

Mineral and Energy Resources and Other Legislation Amendment Bill 2020

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Dr Anthony Lynham, Minister for Natural Resources, Mines and Energy make this statement of compatibility with respect to the Mineral and Energy Resources and Other Legislation Amendment Bill 2020.

In my opinion, the Mineral and Energy Resources and Other Legislation Amendment Bill 2020 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement. It limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

Overview of the Bill

The Mineral and Energy Resources and Other Legislation Amendment Bill 2020 (the Bill) primarily implements three Queensland Government priorities:

1. Safety and health – to strengthen the safety culture in the resources sector through the introduction of industrial manslaughter offence provisions and requiring that persons appointed to critical safety statutory roles for coal mining operations must be an employee of the coal mine operator;
2. Financial assurance – to implement legislative changes that support mine rehabilitation and financial assurance reforms that mitigate the financial risk to the State and improve rehabilitation outcomes for Queensland; and
3. Regulatory efficiency – to improve the administration and effectiveness of the regulatory framework applying to resource projects.

The Bill also includes a range of streamlining, minor and miscellaneous amendments to legislation within the Natural Resources, Mines and Energy portfolio. These amendments are designed to improve the operation of these Acts and Regulations.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the Bill are:

- Recognition and equality before the law (section 15);
- Right to life (section 16);
- Freedom of expression (section 21);
- Peaceful assembly and freedom of association (section 22);
- Property rights (section 24);
- Privacy and reputation (section 25);
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28);
- Right to liberty and security of person (section 29);

- Fair hearing (section 31);
- Rights in criminal proceedings (section 32); and
- Right not to be tried or punished more than once (section 34).

Recognition and equality before the law

The clauses of the Bill that are relevant to this right are:

- Requirements for statutory office holders – clauses 4 to 10.

Right to life

The clauses of the Bill that are relevant to this right are:

- Abandoned mines and abandoned operating plant amendments – clauses 147, 200 to 202.
- Regulation-making power amendments under the *Explosives Act 1999* – clause 33.

Freedom of expression

Clause 148 of the Bill which relates to the modernisation of document delivery methods may potentially be relevant to the freedom of expression right.

- Section 21 of the *Human Rights Act 2019* provides that a person has the right to hold an opinion without interference and seek, receive, and express information and ideas.
- The Bill proposes to amend the *Mineral Resources Act 1989* to provide that certain documents required by the Act may be served on the affected person by email, if the affected person consents to that method of service.
- These amendments may be viewed as engaging the freedom of expression right by affecting the ability of persons (and companies) to express themselves. However, the purpose of the amendments are to broaden the method of expression rather than restricting it. As such, the amendments do not limit freedom of expression.

Peaceful assembly and freedom of association

The clause of the Bill that are relevant to this right are:

- Disqualification criteria – clause 79.

Property rights

The clauses of the Bill that are relevant to this right are:

- Abandoned mines and abandoned operating plant amendments – clauses 147, 200 to 202.
- Dispute resolution framework for overlapping tenure applications or activities under the Resource Acts – clauses 74 to 78, 128, 131, 140, 192, and 195.

Privacy and reputation

The clauses of the Bill that are relevant to this right are:

- Abandoned mines and abandoned operating plant amendments – clauses 147, 200 to 202.
- Disqualification criteria – clause 79.
- Regulation-making power amendments under the *Explosives Act 1999* – clause 33.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

The clauses of the Bill that are relevant to this right are:

- Abandoned mines and abandoned operating plant amendments – clauses 147, 200 to 202.

Right to liberty and security of the person

The clauses of the Bill that are relevant to this right are:

- Industrial manslaughter offences – clauses 11, 30, 157, and 203.

Fair hearing

The clauses of the Bill that are relevant to this right are:

- Industrial manslaughter offences – clauses 11, 30, 157, and 203.

Rights in criminal proceedings

The clauses of the Bill that are relevant to this rights are:

- Industrial manslaughter offences – clauses 11, 30, 157, and 203.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Abandoned mines and abandoned operating plants

The abandoned mines and abandoned operating plant provisions included in the Bill, potentially engage the following human rights:

- Property rights;
- Privacy and reputation; and
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples.

(a) The nature of the rights

Section 24 of the *Human Rights Act 2019* protects the right of all persons to own property (alone or with others) and provides that people have a right to not be arbitrarily deprived of their property. This right does not provide a right to compensation.

Section 25 of the *Human Rights Act 2019* protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right is broad in its application, however for the purpose of the abandoned mines and abandoned operating plant amendments in the Bill, the potential engagement of the right occurs with regard to the individual's privacy, family and home. Only lawful and non-arbitrary intrusions may occur upon privacy, family and the home.

Section 28 of the *Human Rights Act 2019* protects the right to live life as an Aboriginal person or Torres Strait Islander who is free to practise their culture, and provides that they must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment. The abandoned mines and abandoned operating plant provisions could be seen as engaging this right by potentially interfering with the relationship between Aboriginal or Torres Strait Islander persons and the environment, land, water and resources.

The amendments may impact property rights (section 24(2)) and privacy and reputation (section 25) as authorised persons will be able to enter a landholder's property. The amendments may also engage the cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28) by allowing for entry to land to undertake remediation activities.

- (b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of potential limitations on property, privacy and reputation, and cultural rights are to ensure that abandoned sites, including land outside the abandoned site that may be affected, are able to be remediated. These remediation activities are targeted towards making the site safe, secure, durable, and, where possible, productive. These provisions ensure that the public are able to be protected from potential public health and safety concerns.

- (c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The abandoned mines and abandoned operating plant provisions may potentially limit property, privacy and reputation, and cultural rights. These limitations will allow authorised persons to enter ‘affected land’ (including land outside of the abandoned sites) to undertake prescribed activities, which will make abandoned operating plants secure. This will achieve the purpose of remediation and protect the public from health and safety concerns.

- (d) Whether there are any less restrictive and reasonably available ways to achieve the purpose of the Bill

The abandoned mines and abandoned operating plant provisions included in the Bill are the least restrictive way of achieving the policy intent of ensuring that sites and affected land that have been impacted by previous mining or petroleum activities can be made safe, secure, durable and, where possible productive.

The provisions have measures incorporated to ensure that human rights are protected and safeguarded. Entry to land is for a clear purpose – to undertake remediation activities on land that is affected by previous resource activities, ensuring that the public health and safety of the community is protected.

The Bill also introduces a process by which authorised persons may seek the consent to enter the land of landholders whose property may have been affected by previous resource activity (but on which there is no former mine or operating plant). Before entering this ‘affected land’, the consent of the owner and occupier must be obtained, except where entry is necessary to preserve life or property. Consent may be withdrawn at any time and may be given on conditions, other than compensation. Authorised persons are not permitted to enter a residential structure without the consent of its occupier, and this ensures the right to privacy and reputation is protected.

- (e) The balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Any potential impact on property rights, privacy and reputation, or cultural rights, is considered to be outweighed by the benefits to the community in ensuring that sites that have been impacted by previous mining or petroleum activities are remediated.

Further, remediation activities – including access to affected land – protect the right to life (section 16) by enabling authorised persons to make potentially dangerous sites or land safe. This is considered to be in the public interest as protecting the right to life outweighs any potential impacts on property rights, privacy and reputation, or cultural rights, as the preservation of life should take precedence over temporary deprivation of access to land.

(f) Any other relevant factors

The abandoned mines and abandoned operating plant provisions included in the Bill are replacing previous legislative provisions. While the remediation powers have been expanded, these powers are more clearly defined, consistent across the Resource Acts and provide greater safeguards to protect human rights have been included in the provisions. For example, consent of the landholder of affected land will now be required to remediate the impacts, ensuring that the sites can be made safe, secure, durable, and where possible, productive.

Disqualification criteria

The disqualification criteria included in the Bill, potentially engage the following human rights:

- Freedom of association; and
- Privacy and reputation.

(a) The nature of the right

Section 22(2) of the *Human Rights Act 2019* provides that every person has the right to freedom of association with others. The freedom of association protects the right of individuals to join together with others to formally pursue a common interest – for example, political groups, sporting groups and trade unions.

The disqualification criteria may potentially engage the right of freedom of association, as the criteria may also be applied to an associate of the applicant. An associate is defined in the Bill as an entity that is in a position to control or substantially influence the applicant's affairs in connection with the resource authority. An associate is also specifically defined in the Bill to include, if the applicant is a body corporate, a director of the applicant or the parent company.

Section 25 of the *Human Rights Act 2019* protects the right to privacy and reputation. The right to privacy protects the individual from interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy is broad and may include matters such as personal information, data collection and correspondence. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation.

The disqualification criteria may also be considered to interact with a person's right to not have their privacy unlawfully or arbitrarily interfered with, or have their reputation unlawfully attacked. While it is the applicant's discretion as to whether to apply for a tenure, the privacy and reputation right may be engaged as the applicant may be asked to provide personal information, including consent to a criminal history check, to inform the decision.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The disqualification criteria amendments provide an application for a prescribed resource authority may be refused if the applicant triggers the disqualification criteria. The disqualification criteria are outlined in clause 79 of the Bill, and include whether the applicant has a relevant prescribed criminal history, a history of contraventions of prescribed legislation and a history of insolvency or being the subject of a winding-up order.

The purpose of limiting the right to freedom of association and the right to privacy is to ensure that resource tenures are held by entities that are able to adequately manage their tenure and

remain compliant with obligations under Queensland law. Further, the process will also help mitigate the potential risk that the site may be disclaimed or left with other outstanding debts.

- (c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Limiting the right to freedom of association will enable decision makers to consider the control or influence exercised by third parties over the activities of an applicant for tenure, allowing them to appropriately manage potential risk to the State.

Limiting the right to freedom of privacy and reputation will enable decision makers to consider relevant convictions (such as those convictions under the Resources Acts or other convictions involving fraud or dishonesty) when considering the suitability of an application to hold resource tenure in Queensland, alerting them to any risk to the State about mismanagement.

- (d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

The disqualification criteria provisions included in the Bill are the least restrictive way of achieving the policy intent of ensuring that the State's resources are adequately managed through the grant of tenures only to entities with lower risk profiles with regard to management of the tenure. Further, there are sufficient safeguards incorporated in the disqualification process to ensure human rights are protected.

These include, that while the decision-maker has the discretion to consider an associate of the applicant, they can only do so if the associate is in a position to substantially control or influence the actions of the applicant for the resource authority. This requirement for the associate to be in a position to control or influence ensures that the right to freedom of association is protected by ensuring that there is a clear link between the associate and potential activities that may be undertaken on the tenure should it be granted.

Another safeguard is that the decision-maker may only receive the criminal history check from the applicant or associate with that individual's consent. If the person does not provide consent, the decision-maker may still consider the application without this information. In addition, after the decision has been made on the application, the decision-maker must destroy the criminal history report as soon as practicable. These requirements ensure that the potential limitation on the privacy and reputation right is proportional in the circumstances where the information is material to determining the suitability of an applicant (or an associate) to hold tenure in Queensland.

The Bill also allows the decision-maker to consider a range of mitigating factors when assessing disqualification criteria of the applicant or associate. These include, the discretion to consider the degree of seriousness, harm and length of the time that has elapsed since the commission of the contravention or offence. Additionally, if the decision-maker proposes to disqualify an applicant, the applicant must be given an opportunity to make a submission about the proposed disqualification. This provides the applicant with procedural fairness.

- (e) The balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Any potential impact on the human rights of freedom of association and privacy and reputation arising from the disqualification criteria amendments included in the Bill, is considered to be outweighed by the benefit to the community in ensuring that tenures in Queensland are held by

entities that do not pose a heightened risk of mismanagement. The Bill includes significant safeguards to ensure that any limitation is proportional and that human rights are only impacted to the extent required to deliver the policy intent and these are outlined above.

(f) Any other relevant factors

The disqualification criteria provisions included in the Bill have been modelled on criteria included in section 137 of the *Mineral Resources Act 1989* that only applied at grant of an exploration permit. The criteria have been clarified, are proposed to apply to all primary tenure types under the Resource Acts, and are intended to be considered at the start of an application process.

Dispute resolution framework for overlapping tenure applications or activities under the Resource Acts

The dispute resolution framework for overlapping tenure applications or activities under the Resource Acts included in the Bill, potentially engage the following human right:

- Property rights.

(a) The nature of the right

Section 24(2) of the *Human Rights Act 2019* provides that a person must not be arbitrarily deprived of their property. This right does not provide a right to compensation. Case authority suggests that ‘arbitrary’ refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate.

The dispute resolution framework proposed in the Bill may potentially engage the right to property (section 24(2)) as it changes the way that a tenure holder provides or withholds consent to subsequent applications or activities.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The *Mineral Resources Act 1989* currently requires an applicant for a specific purpose mining lease or a mining lease for transportation to secure the consent of the pre-existing tenure holder for their application to be granted. Similarly, the *Petroleum and Gas (Production and Safety) Act 2004* restricts the activities of pipeline licence holders under section 400 and petroleum facility licence holders under section 440 if they are unable to obtain the written agreement of the pre-existing tenure holder.

The Bill proposes to establish a process that will allow the Minister to grant a specific purpose mining lease or a transportation mining lease over an existing tenure even without the consent of the existing tenure holder, if the Minister forms a view that doing so is in the public interest and that the overlapping tenures will be able to co-exist.

The Bill also includes an ability for overlapping pipeline licence holders and petroleum facility licence holders to apply for arbitration if they are unable to obtain the written agreement of the pre-existing tenure holder to resolve the dispute.

The purpose of potential limitations to property rights is to support the appropriate development of mineral resources vested in the State. Resource development is a significant contributor to the State’s economy through direct investment, employment, royalties and flow-through economic and social benefits. For example, royalties provide a dividend to Queenslanders for

the use of their resources and provides funding for schools, hospitals, roads and other vital infrastructure.

The proposed amendments in the Bill to allow the Minister to grant a specific purpose mining lease under limited circumstances, as well as the ability for tenure holders to ultimately access arbitration to resolve disputes about overlapping tenures, aligns with the policy objective of supporting appropriate development of the State's resources and maximising the benefits of the State's resources for all Queenslanders.

(c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Potential limitations to property rights will allow the Minister to grant a specific purpose mining lease or transportation mining lease under limited circumstances to allow the development of two resource projects that can coexist to proceed, supporting the appropriate development of the State's resources.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The proposed dispute resolution framework included in the Bill does not arbitrarily deprive of a tenure holder of their tenement and is the least restrictive option to deliver on the policy intent. There is a clear purpose, governance framework and procedural fairness for the proposal.

The Minister may only grant a specific purpose mining lease or transportation mining lease over an existing tenure holder if satisfied that the two projects can coexist and that the grant of the second lease will maximise the benefits of the State's resources for all Queenslanders. This decision will be guided by an administrative decision making process within the relevant Acts, including procedural fairness to both parties, and will be consistent with existing limitations on other rights holders (for example landholders) within the relevant Acts.

Should the Minister decide to grant a specific purpose mining lease or transportation mining lease, the tenure holders must enter into a coexistence plan and if they cannot reach an agreement on the plan, the dispute must be resolved through arbitration. The terms of the coexistence plan will include details on how the activities of the two tenure holders will be undertaken, any monetary or non-monetary compensation required to be paid for any impacts, as well as addressing safety and health matters. The requirement for a coexistence plan mitigates any potential deprivation of property from the decision to grant the second lease over the existing tenement.

(e) The balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The decision to grant a specific purpose mining lease or transportation mining lease may only be made by the Minister if the two projects can coexist and the granting of the second lease will maximise the benefits of the State's resources for all Queenslanders. As mentioned above, resource development is a significant contributor to the State's economy through direct investment, employment, royalties and flow-through economic and social benefits. Given these benefits to the community, any potential abrogation of property rights from the proposed dispute resolution process in the Bill is considered to be proportional.

(f) Any other relevant factors

The proposed dispute resolution framework is similar to the existing overlapping framework included in the *Mineral and Energy Resources (Common Provisions) Act 2014* which applies to overlapping coal and coal seam gas activities.

Industrial manslaughter offences

The industrial manslaughter offence provisions included in the Bill, potentially engage the following human rights:

- Right to liberty and security of the person;
- Fair hearing; and
- Rights in criminal proceedings.

(a) The nature of the right

The new industrial manslaughter offences in the Bill could engage with sections 29, 31 and 32 of the *Human Rights Act 2019*.

Everyone has the right to liberty and security and their liberty must not be deprived except on grounds and procedures established according to law (section 29). The right entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. A person must not be subject to arbitrary arrest. A person who is arrested or detained on a criminal charge has the right to be brought to trial without unreasonable delay. The proposed industrial manslaughter offences provisions protect these rights and further details in this regard are contained in paragraph (b) below.

A person charged with a criminal offence has the right to have the charge decided by an impartial court after a fair hearing (section 31). The right affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It guarantees that criminal proceedings must be heard and determined by a competent, impartial and independent court or tribunal. The proposed industrial manslaughter offence provisions protect these rights and further details in this regard are contained in paragraph (b) below.

A person charged with a criminal offence has the right to be presumed innocent until proven guilty and has procedural rights in relation to the criminal proceedings (section 32). This right explicitly protects the right to be presumed innocent until proven guilty. This imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proven beyond reasonable doubt, gives the accused the benefit of the doubt and requires that accused persons be treated in accordance with this principle. It also protects the right for persons to be tried without unreasonable delay, the right of appeal, the right of an accused to defend themselves and the right to not be compelled to testify against themselves or to confess guilt. The proposed industrial manslaughter offence provisions protect these right and further details in this regard are contained in paragraph (b) below.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The new industrial manslaughter offences significantly increase potential penalties for the most serious examples of a workplace fatality for the Resources Safety Acts (*Coal Mining Safety and Health Act 1999; Mining and Quarrying Safety and Health Act 1999; Explosives Act 1999*

and Petroleum and Gas (Production and Safety) Act 2004). Maximum penalties of 20 years imprisonment for an individual and 100 000 penalty unit fine for a corporation, will apply.

The offence and potentially severe maximum penalties recognise the extremely serious circumstances of a workplace fatality where an employer or senior office holder has been criminally negligent and caused the fatality. In July 2019, industry leaders, mining companies and unions came together to refocus their commitment on safety, including consideration of industrial manslaughter offences.

The focus is on ensuring every worker returns home safely after every shift. Extending industrial manslaughter offences to mining workplaces aligns with the Queensland Government's commitment to ensuring the safety and health of all workers across all industries. The provisions are consistent with industrial manslaughter offence provisions in the *Work Health and Safety Act 2011*.

The prosecution will need to prove the industrial manslaughter offence on the criminal standard of beyond a reasonable doubt. Criminal procedural requirements for indictable offences will apply to the proposed industrial manslaughter offence provisions. The independent Work Health and Safety (WHS) Prosecutor will make the decision to prosecute. The guideline for industrial manslaughter prosecutions will be the same as those used for manslaughter under the Criminal Code.

The right to liberty has been protected as under the new proposed industrial manslaughter offence provisions the right to liberty can only be deprived on grounds and procedures established according to law and that are consistent with those that apply for all indictable offences. The new industrial manslaughter offence provisions will also create stronger protection for the rights of employees and will protect their rights to life and security.

The right to have a charge decided by an impartial court after a fair hearing has been protected under the new industrial manslaughter offence provisions as legislative procedural requirements apply for bringing and conducting these indictable offence proceedings, the same as those that apply to other indictable offences.

The right to be presumed innocent until proven guilty and to certain procedural rights in criminal proceedings has been protected as the proposed industrial manslaughter offence provisions protect these rights.

Requirements for statutory office holders

The new provisions in the Bill for requirements for statutory office holders, potentially engage the following human right:

- Recognition and equality before the law.

(a) The nature of the right

The right to recognition and equality before the law encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular group. Discrimination includes direct and indirect discrimination as is defined in the *Anti-Discrimination Act 1991* (e.g. on the basis of age, impairment, race, religious belief, sex etc) as well as discrimination in a broader sense such as employment status.

The amendments to the *Coal Mining Safety and Health Act 1999* limit the right to equality before the law as appointments to critical safety statutory roles for coal mining operations are limited to employees of a coal mine operator, excluding people with any other employment status from applying for the roles.

(b) The nature of the purpose of the limitation

The purpose of limiting the right to equality before the law is to protect statutory office holders so they can raise safety issues and make reports about dangerous conditions without fear of reprisal or impact on their employment.

This in turn this will protect the safety and health of workers more broadly.

(c) The relationship between the limitation and its purpose

Limiting the right to equality before the law will ensure security in employment for critical safety statutory office holders, which will ensure the protection of safety and health of workers, as statutory office holders who feel secure in their employment will raise safety issues and make reports about dangerous conditions. Without this limitation on employment status for such statutory office holder positions, the fear of reprisal would mean that there was no guarantee that safety issues would be raised or reports about dangerous conditions would be made and therefore workers safety and health would not be protected.

(d) Whether there are less restrictive and reasonably available ways to achieve the purpose

Rather than imposing a blanket immediate requirement that holders of safety statutory office holders must be an employee of a coal mine operator, a less restrictive approach of applying a twelve month transitional period for compliance has been adopted. This provides safeguards to protect the rights of such statutory office holders and ameliorates the negative impact on the right of equality before the law for people with any other employment status (e.g. contractors) who may currently be a statutory office holder.

(e) The balance between the importance of the purpose and the importance of preserving the human right

While the proposed amendments limit the right to equality before the law, the potential limitation needs to be considered on balance with the greater right to life for coal mine workers and community expectations. It is critical that workers' safety and health is protected.

On balance the proposed amendments will minimise the impact on equality before the law while ensuring the safety and health of workers, thereby promoting the right to life of workers more generally. The amendments are necessary to safeguard the health and safety of workers.

(f) Any other relevant factors

Nil.

Regulation-making powers under the *Explosives Act 1999*

The regulation-making powers under the *Explosives Act 1999* that are proposed to be established through the Bill, potentially engage the following human rights:

- Right to life; and
- Privacy and reputation.

(a) The nature of the right

The amendments to the regulation-making powers under the *Explosives Act 1999* may have a potential to impact on sections 16 and 25 of the *Human Rights Act 2019*.

Everyone has the right to life and has the right not to be arbitrarily deprived of life (section 16). The right imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life, including, for example effective criminal law and law enforcement provisions. This protective obligation extends to requiring authorities to put in place measures that would protect an individual whose life is being put at risk by another's criminal activity. The *Explosives Act 1999* addresses this right by regulating the handling of, and access to, explosives to protect public health and safety, property and the environment. This protects the right to life of persons, including those involved in the explosives industry and the wider community.

Everyone also has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have their privacy unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked (section 25). The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The right protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender). Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation.

The *Explosives Act 1999* addresses the right to privacy by limiting the disclosure of information obtained in the administration of this Act unless certain criteria are met (e.g. with consent, in the public interest, etc.).

While the proposed amendments do not limit any particular human rights in and of itself, the subsequent making or amendment of regulations may engage the right to life (i.e. promoted) and potentially limit a person's right privacy and reputation. Privacy and reputation may be limited by a proposed requirement to notify their employer if their security clearance is suspended, cancelled or surrendered; and by the potential disclosure and publication of limited information contained in a register of authorities and security clearances (e.g. the holder's name, authority or clearance number and status).

(b) The nature of the purpose of the limitation

The amendments contained in the Bill aim to address the issues identified below by broadening the existing regulation-making power under section 135(2)(j) of the *Explosives Act 1999* relating to explosives authorities (i.e. licences and permits), so a regulation may also be made about conditions, and other requirements, that apply to a security clearance. Additionally, the Bill inserts a new regulation-making power under section 135(2) of the *Explosives Act 1999* so a regulation may be made about the keeping of a register of authorities and security clearances, including the disclosure and publication of information in the register.

While the proposed changes to the regulation-making powers under the *Explosives Act 1999* do not limit any particular human rights in and of itself, certain human rights such as the right to life and privacy and reputation may be engaged or limited if the resulting powers are subsequently exercised in the making or amendment of regulations. Where those impacts

occur, it would be to achieve the purpose of improving public safety in relation to explosives. This is consistent with the values of a free and democratic society and one in which the right to life is supported and any limitations on a person's privacy and reputation (in order to help protect public safety) are appropriately dealt with.

Under the new regime, security clearance holders must notify the Chief Inspector of Explosives of any change in circumstance that may affect their suitability to continue to hold a clearance (e.g. if named in a domestic violence order). However, there is currently no requirement for a security clearance holder to notify other persons (e.g. their employer) if the status of their clearance changes (e.g. if it is suspended, cancelled or surrendered). Further, the Chief Inspector is limited under the explosives legislation to release information unless it meets disclosure requirements under the *Explosives Act 1999* (e.g. such as being in the public interest).

To address this issue, amendments to the Explosives Regulation 2017 were proposed in late 2019 to broaden security clearance holder notification requirements (e.g. to notify their employer if their security clearance is suspended, cancelled or surrendered) and to enable the disclosure and publication of limited security clearance and authority holder information, including in an online register (e.g. name, authority or security clearance number, and status).

The proposed regulatory amendments were aimed at ensuring relevant authority holders are able to be informed if the status of an associated security clearance holder changes and to provide industry with a mechanism to independently verify the status of a person's authority or security clearance. However, before regulatory amendments can be made, changes to regulation-making powers under the *Explosives Act 1999* are first required.

(c) The relationship between the limitation and its purpose

The explosives regulation-making power amendments contained in the Bill primarily support the new security clearance regime which commenced on 1 February 2020. The security clearance regime is aimed at ensuring only persons assessed as suitable to have unsupervised access to explosives do so (e.g. a person who is the subject of a domestic violence order is prohibited from holding a security clearance or an explosives authority). To achieve this intent, the regime imposes obligations on security sensitive authority holders to ensure certain persons associated with their authority (including employees who have unsupervised access to explosives) hold a valid security clearance. A failure to do so may be grounds for suspension or cancellation of the holder's authority.

The potential of the proposed changes to the regulation-making powers under the *Explosives Act 1999* to limit a person's right to privacy and reputation (if exercised in the making or amendment of regulations) aim to ensure obligation holders (e.g. security sensitive authority holders) are able to obtain the necessary information they need to fully comply with their obligations under the *Explosives Act 1999* (e.g. to ensure that only an employee that holds a security clearance has unsupervised access to an explosive).

The proposed amendments enable the making or amendment of regulations to support the effective operation of the security clearance regime and improve public safety in relation to explosives.

(d) Whether there are less restrictive and reasonably available ways to achieve the purpose

As stated above, the proposed changes to the regulation-making powers under the *Explosives Act 1999* contained in the Bill are required to enable subsequent regulations to be made.

Further, any subsequent regulatory amendments would seek to minimise potential impacts on the human rights of privacy and reputation by including appropriate protections.

For example, by broadening security clearance holder notification requirements to only include notification of a change in status (i.e. if the holder's security clearance is suspended, cancelled or surrendered). This would not include the details of, or reasons for, the status change. Additionally, the disclosure or publication of register information is expected to be limited to only relevant information that would be available to a person shown a copy of the holder's authority or security clearance.

It is also expected that the disclosure or publication of non-critical personal information will be prohibited. For example, the contact details of an individual, and if an authority or security clearance has been suspended, cancelled or surrendered—details of the suspension, cancellation or surrender.

Furthermore, a subsequent assessment will be undertaken in preparing regulations to assess compatibility with human rights in accordance with section 13 of the *Human Rights Act 2019*. A Human Rights Certificate will also accompany subsequent regulations.

(e) The balance between the importance of the purpose and the importance of preserving the human right

The proposed amendments do not limit any particular human rights in and of itself; however, the subsequent making or amendment of regulations may engage (and promote) the right to life and may potentially limit a person's right to privacy and reputation. The preservation of a person's right to privacy and reputation is important; however, the preservation of a person's right to life is arguably a more fundamental human right that needs to be preserved.

While the proposed amendments may potentially limit a person's right to privacy and reputation, it is expected that subsequent regulations would actively seek to minimise the potential impacts on these rights by including appropriate protections as outlined above (thus minimising the impact).

Further, the potential limitation on a person's right to privacy and reputation needs to be considered on balance with the greater right to life and community expectations. It is important that appropriate measures are in place to ensure the community is kept safe from the misuse of explosives.

The proposed amendments, which will enable the making or amendment of regulations to support the effective operation of the security clearance regime, take a fair and reasonable approach to how they may impact on a person's human rights.

On balance the proposed amendments will minimise the impact on a person's right to privacy and reputation whilst enabling improvements in public safety in relation to explosives, promoting the right to life for the wider-community. These amendments are considered necessary to safeguard the community and workplaces from the misuse of explosives.

(f) Any other relevant factors

Nil.

Conclusion

In my opinion, the Mineral and Energy Resources and Other Legislation Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

The Honourable Dr Anthony Lynham
MINISTER FOR NATURAL RESOURCES, MINES AND ENERGY

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