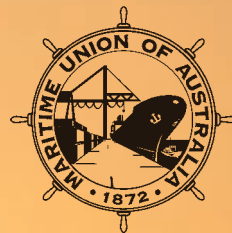


OFFSHORE SAFETY PROJECT



Prepared for the Australian Council of Trade Unions, the Maritime Union of Australia and the Australian Workers Union

Tom Fisher



List of Recommendations

Recommendation 1: *The relevant Minister responsible for administering the OPGGS Act (the Minister) be requested to urgently convene discussions with the stakeholders (including the ACTU and offshore unions) to finalise legislative amendments and introduced into Parliament as a matter of priority*

Recommendation 2: *The ACTU and offshore unions seek assurances from the Minister that issues relating to uncertainty over the application and coverage of the relevant safety regulatory regime are being addressed as a matter of urgency.*

Recommendation 3: *The ACTU and offshore unions request that the Minister accept the principle of adopting where appropriate the model law provisions in the OPGGSA and ensure consistency elsewhere, that is, the Workplace Relations Ministers' Council position.*

Recommendation 4: *The ACTU and offshore unions encourage the Minister to move quickly on the foreshadowed amendments relating to penalties.*

Recommendation 5: *The ACTU and offshore unions request the Minister to direct NOPSEMA to compare its compliance policy and principles with the Heads of Workplace Safety Authorities' (HWSA) nationally developed policy and framework documents.*

Recommendation 6: *The ACTU and offshore unions request the Minister to include in the foreshadowed amendments, all of those provisions relating to compliance and enforcement that were identified by the 2011 Triennial Review as deficient in the OPGGSA as compared to the model legislation.*

Recommendation 7: *The ACTU and offshore unions request the Minister to direct NOPSEMA to work with Safework Australia to undertake a detailed comparison and review of the respective approaches of the OPGGSA and the model legislation within an agreed timeframe and in consultation with industry stakeholders.*

Recommendation 8: *The ACTU and offshore unions urgently develop a submission to the Review of Seacare which would include a proposal that right of entry provisions in the Seacare legislation should reflect the model laws, and that those provisions should be replicated in the OPGGSA.*

Recommendation 9: *The ACTU and offshore unions continue to seek the Minister's immediate agreement to the HSR training provisions in the model legislation.*

Recommendation 10: *The ACTU and offshore unions seek the Minister's agreement that NOPSEMA become the licensing issuing body for high risk work in the offshore oil and gas industry (once the new competencies are finalised) (Recommendation 10).*

Recommendation 11 (a): *The ACTU and offshore unions quickly draft Terms of Reference for the formal tripartite process announced by Minister Ferguson for the Minister's consideration.*

Recommendation 11 (b): *Those Terms of Reference should also include provision for the ACTU and the offshore unions to be involved in the development of NOPSEMA's proposed Service Charter (Recommendation 10(b)).*

Recommendation 12: *The ACTU and offshore unions formally request the Minister to amend the OPGGSA to allow for verbal approval in clearly stated circumstances, including the requirement to keep appropriate records to reflect the decision.*

Recommendation 13: *The ACTU and offshore unions urgently develop a draft of a protocol or Memorandum of Understanding (MoU) to guide the operation of section 35 so that it can be considered at the December 2012 tripartite meeting. The draft should include the information required to be included in the request and the timeframe for consideration of a section 35 request.*

Recommendation 14: *The ACTU and offshore unions request NOPSEMA's agreement to the joint development of a guide for HSRs to use when seeking assistance through section 35 of the OPGGSA. The guide would include the details of the agreed protocol or MoU in clear and simple terms.*

Recommendation 15: *The ACTU and offshore unions request a specific meeting with the Minister and/or his department to discuss the reform of the safety case regime as per the ACTU and offshore unions' submission to the 2011 Triennial Review, prior to discussions under the tripartite arrangements.*

Recommendation 16: *The ACTU and offshore unions request the Minister to direct NOPSEMA to commit to being part of the national OHS agenda, and in particular to initiate (or continue) discussions with Safework Australia (SWA) on relevant Key Performance Indicators, the Comparative Performance Monitoring reports and to develop a Memorandum of Understanding with SWA that commits to a cooperative approach for both agencies.*

Recommendation 17: *The ACTU and offshore unions request the Minister to encourage NOPSEMA to consult with the industry parties (including the ACTU and offshore unions) with a view to adopting the targets and the approach in the new National OHS Strategy.*

Recommendation 18: *The ACTU and offshore unions request the Minister to encourage NOPSA to engage with HWSA as a participant.*

Recommendation 19: *In respect to recommendations 16, 17 and 18, the ACTU and offshore unions place these issues on the agenda for the first meetings of the formal tripartite meeting so that NOPSEMA can report on the outcomes of their discussions.*

Recommendation 20: *The ACTU and offshore unions seek NOPSEMA's agreement to discussions with industry stakeholders about the type of guidance materials that stakeholders (including HSRs) might require to improve their safety performance.*

Introduction

The ACTU and offshore unions requested Tom Fisher to prepare a report aimed at improvements in offshore safety legislation and administration by the regulator.

As the Director of Fisher Advisory P/L Tom has undertaken a variety of work in the public, private and not for profit sectors, primarily on projects aimed at improving the OHS performance of his clients, particularly in the building and construction industry. His work has also included a major review on the regulation of major hazard facilities and dangerous goods in Queensland.

Prior to setting up Fisher Advisory, Tom's was Australia's first Federal Safety Commissioner, was the Chief Executive Officer of the National Occupational Health and Safety Commission and the Head of the Office of the Australian Safety and Compensation Council. He was also a member of the Safety, Rehabilitation and Compensation Commission and was part of the Review into the Military Compensation Scheme. During this time he had responsibility for setting up the national review to develop model OHS laws and had responsibility for the harmonisation of OHS laws.

Tom was also the Head of the Australian Government's Office of Small *Business*.

Background

This report has been prepared at the request of the Australian Council of Trade Unions (ACTU), the Maritime Union of Australia and the Australian Workers Union (the offshore unions) to support ACTU and offshore union objectives for improvements in offshore safety legislation and administration of the legislation by the regulator, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA). The Terms of Reference are at Attachment A.

In preparing to write this report I was provided with a broad range of documentation, including, but not only:

- The Australian Government's progress report on the implementation of the Recommendations of the Montara Commission of Inquiry.
- The ACTU/offshore unions submission to the Second (2011) Triennial Review of the Operational Effectiveness of NOPSA (as it was then known).
- The Report of the above Review and the response of the Australian Government.
- The Australian Government response to the Offshore Petroleum Safety Regulation Inquiry (June 2009) and the Review of the National Offshore Petroleum Safety Authority Operational Activities (March 2008) of September 2010.
- The Australian Transport Safety Bureau (ATSB) report on the *Karratha Spirit* fatality.
- The Department of Resources, Energy and Tourism Issues Paper *A rigorous compliance and enforcement regime for offshore petroleum activities in Australia*.

I also had access to the relevant legislation, particularly the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGSA), materials on the website of NOPSEMA and the Department of Resources, Energy and Tourism and have taken into account the provisions of the model OHS legislation, regulations and codes of practice.

I have referenced these documents throughout this report.

Industry Safety Performance

As a starting point it is important to consider the current OHS performance of the industry. In the Report of the *Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority* (2011 Triennial Review), the following statements were recorded:

- “the safety performance of the offshore petroleum and gas industry has improved in many respects since 2008 and whilst it continues to be a strong performer nationally, its safety performance lags that of its international offshore industry peers” (page 8 with similar comments at page 27).
- “we note that there have been improvements, but that some areas, such as reportable incidents and dangerous occurrences, show little or no improvement” (page 8 with similar comments at page 38).
- “The industry recognises that its safety performance needs to improve, particularly measured against international benchmarks” (p.39).
- “What is difficult to explain is why some safety indicators show little improvement and why Australia’s performance substantially lags the world’s best” (p.41).

In the Australian Government’s final response to the Report of the 2011 Triennial Review it is also stated that:

“The Report notes that Australia’s safety performance substantially lags the world’s best and that gap is unlikely to close unless the primary duty holders achieve and maintain safety cultures within their organisations that equal world’s best practice. Incorporating leading practice and continuous improvement is as essential for the regulator as it is for industry.”

The issue of safety culture and the role that NOPSEMA has in this regard will be addressed later in this report.

These statements have been quoted in this report as evidence that the safety performance of the industry needs to improve. Acceptance of this as a fact should in itself be sufficient to galvanise all of the stakeholders within the industry to do something additional and/or different to address the problem. Continuing along the same path with the same approaches and policies is unlikely to see Australia join the international top performers in the near future.

It is accepted that the offshore industry is in fact a hazardous industry, particularly the drilling/exploration side, but that should only serve to make stakeholders more vigilant and determined to improve their safety performance.

It is interesting to note that when the Australian Government realised that one of the most hazardous onshore sectors, the building and construction industry, was also one of the worst performing industries in safety terms, it took unprecedented steps to address the OHS performance and used its power as a significant purchaser in the sector. I note that this initiative was taken by a former Coalition government, however, the ALP, on coming to power made a deliberate decision to maintain that initiative.

The Federal Safety Commissioner (FSC) undertakes the roles as a regulator and as an advocate for OHS improvements in the building and construction industry. In its audit program they focus on several areas, particularly consultation and communication as important features of good OHS systems.

Attention on the safety of workers in the offshore industry should be no less focussed than that of onshore workers.

Against this background, it would seem to me that the offshore industry is deserving of additional attention and/or different approaches in an effort to ensure that Australia becomes a world leader in safety for offshore workers.

Major Issues to be Addressed

While it is accepted that there is no one single “fix” to improving OHS performance, I believe that there are three areas that warrant immediate attention by the Australian Government and/or the regulator, NOPSEMA.

(a) Interface Between the OPGGS legislation and Commonwealth maritime laws.

The ATSB report into the fatality on board the *Karratha Spirit* in December 2008 found that it is possible, under some circumstances that facilities like the *Karratha Spirit* can fall outside the jurisdiction of the safety regulators. Its report, at pages 42 and 48 states the following:

“In this instance, the consensus of the regulatory authorities is that the *Karratha Spirit* was not in a navigable form at the time of the accident and was therefore under NOPSA’s jurisdiction according to the OPGGSA. However, the point at which *Karratha Spirit* became ‘navigable’ is not clearly defined in the OPGGSA and is open to interpretation. Consequently, during some operations, it is possible that the ship would not come under the jurisdiction of any Australian safety regulatory regime.”

This issue was also raised in the 2011 Triennial Review at pages 79 to 83 and was the subject of a Recommendation (Recommendation 9 in the Report) when the report stated that;

“legislative action to resolve the issues of the interface between the OPGGS legislation and Commonwealth maritime laws should continue to be given priority attention” (Recommendation 9).

The Australian Government response to the Triennial Report accepted the recommendation and noted that it will “...require that ship-like petroleum facilities, while operating on-site, maintain ship seaworthiness and marine pollution prevention certification in line with relevant international conventions” (page 18-19 of the Australian Government response).

It also stated that “Drafting of amendments to clarify the point of transition between a petroleum facility and a marine vessel, are also underway. It is intended that stakeholder consultation on amendments will be undertaken as part of the legislative process during 2012”.

At the time of writing, however, the Australian Government had not advised industry stakeholders (or at least the ACTU and offshore unions) on the proposed legislative solution to resolve this issue.

I therefore **recommend** that the relevant Minister responsible for administering the OPGGS Act (the Minister) be requested to urgently convene discussions with the stakeholders (including the ACTU and offshore unions) to finalise legislative amendments and have them introduced into Parliament as a matter of priority (Recommendation 1).

I also note the comments of the ATSB Report into the fatality on the *Karratha Spirit* that the vessel “appears not to have been subject to any safety regulatory regime once it left the CALM buoy and for the duration of its intended voyage.” (page 35). Any confusion relating to appropriate coverage arising from questions about international v intrastate v interstate voyages should also be resolved through legislation as soon as possible. I **recommend** that the ACTU and offshore unions seek assurances from the Minister that this is being addressed as a matter of urgency (Recommendation 2).

(b) Model OHS laws (Act and Regulations and Codes)

In July 2008 the Council of Australian Governments formally committed to the harmonisation of work health and safety laws.

The model work health and safety legislation consists of an integrated package of a model Work Health and Safety (WHS) Act; supported by model WHS Regulations, model Codes of Practice and a National Compliance and Enforcement Policy. The legislation was formulated on a tripartite basis by all Australian governments and peak industry and union bodies and followed extensive public consultation and decisions of the Workplace Relations Ministers’ Council (WRMC).

It is accepted that the legislation will provide more effective and wider protection from work-related injury and disease than is provided by most of the existing Australian OHS laws.

Under the current arrangements, however, the new laws do not affect the OHS regime under the OPGGS legislation. Given the particular hazards and high risk in the offshore sector this is understandable, at least until a detailed comparison and review of the approaches of the OPGGS legislation and the nationally harmonised laws can be undertaken.

I understand that the WRMC has requested COAG to consider a proposal that separate legislation such as the OPGGSA only continue where justification is established and then, as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws. The WRMC position goes on to state that;

“even where that justification is established, there should be an on-going, legislative and administrative inter-relationship between the laws and, if there are different regulators, between the regulators”. (See WRMC 81 decisions at <http://www.safeworkaustralia.gov.au>)

I will return to the comments about the regulators later in this report.

I believe that the Commonwealth should be taking the lead in this regard. The Commonwealth, through the actions of the Workplace Relations Minister obviously supports this position and I believe it would be appropriate for the Commonwealth to show the lead in this regard by initiating a detailed comparison of the two approaches with the view towards addressing the WRMC position. At the outset, the ACTU and offshore unions should ask the Minister for an in-principle agreement to

the WRMC position, that is, that the OPGGSA will adopt the model OHS provisions where appropriate and ensure consistency elsewhere in the legislation.

Further to my opening comments about Australia needing to get to best international practice, a comparison with the OPGGSA approach and the new OHS laws at least will show the way towards national best practice.

In relation to penalties, I note that the Australian Government, in its' *Progress Report on implementation of the recommendations of the Montara Commission of Inquiry – September 2012* has committed to amendments so that:

“penalties, including custodial penalties, for occupational health and safety offences under the OPGGS Act will be harmonised with the Work Health and Safety Act (WHS Act) (Cth) or made greater, as appropriate, to reflect the greater consequences in a major hazard industry.”

This is to be welcomed, but one has to wonder why one section of the model OHS legislation is worthy of adoption while other sections such as the right of entry and HSR training apparently are not.

On the related issue of compliance I also note that the 2011 Triennial Review recorded the following comments:

“We note that, as national harmonisation has been developed, the Heads of Workplace Safety Authorities, Australian and New Zealand (HWSA) have agreed on a principles-based *National OHS Compliance and Enforcement Policy (2008)* and a *Framework for a common approach to inspection work (2011)*. NOPSEMA may find it useful to compare its policy and principles with HWSA’s nationally developed policy and framework documents.” (p.49)

I support this view and note that the Australian Government’s response does not specifically address this issue. I suggest that the Minister be asked to direct NOPSEMA to undertake this work in partnership with Safework Australia and in consultation with industry stakeholders.

Finally, in relation to compliance and enforcement, I note that the 2011 Triennial Review detailed, at page 51, a comparison of compliance powers and enforcement mechanisms under the OPGGSA and the model OHS Act. Of the 14 types of powers listed, the OPGGSA is deficient in respect to 10. I note that some of these, for example, civil penalties and imprisonment, are being addressed as part of the legislative package referred to above, however, it seems that the Australian Government’s response to the remainder is unclear.

Again, it seems to me that the OPGGSA would benefit from adopting all of the provisions of the model legislation in this regard.

Without undertaking a comprehensive comparison and review of the OPGGSA as compared to the model OHS legislation it is not possible to detail all the differences, however, a few others do stand out and could be addressed quickly. These include right of entry and the training of HSRs, both of which are discussed below. Others include the length of term of office for a HSR (3 years in the model OHS legislation versus 2 in the OPGGSA) and the right for the HSR to be on the site Work Health Safety (WHS) Committee.

The right of entry for union officials for OHS purposes has long been a feature of Australian OHS legislation. Obviously this is not normally an unfettered access and the model OHS legislation, developed under a tripartite process, outlines the provisions for access for WHS permit holders that should be suitable, although some additional provision(s) may be necessary given the remote locations inherent in this sector (see Part 7 of the model legislation).

These additional provisions should be aimed at facilitating the intent of the provisions, by for example, ensuring timely access to the relevant site and if necessary, transportation and accommodation for those officials.

Unless it can be demonstrated that the offshore sector has such peculiar circumstances that prevents such an arrangement then the model laws should apply. In line with the Commonwealth's position on the model laws, the Australian Government should commit to the principle of including the model law provisions into the OPGGSA. In my view, it should be up to those opposed to demonstrate their case rather than vice versa which seems to be the case at present.

I understand that recently Minister Ferguson advised the ACTU and the offshore unions that he wanted to wait for the outcome of the Review of Seacare before making a decision on the right of entry issue. This is unfortunate; however it does give the ACTU and offshore unions the formal opportunity to influence any future decisions through a submission to the Seacare Review.

Section 35 of the OPGGSA, relating to the capacity of a HSR to have the assistance of a consultant is also relevant here; however I have chosen to discuss that issue later in this report under the "Consultative approach" chapter.

The OPGGSA currently also has provisions for HSRs; however it does not provide the broader provisions of the model legislation (see section 72 of the model legislation). For example, while both provide for the HSR to attend a training course approved by the regulator, the OPGGSA does not allow the HSR to choose a suitable training course. Does this mean that all HSRs are assumed to have exactly the same knowledge base? Again, it raises the question as to why HSR in the offshore sector should be treated differently to others onshore when there is no apparent benefit to the worker or employer.

The final point in relation to the model OHS laws that I wanted to make relates to the licensing of high risk work (schedules 3 and 4 in the model OHS regulations refer). As I understand from discussions with the offshore unions, a new set of competencies for offshore crane operations and associated rigging and dogging are being developed by the Transport and Logistics Industry Skills Council (TLISC), at the request of the Minister.

I also understand that these competencies will be ready by early 2013 and that the TLISC is working with Safework Australia to develop assessment tools. The ACTU and offshore unions want the competencies accepted in the safety cases and as a minimum standard. I agree with that position and note that in line with earlier comments about consistency, they should become a licensed occupation consistent with the licensing provisions in the model OHS regulations.

The one outstanding issue relates to the licensing issuing body. As I understand it there is no agreement on this point. It seems to me that the obvious body should be the industry regulator. I do not see it as appropriate for an external body to take on that role. NOPSEMA is uniquely placed to

undertake that role and the newly established tripartite body would provide an appropriate forum to ensure that the competencies remained appropriate and up to date. My view therefore, is that NOPSEMA should become a licensing issuing body for high risk work in the offshore oil and gas industry.

My **recommendations** in relation to the model OHS laws are therefore as follows:

I **recommend** that the ACTU and offshore unions;

- Request that the Minister accept the principle of adopting where appropriate the model law provisions in the OPGGSA and ensure consistency elsewhere, that is, the WRMC position (Recommendation 3);
- Encourage the Minister to move quickly on the foreshadowed amendments relating to penalties (Recommendation 4);
- Request the Minister to direct NOPSEMA to compare its compliance policy and principles with HWSA's nationally developed policy and framework documents (referred to above) (Recommendation 5);
- Request the Minister to include in the foreshadowed amendments, all of those provisions relating to compliance and enforcement that were identified by the 2011 Triennial Review as deficient in the OPGGSA as compared to the model legislation (Recommendation 6);
- Request that the Minister direct NOPSEMA to work with Safework Australia to undertake a detailed comparison and review of the respective approaches of the OPGGSA and the model legislation within an agreed timeframe and in consultation with industry stakeholders (Recommendation 7);
- Urgently develop a submission to the Review of Seacare which would include a proposal that right of entry provisions in the Seacare legislation should reflect the model laws, and that those provisions should be replicated in the OPGGSA (Recommendation 8);
- Continue to seek the Minister's immediate agreement to the HSR training provisions in the model legislation (Recommendation 9);
- Seek the Minister's agreement that NOPSEMA become a licensing issuing body for high risk work in the offshore oil and gas industry (once the new competencies are finalised) (Recommendation 10).

(c) Operations of the Regulator

The third and final area that I have identified as requiring urgent attention relates to the way in which NOPSEMA is seen to operate, particularly in respect to its relationships with stakeholders and other OHS bodies.

(i) Consultative approach

Schedule 3, Part 1, section 1 of the OPGGSA states as one of the objects of the Act:

“to foster a consultative relationship between all relevant persons concerning the health, safety and welfare of members of the workforce at those facilities”.

The various reports, reviews and submissions that I read in preparing this report place considerable emphasis on NOPSEMA adopting a consultative and tripartite approach.

The 2011 Triennial Review noted at page 33 that “Stakeholders mostly considered their relationship with NOPSA to be satisfactory, but unions and some industry associations felt that, until relatively recently, their level of contact with NOPSA was inadequate”.

That report went on to recommend that the regulator “should continue and strengthen ongoing, constructive engagement, directly and through their representatives, with the industry and the offshore workforce.” (Recommendation 3(a) at page 47)

Recommendation 8, at page 77 states:

“In developing and improving its policies and practices for stakeholder engagement, NOPSA should ensure that:

- a) They are underpinned by a clearly stated commitment to representative, tripartite and consultative engagement (this could be included in a service charter)
- b) A clear program for stakeholder engagement be developed and implemented as part of NOPSA’s Annual Operating Plan, with appropriate preliminary scoping of stakeholder needs and issues and the outcomes analysed and reported to the Advisory Board.’

The Review also noted that the ACTU and offshore unions sought more consultation with NOPSEMA.

The Australian Government response to that Review accepted Recommendation 3(a) and 8 and at page 10 stated that “the Government’s response to Recommendation 3(a) and 8 expand on the level of appropriate engagement, including a clear commitment to representative, tripartite and consultative engagement”.

The Government response went on, at page 17 to say that “the Government supports the development of a service charter by NOPSEMA that is appropriate for a regulator and inclusive of a commitment to consultative tripartite engagement with its stakeholders, including industry and the offshore workforce, directly and through their representatives.”

Despite this emphasis on consultation and a tripartite approach, the ACTU and offshore unions stated in their submission to the 2011 Triennial Review that NOPSEMA’s approach was characterised by;

“its reticence in working with and being seen to be working with trade unions and workforce representatives, Health and Safety Representatives (HSR) and safety committees as integral to its regulatory model.”

In my recent discussions with offshore union representatives it is clear that little has changed since that submission and this lack of a positive relationship is evidenced by recent correspondence between the ACTU and offshore unions and NOPSEMA.

In terms of general consultation and communications with HSRs, the offshore workforce and their representatives, the 2011 Triennial Review found, at page 73, that there were no formal arrangements with the workers, that the CEO has quarterly meetings with the ACTU and unions and

that in respect of HSRs, information was provided and NOPSEMA “supported” the annual HSR forum. This compares with the formal consultations with industry associations over OPGGSA operational matters.

It seems to me that it would be consistent with the comments above if NOPSEMA entered into more formal arrangements with the workers and their representatives and I understand from discussions with the offshore unions, that Minister Ferguson has set up a formal tripartite process involving unions, employers and government which will meet in December 2012. This initiative is to be welcomed.

While I am not aware of all details relating to the chair, future agenda, etc, I **recommend** to the ACTU and offshore unions that they quickly draft a suggested Terms of Reference for the Minister’s consideration (Recommendation 11(a)). If this is not done quickly, then the ACTU and offshore unions run the risk of being “on the back foot” in having to consider Terms of Reference drafted by NOPSEMA or others.

I also **recommend** that those Terms of Reference also include provision for the ACTU and the offshore unions to be involved in the development of their proposed Service Charter (referred to in the Australian Government’s response to the 2011 Triennial Review) and would also be consistent with the WRMC 81 decision referred to at page 5 of this report (Recommendation 11(b)).

I want to describe one recent example that demonstrated the lack of a cooperative and positive approach that has led to problems in the relationship between the workforce representatives and the regulator.

Section 35 of the OPGGSA provides for a HSR to be assisted in the exercise of their powers by a consultant. Some detail is provided in the legislation, including that either the operator or NOPSEMA has to agree, in writing to the proposal.

In August 2012 there was an incident on the *Stena Cyde* in Bass Strait that resulted in two workers being killed. That incident is the subject of an investigation and I do not propose to go into the issues surrounding the incident.

This example raises a number of issues. At the outset let me state that I understand the purpose in section 35 where it specifies that written approval is required. However, I can imagine that in some circumstances time would be of the essence and I think that there should be some provision for verbal approval, with appropriate records being made at the time.

In this regard, I **recommend** that the ACTU and offshore unions formally request the Minister to amend the OPGGSA to allow for verbal approval in clearly stated circumstances, including the requirement to keep appropriate records to reflect the decision (Recommendation 12).

Following the incident, as I understand it, the relevant HSR requested the assistance of a consultant under section 35 of the OPGGSA. I should note here that the *HSR Handbook*, available on the NOPSEMA website and presumably supplied to all HSRs, points out the provision of section 35, however, it does not provide any guidance on the form of the request or the information required by NOPSEMA or the operator.

I think it can be assumed that the request to NOPSEMA should provide some basis for the request, but as I have mentioned, the legislation is silent on the extent of information required of the HSR making the request. That means the HSR (nor their representatives) have no way of knowing what material to include in a request. Additionally, the legislation provides no guidance to NOPSEMA or the operator on the reasons that they could rely on to approve or reject a request.

In short, in terms of this particular request NOPSEMA did not provide approval for more than 6 days.

I can imagine that the HSR making the request, immediately following such a traumatic incident would have been concerned to get the assistance as soon as possible to allow him/her to undertake his responsibilities.

I would have imagined that had there been a consultative and cooperative relationship between NOPSEMA and the offshore unions and HSRs, then the regulator would have assisted the HSR to expedite the request.

The development and maintenance of strong cooperative relationships takes more than correspondence exchange and meetings. It should include a deep understanding of the concerns, rights and obligations of all parties. In this case it seems that was missing.

I now understand from meetings with offshore unions that the Minister recently indicated that he expects the tripartite meeting in December 2012 to develop a protocol or Memorandum of Understanding (MoU) to cover issues surrounding section 35 and agree that this is appropriate.

Any protocol or MoU should be based on providing a facilitative approach, that is, to provide guidance to the operator and NOPSEMA on how they can assist the HSR in the undertaking of their legislative right (i.e. access to expert assistance) in a simple as possible manner. As mentioned above in the discussion of right of entry, this should also take into account the peculiarities of the offshore sector relating to remote locations, including timing, transportation and accommodation issues.

I **recommend** that the ACTU and offshore unions urgently develop a draft of a protocol or MoU so that it can be considered at the first tripartite meeting in December 2012 (Recommendation 13). If the ACTU and offshore unions take the initiative by putting the first draft “on the table”, it will ensure that all relevant issues are covered and is likely to result in a better outcome for workers, particularly for HSRs. It is always more difficult to introduce additional issues to a draft prepared by another party. The draft should include the information to be included in the request and the timeframe for consideration of a section 35 request.

I also **recommend** that the ACTU and offshore unions request NOPSEMA’s agreement to the joint development of a guide for HSRs to use when seeking assistance through section 35 of the OPGSA and that the guide would include the agreed protocol or MoU in clear and simple terms. (Recommendation 14).

Before moving on from this chapter on “Consultative Approach”, I wanted to raise the safety case issue, given its importance in dictating the safety practices within the offshore sector. As I see it, there are two main issues that require consideration.

Firstly, the lack of access to the safety case documents. I have been advised that the Minister is considering a process to ensure greater access to safety case documents under the OPGGS Act. I also understand that a possibility being considered is a web-based system where a summary report that avoided commercial in confidence issues could be made available. I believe that this is a step in the right direction, however I do not believe that it goes far enough. I see no reason why safety case documentation should not be readily available in its entirety to an interested person, particularly a HSR, any member of the workforce, or trade union officials with coverage of the workforce.

I do not accept the argument that these documents should be held as commercial in confidence. We are talking about the means by which an operator ensures the safety of their workforce and others on site. In my mind, the need to ensure the integrity of these documents and systems, and to give confidence to the workforce and their representatives, overrides any other argument. It would be a sad reflection on the industry if it were accepted that safety were to be seen as a commercial advantage. We want an industry that is consultative and collaborative in its approach to OHS on site. This is the only way to get to international best practice.

Of course, members of the workforce are in a unique position to make recommendations to the operator (and the regulator) on improvements to safety cases, based on their own experiences.

That leads me to the second issue, and that relates to the lack of involvement in the development, implementation and revision of safety cases by the workforce and their representatives.

Under current arrangements it seems that there is no role for unions in this regard. Importantly, I note from the NOPSEMA website that there is work being undertaken on the *Safety Case Guidance Note Project*. I also note that neither the ACTU nor the offshore unions are involved in the project and, in fact in the draft guidance under preparation on involving the workforce does not specifically mention unions or acknowledge the important contribution they can make.

I am concerned that with the lack of a formal role for unions, individual members of the workforce could be expected to make contributions when they may have no prior knowledge of the safety case in concept or practice and, in all likelihood, have not been trained to ensure they have that expertise.

Given the emphasis on consultation and tripartite approaches mentioned elsewhere in this report, I do not understand why the expertise in the union movement is not being utilised in this area.

I also note here that in Division 2, sections 2.24 to 2.39 of the Offshore Petroleum Greenhouse Gas Storage (Safety) Regulations 2009 provide no references to consultation on safety cases.

In its submission to the 2011 Triennial Review the ACTU and Offshore unions made detailed submissions relating to a range of aspects of the safety case regime (see pages 46-51 of the ACTU and offshore unions' submission).

Obviously the proposals in this submission are aimed at improving the safety case regime, as well as making that regime relevant and useful to the workforce, as well as improving the consultative arrangements. They include, but are not restricted to proposals that would:

- Require a revised safety case to be submitted prior to the facility moving from a construction or installation phase to an operational phase.
- Require the initial acceptance of a new facility Safety Case is in conjunction with an inspection of a facility upon commencement of operations.
- Require the safety case be a stand-alone document and can be understood by users, that is, the actual standard should be specified in full rather than be referenced.
- Provide greater clarity for involvement of members of the workforce.
- Make provision for consultation before a workforce is engaged.
- Strengthens the commitment to consultation and workforce involvement.
- Make a number of specific changes aimed at improving safety.

The submission outlines the reasons in support of each of the proposals and I do not propose to repeat them all here, however I do believe that they warrant further attention.

While the Review did not address each proposal I believe that it would be worthwhile for the ACTU and offshore unions and the Australian Government to discuss these in detail. The ACTU and offshore unions should also ensure that the new tripartite body being set up by the Minister is able to discuss these issues. My recommendation relating to the proposed Terms of Reference is relevant here. It is important that issues relating to the safety case regime are able to be raised in that forum.

I therefore **recommend** that the ACTU and offshore unions request a specific meeting with the Minister and/or his department to discuss the reform of the safety case regime as per the ACTU and offshore unions' submission to the 2011 Triennial Review, prior to discussions under the tripartite arrangements (Recommendation 15).

(ii) NOPSEMA's role in the national OHS agenda

The Australian Government response to the 2011 Triennial Review included acceptance of Recommendation 2(b) that "NOPSA should consult Safe Work Australia about how the National Strategy 2002-12 and its forthcoming replacement may assist strategic planning over safety performance and measurement in the offshore oil and gas industry".

I note here that on 31 October 2012 the Workplace Relations Minister, Minister Shorten, released the new National OHS Strategy 2012-2022, including new targets and an emphasis on a collaborative approach (see www.safeworkaustralia.gov.au).

The ACTU and offshore unions, I am sure support this proposition and I see no reason why NOPSEMA should not adopt the targets and approach outlined in the new National Strategy. However, I believe that NOPSEMA needs to go further to ensure that it develops a place for itself in the national OHS agenda. This would ensure that it is well placed to learn from other Australian OHS agencies and see how they operate. Likewise, those agencies will benefit from getting the NOPSEMA perspective on dealing with OHS in a hazardous industry.

If earlier recommendations are accepted, NOPSEMA will develop a stronger relationship with Safe Work Australia (SWA) while undertaking the model OHS law project and considering the national documents on compliance and enforcement referred to above.

I note that NOPSEMA is also seeking opportunities for working with SWA on regulatory Key Performance Indicators (KPIs) and I would encourage this to continue. Put simply, what is not measured will not be improved. I also note that national OHS performance is measured and reported upon through SWA's *Comparative Performance Monitoring (CPM)* reports that compare OHS outcomes within Australia. Seacare Authority figures are included and I believe that NOPSEMA should consider becoming part of that exercise and should engage in discussions with SWA for that purpose. This should not replace performance benchmarking against international counterparts, but be in addition to that work.

Membership of the Heads of Workplace Safety Authorities (HWSA) would also be a worthwhile exercise for NOPSEMA and would allow them to contribute more to the national OHS debate. HWSA has been at the forefront of developing national guides and compliance strategies for OHS agencies and it seems strange to me that NOPSEMA, as the regulator in such an important and high risk industry is not a participant.

Against that background, I **recommend** that the ACTU and offshore unions request the Minister to direct NOPSEMA to commit to being part of the national OHS agenda, and in particular to initiate (or continue) discussions with SWA on relevant KPIs, the CPM reports and to develop an MoU with SWA that commits to a cooperative approach for both agencies (Recommendation 16).

I **recommend** that the ACTU and offshore unions request the Minister to encourage NOPSEMA to consult with the industry parties (including the ACTU and offshore unions) with a view to adopting the targets and the approach in the new National OHS Strategy (Recommendation 17).

Finally, in respect to this section I **recommend** that the ACTU and offshore unions request the Minister to encourage NOPSAs to engage with HWSA as a participant (Recommendation 18).

In respect to these last 3 recommendations (Recommendations 16, 17 and 18), NOPSEMA should report to the new formal tripartite body on the outcomes of their discussions and I **recommend** that the ACTU and offshore unions place these issues on the agenda of the formal tripartite meetings in December 2012 for this purpose (Recommendation 19).

(iii) NOPSEMA's role as a safety advocate

The OPGGSA gives NOPSEMA responsibilities for promoting OHS and many recent reports note the importance of developing and maintaining a safety culture. NOPSEMA's 2012-2015 Corporate Plan notes its role in promoting safety as well as being a regulator.

NOPSEMA should be seen as the chief advocate for such a culture. The 2011 Triennial Review noted some of NOPSEMA's work in this regard.

I acknowledge here that NOPSEMA's role as an independent regulator is important and should not be compromised. It is about getting the balance right. Many OHS agencies around Australia (e.g. Comcare and NSW Workcover) undertake these dual roles successfully.

This role could be enhanced if the recommendations above are adopted, particularly if NOPSEMA is seen as a major participant in national OHS activities and if the performance of the industry improves to that of an international leader.

NOPSEMA could also consider developing more guidance and tools for stakeholders, particularly the HSRs. Such supporting documents could be developed in cooperation with industry and union stakeholders which will also strengthen those relationships. For example, the Federal Safety Commissioner developed the FSC Safety Principles (www.fsc.gov.au) to assist stakeholders in their particular industry to understand what it takes to establish and maintain a strong safety culture.

These Principles include a focus on, amongst other things, industry stakeholders' commitment to a safety culture, consultation and communication, measurement and benchmarking. All of which are important to the offshore sector.

I **recommend** that the ACTU and offshore unions seek NOPSEMA's agreement to discussions with industry stakeholders about the type of guidance materials that stakeholders (including HSRs) might require to improve their safety performance (Recommendation 20).

Conclusion

The offshore industry is a hazardous sector that needs to improve its OHS performance to match that of Australia's international competitors. Previous reviews and reports have highlighted some of the actions required to make this advance and Ministers should be encouraged to move quickly to implement the foreshadowed changes.

Additionally, an enormous amount of work was undertaken by all Australian governments, union and industry associations to develop model OHS legislation. All have accepted that a move to this legislation will improve Australia's safety performance. It would beggar belief if one sector took a contrary view to that of the large number of people involved in its development, particularly when the Commonwealth, through the Workplace Relations Ministers' Council has indicated in principle support.

NOPSEMA can also play an important role in the national OHS agenda. This role will result in NOPSEMA having a strong voice in national guidance materials, and other agencies having regard for the peculiarities' of the offshore sector.

Finally, I believe that NOPSEMA needs to improve its relationship with the offshore workers and their representatives, the ACTU and offshore unions. Immediately addressing this through a Service Charter and joint development of guidance material for HSRs wishing to utilise section 35 would be a good start in this regard.

Terms of Reference

The ACTU and affiliated offshore unions wish to engage a consultant with OHS expertise, knowledge of contemporary Australian OHS legislation and knowledge of offshore oil and gas safety to prepare a report aimed at supporting ACTU and offshore union objectives for improvements in offshore safety legislation and administration of the legislation by the regulator (NOPSEMA).

The key tasks of the consultant will be to:

Review, and extract important findings from various Australian offshore safety reports and union submissions to the reviews that led to those reports.

Collate, through a process of consultation with offshore unions (and other stakeholders as appropriate), key deficiencies in offshore OHS, significant safety incidents, and deficiencies in the performance of the regulator, NOPSEMA.

Identify findings and recommendations for improvements in offshore safety that could be put to Government for immediate legislative and regulatory action.

The ACTU/offshore unions require a draft or interim report by 6 November 2012 for release at the ACTU/Offshore union's conference in Perth on 13 November 2012.