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

By email: SDNRAIDC@parliament.qld.gov.au

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

Dear Committee Secretary,

Thank you for the opportunity to make a submission in relation to the *Mineral and Energy Resources and Other Legislation Amendment Bill 2020* (Qld) (the Bill).

We are supportive of policy steps that improve health and safety outcomes, and we welcome the opportunity to comment on the Bill. However, our strongly held view is that, if the Bill is passed in its current form, it will not meet the objective of strengthening the safety culture in Queensland's resources sector, and will result in poorer safety outcomes across the industry.

### **1. Safety**

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Our highest priority is the safety of our people, including our employees and contractors and the communities in which we operate.

A strong safety culture depends on an ability to clearly and openly share information. In order to achieve real ongoing safety improvements, everyone must be empowered to speak up and take action if they see something unsafe.

We actively participated in the Queensland mining industry's safety re-set during July and August 2019. More than 11,600 employees and contractors across our Queensland operations took part in approximately 400 sessions, which provided a forum for full and frank conversations about safety. While the end of August 2019 marked the official completion of the safety re-set, it has in no way reduced our focus on safety.

Across our coal assets, we are currently averaging 1,060 Field Leadership conversations each day, focused on the controls that keep people safe. Field Leadership is a program designed to drive cultural change and improve health, safety and environmental outcomes, by encouraging people across the company to engage with their colleagues in the field.

We will never stop focusing on continuously improving our safety performance and culture. We believe that – with the right controls and the right culture of care - there's absolutely no reason why every mine worker can't go home safely at the end of every day.

## 2. Industrial Manslaughter

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While we do not consider that industrial manslaughter offences are necessary, we recognise that the Queensland Government has made a decision to proceed with introducing these offences into the *Coal Mining Safety and Health Act 1999* (Qld) (CMSH Act).

We are supportive of the Bill's objective, which is to strengthen the safety culture in Queensland's resources sector.<sup>1</sup> However, we are concerned that the Bill - if passed in its current form - could have the opposite effect. To ensure that the proposed industrial manslaughter offence (in particular, the "senior officer" offence) is practical, balanced and achieves this objective, we submit the following recommendations.

### **Recommendation 1 – SSEs and those reporting into SSEs to be expressly excluded**

We recommend that the individual offence of industrial manslaughter be expressly limited to the most senior levels of an organisation, consistent with the "officer" definition in the *Corporations Act 2001* (Cth). Further, that Site Senior Executives (SSEs) and those reporting to SSEs are expressly excluded in the same way they are excluded from the definition of "officer" in s 47A of the CMSH Act.

### **Significant cause for concern**

Under the Bill's current drafting, the offence of industrial manslaughter applies to an "employer" for a coal mine and a "senior officer" of an "employer" for a coal mine, being any person who is concerned with, or takes part in, if the employer is a corporation, the corporation's management. The use of the term "senior officer" as it is currently defined - without expressly excluding SSEs and those reporting to them (in the same way that they are excluded from the definition of "officer" in s 47A of the CMSH Act) - is a significant cause for concern.

Whilst offences against individuals, such as those that already exist under the CMSH Act, can be seen as necessary to provide appropriate sanctions for those who fail to meet their safety duties and fall short of community expectations, the proposed "senior officer" offence is likely to have unintended consequences in Queensland's coal mining industry. The coal mining safety regime uniquely places overarching responsibilities for safety upon individual statutory roles which do not exist in general workplaces. The introduction of an industrial manslaughter offence that does not expressly exclude SSEs (and those reporting to them) is likely to have a noticeable negative effect on SSEs who work within good safety systems and take all reasonable measures to achieve safe outcomes.

We have already seen this effect within our business, in that the proposed "senior officer" offence has already generated significant anxiety amongst our SSEs and those reporting to them. Our SSEs are concerned that they could be captured by the industrial manslaughter offence and become a target once the new laws commence, and be punished despite their best efforts and overwhelming commitment to mine site safety. Their concern is warranted when viewed in the context of the CMSH Act, which places onerous obligations on SSEs. Moreover, SSEs already carry liabilities under the CMSH Act in the event of a failure to meet these responsibilities, including maximum penalties of up to \$400,350 or 3 years imprisonment.<sup>2</sup>

### **Dilution of focus on safety outcomes**

Recommendation 5 of Dr Sean Brady's recent *Review of all fatal accidents in Queensland mines and quarries from 2000 to 2019* (the Brady Review) is that the industry needs to focus on ensuring the effectiveness and enforcement of controls to manage hazards.<sup>3</sup> The realisation of this recommendation requires site-based personnel to be empowered to report hazards, identify risks and openly share safety information.

If the industrial manslaughter offence becomes law without expressly excluding SSEs (and those that report to them), the anxiety held by SSEs could force the prioritisation of legally defensive behaviours. This could, for example, lead to a decreased willingness to be proactive and transparent with safety information, which would contradict Recommendation 5 from the Brady Review and undermine the overall safety culture of Queensland's coal mining industry. We cannot accept such an outcome, particularly at a time when we are continuously improving our safety culture.

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<sup>1</sup> <https://www.parliament.qld.gov.au/documents/committees/SDNRAIDC/2020/1MEROLAB2020/cor-14Feb2020.pdf>

<sup>2</sup> This is the maximum penalty for a breach of duty by an SSE which causes multiple deaths.

<sup>3</sup> Brady Review, page iv - <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T197.pdf>

Moreover, if the industrial manslaughter offence does not expressly exclude SSEs, the additional potential exposure to an industrial manslaughter offence (on top of existing CSMH Act obligations) could make the SSE qualification, and the take up of SSE positions, less desirable. The consequence of this is that the coal mining industry could face a rapid decline in the level of skill and experience held at the SSE level, as highly experienced SSEs exit the profession and suitable people are deterred from obtaining the qualification in the future. This would undermine the Bill's objective of strengthening safety culture.

Now more than ever, we need to empower qualified mining professionals to build on the work that is already being done to make Queensland mines safer, through collaboration and transparency. As a result of the anxiety held by SSEs, a failure to expressly exclude them (and those reporting to them) from the "senior officer" industrial manslaughter offence will undermine these efforts.

This aspect of the Bill is of considerable concern to our SSEs and we understand that a number of them are making separate, individual submissions on this point.

**Recommendation 2 – Legal rights of potentially affected individuals to be respected, to enable the continued sharing of safety information**

We know how important information sharing and transparency on safety issues is to improving safety culture and performance in the mining industry. In the event of a death it is critical to ensure identified learnings are implemented at both an organisational level and across industry. However, the offence of industrial manslaughter is a serious one and in the face of potential prosecution, individuals will be significantly impacted by the actions of inspectors who carry out their necessary function of investigating such incidents, including by requiring individuals to answer questions and produce documents. In order to strike the right balance between enabling the continued sharing of safety information clearly and openly and protecting individual rights, we are of the view that the following amendments to the Bill should be made:

- **Section 201 CSMH Act immunities** - The CSMH Act currently contains considerable obligations under section 201 of the CSMH Act upon the SSE to investigate and prepare a report in respect of the causes of a serious accident (including a death) or high potential incident and, in particular circumstances, forward that report to the inspectorate. While that report is not admissible as evidence against the SSE or any person named in that report, that immunity does not currently apply to other records or documents created during the course of the investigation which lead to the creation of the report. In order to ensure that investigations are carried out by SSEs without fear of making admissions against their interest and are focussed solely on improving safety outcomes, we recommend that :
  - the same immunities available in section 201 of the CSMH Act expressly apply to records or documents created during the course of the investigation which lead to the creation of the report; and
  - records or documents created during the course of the investigation and the report prepared or forwarded should not be admissible against any individual in relation to a death (failing that, the section 201 immunities should be extended to be available to all individuals, including senior officers and officers, named in the report).
- **Privilege against self-incrimination** - Currently, under the CSMH Act, a person's right to be excused from answering questions does not apply to a serious accident (which includes death) or a high potential incident. Given the seriousness of the industrial manslaughter offence, individuals being questioned in relation to an investigation of a death (which could lead to an industrial manslaughter prosecution) should be entitled to avail themselves of the privilege against self-incrimination in the same way that this right is available under general criminal laws (including for manslaughter). We recommend the right to claim the privilege against self-incrimination be expressly stated in the CSMH Act to apply in all investigations of deaths.

In a similar regard, there is currently no privilege against self-incrimination with respect to a requirement to produce documents under the CSMH Act (see section 155 (2)). Given the seriousness of the industrial manslaughter offence, we recommend that a limited use immunity, such as that which exists under section 159 (2) of the CSMH Act for answers given in response to a requirement by an inspector, inspection officer or authorised officer, should be introduced in respect of the provision of documents produced under such a requirement. This is consistent with the immunity provisions that exist under other health and safety regimes.

- **Recklessness** - The Bill applies the standard of "negligence" to the industrial manslaughter offences. However, the Explanatory Notes refer to "recklessness or gross negligence" and so have

the potential to create confusion, where relied on for the purpose of interpreting the offence provisions.

While we suggest that this be clarified as the Bill progresses through Parliament, our ultimate recommendation is that, given the seriousness of the offence of industrial manslaughter and the fact that it is meant to capture the most egregious of conduct, the standard that should apply to the offence is recklessness, not criminal negligence.

In addition to the standard of recklessness being adopted for the purposes of the industrial manslaughter offence, we recommend that all the available defences under existing criminal laws (including s 23 of the *Criminal Code*) be available.

- **Prosecuting body** - The offence should only be able to be prosecuted by the Director of Public Prosecutions (DPP). Currently the changes to the CSMH Act proposed by the *Resources Safety and Health Queensland Bill 2019* provide that proceedings for offences can be taken by the newly established WHS Prosecutor established under the *Work Health and Safety Act 2011* (Qld). We are of the view that any industrial manslaughter offence should be prosecuted only by the DPP as an important check on the application of such serious laws and so that a consistent approach is taken to the way criminal offences are dealt with.
- **Time limitations** - The Bill expressly provides that the existing limitation for commencing prosecution proceedings does not apply to the industrial manslaughter offence. This means there is no time limit for commencing a prosecution for industrial manslaughter. This could create protracted periods of fear and uncertainty for potentially affected individuals in the aftermath of a fatality, and erode the availability and reliability of evidence in relation to any such offences. To ensure consistency and maintain the integrity of any proceedings, we recommend that the same limitation periods which apply to existing offences in the CSMH Act should apply to the industrial manslaughter offence. That is, effectively a maximum of three years or two years after a coronial inquest (whichever is longer).
- **Penalty options** - The Bill only provides one penalty option for individuals found guilty of an industrial manslaughter offence, which is imprisonment (for a maximum of 20 years).<sup>4</sup> We recommend that the Bill be amended to provide courts with the ability to impose either financial penalties or imprisonment, depending on the nature, circumstances and seriousness of the offence.

If these concerns are not addressed, individuals who may be charged with industrial manslaughter will be deprived of fundamental legal rights, making them unfairly disadvantaged in investigations and legal proceedings. Failure to address these concerns (particularly if SSEs and those reporting to them are not expressly excluded from the offence) may also contribute to the potential for adverse health and safety outcomes in the industry, borne out of fear and legally defensive behaviours. We therefore recommend that these issues be addressed.

### 3. Statutory Roles

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The second aspect of the Bill we wish to respond to is in relation to the proposed amendment to the CSMH Act,<sup>5</sup> requiring certain statutory office holders (including SSEs, Underground Mine Managers, Ventilation Officers and others) to only be appointed to those positions if they are employees of the coal mine operator ("Statutory Roles Amendment").

#### Recommendation 3 – Statutory Roles Amendment

We recommend that the provisions proposed in Part 2 – Division 2 of the Bill be removed in their entirety as:

- there are already strong reprisal protections in the CSMH Act and elsewhere;
- they will have significant operational and structural impacts upon not only coal mine operators, but contractors and individual consultants; and
- they will (potentially combined with the proposed industrial manslaughter offence if SSEs and those reporting to them are not expressly excluded), further exacerbate impending skills shortages in Queensland's coal mining industry.

<sup>4</sup> *Mineral and Energy Resources and Other Legislation Amendment Bill 2020* (Qld), clause 157 s 48C.

<sup>5</sup> *Mineral and Energy Resources and Other Legislation Amendment Bill 2020* (Qld), Part 2, Division 2

### ***Strong reprisal protections already exist***

While the Statutory Roles Amendment is expressed in the Explanatory Notes to the Bill to address the policy objective of ensuring that statutory office holders can ‘*make safety complaints, raise safety issues or give help to an official in relation to a safety issue*’, both State and Federal legislation (including the CMSH Act itself) already contain very strong reprisal protections.

As well as the provisions of the CMSH Act (which are directly on point and have the purpose of providing protection for individuals reporting or making complaints), relevant reprisal protections exist in the *Fair Work Act 2009* (Cth) (Part 3-1 General Protections) and the *Corporations Act 2001* (Cth) (Part 9.4AAA Protection for Whistleblowers) (“Existing Legislative Reprisal Protections”). These protections are available to all statutory office holders, irrespective of their employment arrangements.

The Existing Legislative Reprisal Protections already ‘cover the field’ in respect of this issue. The Statutory Roles Amendment is therefore unnecessary, as it provides no additional protections for statutory office holders beyond those already in existence.

### ***Operational and structural impacts***

We expect that the proposed Statutory Roles Amendment, if passed, will trigger significant restructuring of existing operating arrangements in the coal mining industry. Many companies, including ours, have complex ownership structures, particularly when ownership of a coal mine is a joint venture arrangement. In order to ensure that statutory office holders are employed by the coal mine operator, it is likely many companies would be forced to undertake costly, complex and time-consuming restructures, likely causing disruption in the industry, with no demonstrated safety benefits.

The proposed Statutory Roles Amendment will also deny individuals the option to work as consultant or contractor statutory officer holders, for financial reasons and for the flexibility that these arrangements can offer, including the ability to fill the leave time taken by full-time statutory officers. Requiring statutory office holders to be employees of the coal mine operator would restrict this flexibility and may lead a number of statutory office holders to exit the industry due to an inability to find suitable arrangements (they may also not want the potential personal exposure from the proposed industrial manslaughter offence that does not expressly exclude site-based personnel).

The Bill’s objective of strengthening safety culture is best served by allowing coal mine operators and the professionals who could perform the statutory officer holder roles flexibility in their working relationships, so as to maximise the prospect of coal mine operators securing access to the highest calibre professionals to perform those statutory officer holder roles.

### ***Skills shortages***

Contractor or consultant statutory office holders are also not likely to be easily replaced with new employees in the short to medium term where the time required to gain the necessary qualifications is significant (for example, a minimum of five years’ mining work experience, including two years’ supervisory experience for SSE roles).

In addition, there are indications of a looming shortage of workers with the required qualifications and experience. Recent data shows that the number of qualified statutory office holders is decreasing and that the average age of existing statutory office holders is near retirement age.<sup>6</sup>

In these circumstances, it should be a priority of government to make the role of statutory office holder as appealing as possible, to ensure that qualified professionals remain in the industry for as long as possible and to encourage a future pipeline of talented individuals. Restricting employment options would have the opposite effect, which could trigger an acute skills shortage. This would be an unfortunate and potentially dangerous outcome, at odds with the Bill’s stated objective of strengthening safety culture. We need experienced professionals to continue building on the work that is already being done to make Queensland’s mines safer.

For these reasons, we recommend that these provisions of the Bill be removed in their entirety.

<sup>6</sup> Data collected by QRC suggests that almost 50% of Deputy certificate holders are 60 years or older, and that almost 60% of OCE certificate holders are 60 years or older - *Trends in the number of mining certificate s of competency and SSE notices issued by the Queensland Board of Examiners*, QRC Information Paper and Questionnaire, February 2018, page 4.

#### 4. Conclusion

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We are supportive of the Bill's objective, which is to strengthen the safety culture in Queensland's resources sector. However, our strongly held view is that the Bill – if passed in its current form – could have the opposite effect. In order to achieve this objective in a fair and workable manner, the Bill requires the amendments we have recommended.

We welcome the opportunity for further engagement on these important matters.

Yours sincerely,



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Asset President BMA



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