticipated project revenues be taken into account?

A guideline as to how the decision-maker will assess a transferee's financial resources against tenure commitments and the estimated rehabilitation costs may assist but legislative certainty would be preferable.

b) Need for indicative approval for proposed change of control

The introduction of a power to introduce new or changed tenure conditions on a change of control has the potential to materially increase uncertainty around transactions.

Under the proposed regime, there is nothing an acquiring party can do to ascertain the likely outcome of the Minister's assessment.

If the Minister is to be given the power to impose new or changed obligations following a change of control, then provision should also be included in the legislation to extend the existing indicative approval mechanism (which allows consideration of what, if any, conditions will be imposed on a transfer) to allow parties considering a transaction that may result in a change of control, to seek indicative approval in advance.

[4] Clauses 38, 43, 47, 50, 54, 89, 90, 96-103, 117, 122, 132, 151, 172, 181, 185, 194.

c) *Uncertain impact on tenures held by multiple holders*

It is unclear how the proposed power to impose new or amended tenure conditions upon a change of control may impact projects being conducted by multiple entities.

QLS submits that the drafting needs to be improved to make clear whether it is intended that technical and financial resources of all holders will be taken into account.

d) *Need for timeframes to give certainty*

The Bill in its current form does not stipulate timeframes for any of the new decision-making processes contemplated.

This has the potential to add to the uncertainty facing tenure holders subject to the new regime.

While QLS acknowledges the operation of subsection 38(4) of the *Acts Interpretation Act 1954,* we submit that the more appropriate course would be to impose time limitations on any decision to impose new or altered tenement conditions following a change of control.

e) *Consider confidentiality of documents requested during process.*

The amended provisions contemplate requests for information and documents by the Minister to allow consideration of different issues, including whether a change of control has taken place, and whether the holder has the requisite technical and financial resources.

This information is likely to be of a commercially sensitive nature. QLS submits that steps should be taken to ensure information disclosed is kept confidential, for example, by including obligations similar to those found in Part 5 of the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld).

Disqualification criteria for RA applicants

The Bill inserts a new chapter 7, Disqualification of applicants, into the *Mineral and Energy Resources (Common Provisions) Act 2014.*

The proposed amendments permit a decision-maker in respect of an RA (a chief executive or the Minister, as applicable) to disqualify an applicant for a grant or transfer of the RA.

QLS submits the following concerns regarding the amendments:

a) The decision-maker's power to disqualify an applicant is derived from new subsection 196C(1). To make a disqualification decision, the decision-maker must consider certain matters in making his or her determination. The list of matters that must be considered is in subsection 196C(2), which includes such considerations as whether the applicant has breached any relevant legislation, has been convicted of an offence, is insolvent or is disqualified from managing corporations under the *Corporations Act 2001* (Cth). The decision-maker must also consider 'any other matter the decision-maker considers relevant to making the decision' (see new subsection 196C(2)(i)). However, despite the broad amendment to the main purposes of the Act (clause 57, insertion of new subsection

3(d)) there is no provision that clearly articulates the purpose of the disqualification power or the basis on which an applicant is liable to be disqualified; QLS is concerned that there is no provision by which the 'relevance' of any 'other matter' that may be considered by the decision-maker is to be assessed.

A similar issue arises under new subsection 196C(3), which permits a decision-maker to disregard a conviction for an offence, or a contravention of a law having regard to the 'degree of seriousness' or the 'degree of harm' caused by any offence or contravention. This leaves the decision-maker's assessment of seriousness of harm to be made without reference to any provision that articulates the purpose of the disqualification power. It falls to a subjective assessment of the legislature's purpose when conferring the disqualification power, informed by the matters that must be considered, to determine what the legislature was intending to address by introducing the disqualification power.

The consequence is a greater risk that the decision-maker's power will be exercised (or at least appear to be exercised) arbitrarily. Given the consequences of a disqualification decision, a provision that identifies when the power to disqualify is able to be exercised should be included.

b) New chapter 7 provides for a decision-maker to disqualify an application for the grant or transfer of an RA on the basis of matters pertaining to 'associates' of an applicant. New section 196A defines 'associate' to include an entity the decision-maker considers to be in a position to control or substantially influence the applicant's affairs in connection with the RA. This is a subjective determination, and the definition results in substantial uncertainty for applicants. QLS recommends that consideration be given to adopting a more objective test for determining whether an entity 'controls' an applicant, such as the formulation of that concept in the *Corporations Act 2001* (Cth). Consideration should also be given to excluding control that is able to be exercised as a result of the acquisition of securities on a public exchange.

c) Finally, consideration should be given to the inclusion of a provision that addresses whether a disqualified applicant can re-apply for the grant or transfer of an RA after a disqualification decision has been made. Proposed subsection 196C(1) states that it is the entities making applications that are liable to be disqualified. While not explicitly addressed, this leaves the impression that the applicant is then unable to hold an RA and could not then apply again for the grant or transfer of the same or another RA. However, where an applicant is disqualified on the basis of an 'associate', and the applicant then severs its relationship with the associate, that applicant should then be entitled to re-lodge its application. For example, if an applicant was disqualified due to a particular director's history, it could replace that director, and should not be prevented from reapplying. For clarity, QLS submits that a provision confirming the ability to re-apply should be included.

Dispute resolution framework for consent to overlapping resource applications under the Resource Acts

Clause 131 of the Bill inserts new section 271AB of the *Mineral Resources Act 1989* addressing applications for later specific purpose mining leases or transportation mining leases.

QLS notes the broad discretion conferred on the Minister to grant the overlapping tenure subject only to being satisfied that:

- the later mining lease can be carried out in a way that is compatible with the authorised activities of the existing tenure holder, and
- the co-existence of the tenures would optimise the development of the State's resources.

QLS further notes that new section 174C (clause 73) confers on the Minister the ability to require an RA holder to amend an agreed plan.

There is nothing that requires the Minister to either be satisfied that any financial/commercial impact is minimal or will be compensated. Similarly, an arbitrator (where the co-existence plan cannot be agreed within three months) is not required to include, or even consider, compensation within any determination of a co-existence plan. This is despite compensation being mandated as an item that must be stated in the co-existence plan as being payable or not pursuant to subsection 271AB(7)(e).

While operational guidance from the Department regarding what will be considered 'compatible' is anticipated to assist in this regard, a clear statement of legislative intent regarding the considerations relevant to the exercise of the Minister's discretion should be included in the Bill. QLS recommends that, similarly to new section 174C(2)(c), section 271AB(2) include a requirement that the Minister consider technical and feasibility impacts on the RA holders.

Further, assuming the intent is to ensure the existing tenure holder is compensated for negative impacts, QLS submits that the Bill should be amended to require the arbitrator when considering a co-existence plan to consider and address compensation as a result of the grant of the overlapping tender (including compensation for subsequent actions such as pipelines/roads being moved).

Streamlining and consolidating conference provisions throughout all the Resource Acts

The Bill, via clauses 68 and 92 provides that a concerns conference held by an authorised officer will exclude legal representation unless the other party agrees and the officer is satisfied that there is no disadvantage to the other party.

QLS understands the desire for concerns conferences to be an inexpensive mechanism to settle disputes. However, QLS considers that access to legal representation is key to ensuring fair and just outcomes in any contested matter and cautions against excluding legal representation at a concerns conference. Commonly, exclusion of legal representation leads to lengthier disputes and higher costs. QLS submits that legal representation should be allowed as of right at concerns conferences. Legal representation is a cornerstone principle of our justice system.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact the Legal Policy team by phone on [redacted] or email to [redacted]

Yours faithfully

Luke Murphy
President