

Work health and safety of workers in the offshore petroleum industry

Submission of the Australian Council of Trade Unions, 18 April 2018

About the ACTU

1. Since 1927 the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. The ACTU has consulted with governments in the development of almost every legislative measure concerning employment relations over its 90 year history. The ACTU consists of 43 affiliated unions and State and regional trades and labour councils, who between them have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. All of the unions that represent the interests of workers in the offshore petroleum industry are affiliated to the ACTU.

Executive summary

2. The Australian Council of Trade Unions (**ACTU**) welcomes the opportunity to make this submission to the Senate Education and Employment References Committee inquiry into the work health and safety of workers in the offshore petroleum industry. A full list of our recommendations to the inquiry is appended to this submission.
3. The National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) (and the predecessor constituent body, the National Offshore Petroleum Safety Authority (**NOPSA**)), has been subject to several independent and operational reviews since 2008.¹ It is disappointing that shortcomings in respect of stakeholder engagement have been consistently identified in each of these reviews and continue to remain unaddressed.
4. Also of particular concern to the ACTU is that the work health and safety rights and protections of workers in the offshore petroleum industry are inferior to those of other workers in Australia. This inconsistency is especially marked in respect of workplace health and safety representatives (**HSRs**), union right of entry for work health and safety purposes and training and certification requirements for workers performing high risk work.
5. Worker involvement in managing work health and safety, particularly through HSRs and unions, is critical to achieving positive outcomes. The ILO emphasises the crucial role of unions in securing safer and healthier workplaces, strongly advocating for 'a strengthening of collective voice as the primary means of improving working conditions, and protecting workers' health'.² Accordingly, the common rules of the European Union on safety in offshore oil and gas operations provide that 'best practice is for consultation mechanisms to be formally established by Member States on a tripartite basis comprising the competent authority, operators and owners, and worker representatives' and require member states to 'establish a mechanism for effective participation in tripartite consultation between the competent authority, operators and owners, and worker representatives in the formulation of standards and policies dealing with major accident prevention.'³

¹ 2015 Operational Review of the National Offshore Petroleum Safety and Environmental Management Authority; Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority 2011; Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009; Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Marine Issues*, June 2009; and the *Review of the National Offshore Petroleum Safety Authority Operational Activities 2008*.

² International Labour Organisation, 'Economic Security for a better world, ILO Socio-Economic Security Programme', International Labour Office, 2004, ISBN 92-2-115611-7.

³ Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC. The Directive defines 'tripartite consultation' as 'a formal arrangement to enable dialogue and cooperation between the competent authority, operators and owners, and workers' representatives'.

6. A 2008 national review of occupational health and safety (**OHS**) in Australia found that 'There is considerable evidence that the effective participation of workers and the representation of their interests in OHS are crucial elements in improving health and safety performance at the workplace.'⁴ There is also clear international evidence in support of worker involvement in work health and safety:
- A 1995 landmark study in the British private manufacturing sector found that workplaces with a joint consultative workplace committee with an exclusive remit for health and safety matters have between 4.9 and 5.7 fewer injuries on average per 1000 workers (compared to 10.6 injuries on average per 1000 workers where employers managed health and safety in the absence of any joint arrangements).⁵
 - A 2004 study which sought to replicate the 1995 study did not find such stark results, but did confirm that 'health and safety should not be left to management'.⁶ However a further analysis of the same dataset in 2007 found an even stronger confirmation of the mediated effects of unions on injuries at work than those found by the 1995 study.⁷ The 2007 study found further that both non-union joint committees, and management dealing with health and safety unilaterally, are arrangements associated with more injuries.
 - A 2007 study of manual workers found that unionised work places were less likely to have a fatal injury.⁸
 - A 2007 UK Government report concluded that workplace HSRs caused cost savings of between £136m and £371m (in 2004 prices) due to around 161,000 to 241,000 fewer working days lost in 2004.⁹
 - Another UK Government report, in 2011/12, by the Offshore Division of the Health and Safety Executive found that a safety culture that encourages the active involvement of the workforce is an important driver of safety performance.¹⁰
 - A 2011 study found that the occupational injury and illness rate (**OIIR**) in unionised workplaces is lower than those without a union presence, and that workplaces with an occupational safety and health committee usually have a lower OIIR than those without.¹¹ In manufacturing industries with five or more employees in 2007, the OIIR of the workplaces without a union was 0.87 percent, while in unionised workplaces the OIIR was almost half that at 0.45 percent. Further, the study found that the OIIR is negatively correlated with labour productivity, so there is a productivity incentive for involving unions and workers in occupational health and safety management.
 - A 2013 data analysis of 31 European countries showed greater union density was one of the most important factors in determining worker health and national productivity.¹²
 - A 2013 study found that union representation and participation in the management of occupational health and safety is associated with lower levels of injuries (and conversely non-participation with a higher incidence of injuries).¹³

⁴ *National Review into Model Occupational Health and Safety Laws*, Second Report, January 2009, p xvi.

⁵ Barry Reilly, Pierella Paci and Peter Holl, 'Unions, Safety Committees and Workplace Injuries' (1995) 33 *British Journal of Industrial Relations* 2.

⁶ Theo Nichols, David Walters, Ali C Tasiran, *The Relationship between Arrangements for Health and Safety and Injury Rates – The Evidence-Based Case Revisited*, (2004) Working Paper Series Paper 48, School of Social Sciences, Cardiff University.

⁷ Theo Nichols, David Walters, Ali C Tasiran, 'Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK' (2007) 49 *Journal of Industrial Relations* 2.

⁸ Suzanne Grazier, *Compensating Wage Differentials for Risk of Death in Great Britain: An Examination of the Trade Union and Health and Safety Committee Impact* (2007) Working Paper 2007/02, Welsh Economy Labour Market Evaluation and Research Centre, Swansea University.

⁹ Department of Trade and Industry, *Workplace Representatives: A Review of Their Facilities and Facility Time*, Consultation Document, January 2007.

¹⁰ HSE Offshore Division, Business Plan 2010/11, priorities for 2011/12, cited in the *Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority 2011*, paragraph [64], p 40.

¹¹ Kwan Hyung Yi, Hm Hak Cho, Jiyun Kim, 'An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees' Activity, Their Relation to the Changes on Occupational Injury and Illness Rate' (2011) 2 *Safety and Health at Work* 4.

¹² Maureen F Dollard and Daniel Y Naser, 'Worker Health is Good for the Economy: Union Density and Psychosocial Safety Climate as Determinants of Country Differences in Worker Health and Productivity In 31 European Countries' (2013) 92 *Social Science & Medicine*.

7. The stakeholder engagement issues that have been repeatedly identified in the various reviews of the NOPSEMA therefore remain a pressing concern of the ACTU. The NOPSEMA continues to ignore feedback from both industry and unions as to the most effective means for it to engage with and support HSRs.¹⁴ The lack of a tripartite approach to health and safety between the regulator, industry and the workforce also represents a persistent failure by the NOPSEMA to apply best practice. Inadequate protections and support to HSRs is a problem of particular importance given the adverse impact of growing job insecurity in the industry on the confidence of workers to speak up about health and safety concerns. Insecure work is a key factor impacting on the work health and safety of workers in the offshore petroleum industry.
8. The ACTU notes that Ms Marie Boland is currently undertaking a review of the model work health and safety laws on behalf of Safe Work Australia. This submission should be read in conjunction with the ACTU's submission to that review.
- a. **(i) The scope and necessity for amending and updating any legislative inconsistencies in the relevant work health and safety scheme, including any provisions in the legislation which need to be updated**
9. There are several areas of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGGS Act**) that the ACTU considers are deficient and need updating, as outlined below and under term of reference (a)(ii)-(iv).

Workforce participation in the development and review of the safety case

10. A facility cannot be constructed, installed, operated, modified or decommissioned without a safety case in force for that stage in the life of the facility. The safety case is central to the objectives-based regulatory approach adopted in Australia's offshore petroleum industry. The NOPSEMA's operational practice is therefore strongly focused on compliance with controls identified in safety cases.¹⁵ Given the importance of worker involvement in work health and safety management, it is critical that workers and their representatives are involved in the development and review of safety cases.
11. The independent review of the NOPSEMA's operational activities in 2008 (**2008 Review**) noted that:

*The Greenfields situation where the Safety Case is developed before the workforce is often hired makes it difficult for them to be involved in the process. Workforce often does not understand the Safety Case and the documentation is not always in a format that can be easily understood.*¹⁶
12. The 2008 Review therefore recommended that 'Subsequent to the hiring of the workforce and preferably before the commencement of operations, a review of the Safety Case should take place with the new workforce to ensure they understand the accepted Safety Case, its risks and Safety Management Plan'.¹⁷
13. The issue was not new. The 2001 report reinforced the importance of workforce understanding and involvement in a safety case if risk is to be properly managed and continuous improvement is to occur, as noted in the Bills and Agostini review of offshore petroleum safety regulation in 2009.¹⁸

¹³ Andrew Robinson and Clive Smallman, 'Workplace Injury and Voice: A Comparison of Management and Union Perceptions' (2013) 27 *Work, Employment & Society* 4.

¹⁴ See paragraph [59] of this submission.

¹⁵ Operational Review of the National Offshore Petroleum Safety and Environmental Management Authority 2015, paragraph 5.1.3, p x.

¹⁶ *Review of the National Offshore Petroleum Safety Authority Operational Activities 2008*, paragraph 5.6.1, p 30 (33).

¹⁷ *Ibid.*

14. Bills and Agostini suggested that ‘workforce input to continuous review of the safety case (monthly number of suggestions and percentage of workforce making suggestions annually)’ be adopted as a safety indicator that is monitored to drive positive safety change.¹⁹ They recommended that ‘the workforce must be actively supported in understanding the safety case structure and use and effectively represented in its development’.²⁰
15. As the safety case is developed before a workforce is employed, the relevant unions should be involved in the development of the initial case as the representative of the workforce. A copy of the safety case should be available to the HSRs on that facility, including by remote online access, because many HSRs will not want to request access from their employer or facility management directly for fear of persecution (discussed further below under term of reference (f)). HSRs should have the capacity to trigger a review and revision of the safety case, consistent with the *Work Health and Safety Regulations 2011* (Cth) (**WHS Regulations**) (discussed further below under terms of reference (a)(ii)-(iii) below). Under the WHS Regulations, HSRs have the capacity to trigger a review of various safety management documents, including of major hazard facilities, such as the emergency plan, asbestos management plan and safety management system, and other measures implemented to control health risks at the workplace.²¹

Recommendations

1. That the OPGGS Act be amended to provide for:
 - (i) a requirement for consultation with the relevant unions in the development of the initial safety case;
 - (ii) a requirement for a review of the safety case to take place with the workforce once hired (and before the commencement of operations, where possible);²²
 - (iii) a requirement for HSRs to be provided with a copy of the safety case, including by remote online access; and
 - (iv) an ability for an HSR to trigger a review and revision of the safety case in certain circumstances.

(ii)-(iii) The scope and necessity for amending and updating any legislative inconsistencies in the relevant work health and safety scheme, including any legislative changes required to the OPGGS Act to provide for appropriate consistency with the WHS Act

16. The ACTU is concerned that workers in the offshore petroleum industry are denied some of the basic work health and safety rights and protections enjoyed by other Australian workers, for no good cause and contrary to the fundamental principle of uniformity in work health and safety regulation in Australia. We submit that the OPGGS Act should be amended to provide consistency with the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) to the full extent possible, with appropriate modifications for the industry – for example, to take into account the safety case system (discussed above under term of reference (a)(i)) and the remote location of the work (discussed below under term of reference (a)(iv)).
17. In 2008, the Workplace Relations Ministers Council established a national OHS review. The purpose of the review was to make recommendations for the optimal content of a model OHS Act, which could be implemented as nationally consistent laws by the Commonwealth, States and the Territories. The review recommended that

¹⁸ Department of Industry, Tourism and Resources, *Future arrangements for the regulation of offshore petroleum safety: 'Australian Offshore Petroleum Safety Case Review'*, 2001, cited in Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009, p 149.

¹⁹ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009, pp 157-8.

²⁰ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009, p 190.

²¹ Regulations 38(2)(e) and (f), 401(1)(g) and (3), 430(1)(d) and (2), 559(2)(e) and (4) and 569(2)(e) and (5).

²² We note that this recommendation was originally made by the 2008 Review (see paragraph [12] above).

OHS in specific industries or in relation to specific hazards *should only be separately regulated where it is periodically and objectively justified*.²³ As far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws.²⁴

18. In July 2008, the Commonwealth, the States and the Territories entered into the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the Agreement)*. The agreed objectives of the Agreement included 'the development of uniform, equitable and effective safety standards and protections for all Australian workers'.²⁵ The Agreement required each party to 'take all necessary steps to enact or otherwise give effect to model OHS legislation within its jurisdiction' by the end of 2011.²⁶
19. The 2008 Review noted this agreement that separate industry or hazard specific laws relating to OHS should only be maintained where objectively justified.²⁷ The 2008 Review accepted that separate legislation is justified for the offshore oil and gas industry. However it recommended that, in line with the national OSH review's recommendation, the content and operation of all laws in the petroleum and gas industry that affect occupational health and safety should be reconsidered with the aim of achieving as much consistency with the content and operation of the harmonised principal occupational health and safety laws as is appropriate.²⁸ This finding and recommendation was reiterated by Bills and Agostini in 2009.²⁹
20. Outcomes in those jurisdictions that have implemented the 2011 model work health and safety laws have generally been positive. Changes made to the New South Wales work health and safety legislation in 2001 that were later adopted in the 2011 model work health and safety laws were reported in 2006 to have delivered a nine percent reduction in safety incidents.³⁰
21. Despite these positive outcomes, and despite the principle of uniform work health and safety regulation in Australia being adopted by the 2008 Review and mandated by the Agreement, the OPGGS Act continues to be deficient relative to the WHS Act (which is based on the 2011 model work health and safety laws) in several key ways with no objective justification for the inconsistencies. The following inconsistencies are of particular concern to workers in the offshore petroleum industry.

Statutory object to recognise role of industrial organisations

22. The object of the WHS Act specifically envisages a role for unions and employer organisations in work health and safety.³¹ The objects of Schedule 3 of the OPGGS Act do not specifically reference the role of industrial organisations. Given the importance of representative involvement in the management of work health and safety, it would be appropriate that this role is acknowledged in the legislation rather than being left to the interpretation of the regulator, which could change.³²

²³ *National Review into Model Occupational Health and Safety Laws*, Second Report, January 2009, Recommendation 76(a), 17.

²⁴ *Ibid.*

²⁵ Clause 1.4.

²⁶ Clause 5.1.6.

²⁷ *Review of the National Offshore Petroleum Safety Authority Operational Activities 2008*.

²⁸ Recommendation 5.

²⁹ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009.

³⁰ ACIL Tasman (2004) *Occupational Health and Safety: Economic Analysis, Report for WorkCover*, cited in the Explanatory Memorandum to the *Seafarers and Other Legislation Amendments Bill 2016* (Cth), p xxxviii.

³¹ WHS Act, s 3(1)(c).

³² See paragraph [151] of the NOPSEMA's submission to this inquiry, pp 28-29.

23. HSRs play a critical role in securing work health and safety. There is no objective justification for why HSRs in the offshore petroleum industry are not afforded the same rights, powers and entitlements as HSRs under the national uniform system. Addressing deficiencies in the OPGGS Act relative to the WHS Act, including but not limited to those listed below, is critical to attracting and retaining, and providing better support to, HSRs in the offshore petroleum industry.³³
- (a) The WHS Act allows for workers to autonomously determine the manner in which they elect an HSR.³⁴ The OPGGS Act does not.³⁵
 - (b) The WHS Act requires that an HSR be a member of the health and safety committee, if he or she consents.³⁶ The OPGGS Act contains no equivalent provision.
 - (c) The WHS Act requires that the person conducting the business or undertaking to prepare and keep up-to-date a list of each HSR for each work group of workers carrying out work for the business or undertaking. The person must display the list at the workplace in a manner that is readily accessible to the relevant workers and provide an up-to-date copy to the regulator as soon as practicable after it is prepared.³⁷ The OPGGS Act requires the operator of a facility to prepare and keep up-to-date such a list and to ensure that the list is available for inspection at all reasonable times by the workforce and inspectors. There is no requirement to provide a copy to the regulator.

The OPGGS Act should be amended so that the list is required to be *displayed* at the workplace, in a manner that is readily accessible to the workers, so that workers do not have to request a list from the operator and thereby identify their interest in the list to the operator. The OPGGS Act should also be amended so that the operator is required to provide an up-to-date copy to the regulator as soon as practicable after it is prepared.³⁸

Further, the ACTU submits that both the WHS Act and the OPGGS Act should be amended to require the list to also record the date on which the HSR was elected to the role and the date on which they completed the requisite training, so that compliance with the term of office and training provisions can be monitored.³⁹

- (d) The WHS Regulations entitle the HSR to an initial training course in work health and safety of up to five days and up to one day's refresher training each year.⁴⁰ The OPGGS Act contains no equivalent prescription of the period of training or any entitlement to refresher training. Given the importance of the HSR role and the responsibilities that the role entails, it is vital that they are properly trained and that their training remains up-to-date.
- (e) The WHS Act allows the HSR to choose the approved HSR training course that they undertake, in consultation with the person conducting the business or undertaking, and requires that person to pay the

³³ Further means by which the NOPSEMA could better engage with, and support, HSRs is discussed under terms of reference (f) to (h) below.

³⁴ Section 61.

³⁵ Section 26, Schedule 3.

³⁶ Section 76(3).

³⁷ Section 74(2).

³⁸ See further paragraph [62] and recommendation 22(ii) below.

³⁹ See further paragraph [62] and recommendation 22(ii) below.

⁴⁰ Regulation 21.

course fees and any other reasonable costs associated with the HSR's attendance at the training.⁴¹ The OPGGS Act contains no equivalent provisions allowing the HSR choice of course or requiring the operator to cover reasonable costs.

The ACTU further recommends the provision in s 67(2) of the *Occupational Health and Safety Act 2004* (Vic), which provides that an HSR make a request to attend a course not less than 14 days before the course is to start (and the employer must allow the HSR to attend the course). This provision avoids disputation about the timing of the course.

- (f) Section 70(1) of the WHS Act requires that the person conducting a business or undertaking provide an HSR with certain rights and benefits to assist and support the HSR in performing the role. The equivalent provision of the OPGGS Act (s 40(1)) is comparatively deficient in some respects. For example, s 40(1)(f) compared to s 70(1)(f), which provide for facilities and other assistance afforded to HSRs.
- (g) Under the OPGGS Act, the NOPSEMA may disqualify an HSR.⁴² Under the WHS Act, only a court can disqualify an HSR (however, we note that the NOPSEMA may only disqualify an HSR for a period not exceeding five years, while under the WHS Act the court can disqualify the HSR indefinitely).⁴³ We consider that it is more appropriate that the power to disqualify an HSR, which is significant, can only be exercised by a court – with all of the safeguards a court process entails.

Right of entry for work health and safety purposes

24. Unions provide critical support to HSRs and health and safety committees, including training, information and protection from victimisation. The World Bank has noted that 'Trade unions can play an important role in enforcing health and safety standards. Individual workers may find it too costly to obtain information on health and safety risks on their own, and they usually want to avoid antagonising their employers by insisting that standards be respected.'⁴⁴ The 2008 national OHS review found that providing a legislated right of entry for work health and safety purposes to union officials 'would contribute in a positive manner to OHS compliance at a workplace level'.⁴⁵ The work health and safety entry permit system in the WHS Act is contained in Part 7. The OPGGS Act has no equivalent provisions. There is no objective justification for this departure from the national uniform system. We note that union access to offshore facilities is part of work health and safety regulation in other jurisdictions internationally.

Licensing system for workers performing high risk work

25. For the majority of Australian work health and safety jurisdictions, 'the operation of specific high risk work is governed by a system of certification or licensing designed to minimize the risk of adverse consequences associated with a lack of competency'.⁴⁶ In the WHS Act this system is contained in Part 4 of the Act (and Part 4.5 of the WHS Regulations). It requires completion of a VET course to obtain the requisite licence. The 'permit to work' system in the OPSSG Regulations is far less rigorous. It does not require certification or licensing, but simply requires that the 'safety case for a facility must provide for the operator of the facility to establish and maintain a documented system of coordinating and controlling the safe performance of all work activities of

⁴¹ Sections 72(1)(c) and (2) (b).

⁴² Schedule 3, s 32.

⁴³ Section 65.

⁴⁴ World Bank (1995) *Workers in an Integrating World*, Oxford University Press, Washington.

⁴⁵ *National Review into Model Occupational Health and Safety Laws*, Second Report, January 2009, p 389.

⁴⁶ *National Review into Model Occupational Health and Safety Laws*, Second Report, January 2009, paragraph 34.8, p 291.

members of the workforce at the facility'.⁴⁷ Again, there is no objective justification for why workers in the offshore petroleum industry ought to be treated differently from workers in the national uniform system. In fact, given the additional layers of risk in the offshore petroleum industry, which is a major hazard industry where work is performed in remote locations, there is even greater reason to ensure that those persons performing high risk work are properly trained and qualified.

Recommendations

2. That the OPGGS Act be amended to provide for consistency with the WHS Act in respect of:
 - (i) recognition of the role of industrial organisations in the statutory objects;
 - (ii) the rights, powers and entitlements of HSRs, including but not limited to the matters identified in paragraph [23] above;
 - (iii) union right of entry for work health and safety purposes (subject to the necessary modifications discussed under term of reference (a)(iv) below); and
 - (iv) a licensing system for workers performing high risk work.

(iv) The scope and necessity for amending and updating any legislative inconsistencies in the relevant work health and safety scheme, including any legislative changes which recognise that the work is undertaken in remote locations

26. The WHS Act right of entry provisions cannot be directly transposed to the offshore petroleum industry because of the remote location of the work. Without modification, the WHS Act right of entry provisions will be ineffective. Right of entry provisions in the OPGGS Act will need to require the occupier to facilitate transport of the permit holder to the facility for right of entry purposes. Part 3-4, Division 7 of the *Fair Work Act 2009* (Cth) provides an example of the way in which this requirement might operate, although cost has posed a barrier to the effectiveness of this system. The cost issue could be avoided in the offshore petroleum industry context because the cost of transport should be recovered from industry by the levy revenue to the NOPSEMA under the 'user pays' system.
27. Under the WHS Act, a permit holder may only enter a workplace for the purpose of inquiring into a suspected contravention of the WHS Act.⁴⁸ Given the difficulties of accessing remote offshore work locations, this limitation would need to be removed in a right of entry system in the OPGGS Act so that a permit holder can investigate multiple suspected contraventions in one entry, including additional contraventions identified during the course of the entry.

Recommendations

3. That any right of entry for work health and safety purposes established under the OPGGS Act provide for:
 - (i) a requirement for the occupier to facilitate transport of the permit holder for right of entry purpose;
 - (ii) the cost of transport of the permit holder for right of entry purposes to be recovered from industry by the levy revenue to the NOPSEMA; and
 - (iii) an ability for the permit holder to exercise one entry for the purpose of inquiring into multiple suspected contraventions of the OPGGS Act, including additional contraventions identified during the course of the entry.

⁴⁷ Regulation 54.

⁴⁸ Section 117(1).

b. The effectiveness of NOPSEMA and equivalent state and territory offshore petroleum regulators in promoting the work health and safety of persons engaged in offshore petroleum operations

System is not best placed to maximise cooperative compliance

28. The NOPSEMA Enforcement Policy aims to encourage 'cooperative compliance'.⁴⁹ Regulatory experts advise that two aspects of an enforcement regime will achieve cooperative compliance: first, significant sanctions at the top of the regulatory pyramid; and second, the likelihood that the regulator will move to the top of the pyramid and apply those sanctions.⁵⁰ The work health and safety regime in the offshore petroleum industry fails in both aspects.

29. First, the offences and penalties regime in the OPGGS Act is woefully inadequate. Regulatory expert Mr Richard Johnstone gave advice to Safe Work Australia that the regulatory theory on which the pyramid framework is based envisaged far greater penalties than those contained in the WHS Act. The current penalties available in the WHS Act fall short of optimum levels:

Ten years ago in a book of essays, John Braithwaite discussed restorative justice in health and safety and talked about restorative justice playing at the bottom of the enforcement pyramid and at the top you have significant mega penalties, and the kinds of penalties he was talking about were penalties of \$100 million dollars for contraventions, but major discounts where a firm had a robust approach to systematic health and safety management. So, when we talk about large penalties at the top, we are talking about significantly greater penalties than we currently find in the health and safety legislation.⁵¹

The penalties in the OPGGS Act need to be even greater than those in the WHS Act 'to reflect the greater consequences in a major hazard industry'.⁵²

30. Second, the NOPSEMA has demonstrated an overreliance on the lower levels of the regulatory pyramid, as demonstrated by its unwillingness to sensibly penalise or prosecute repeat offenders. For example, the NOPSEMA has failed to escalate its regulatory response to the following repeat offenders:

- In the two month period between 13 December 2017 and 23 January 2018, five improvement notices were issued to two organisations in respect of the rig called Ocean Monarch, including in relation safety-critical equipment.
- Between June 2015 and December 2017, Esso Australia Pty Ltd was issued with 27 *improvement notices*, including in relation to contraventions of the OPGGS Act causing risk of serious or fatal injury.
- Between August 2015 and August 2017, the organisation MODEC Venture 11 B.V. was issued with one prohibition notice and three improvement notices in respect of the rig called MODEC Venture 11.
- Between October 2014 and June 2017, Woodside Energy Pty Ltd was issued with one prohibition and four improvement notices, including in relation to contraventions of the OPGGS Act causing risk of multiple serious injuries or fatalities.

⁴⁹ NOPSEMA, *Enforcement Policy*, March 2017, p 2.

⁵⁰ Richard Johnstone, 'Rethinking Regulation', video transcript, p 8, <<https://www.safeworkaustralia.gov.au/sites/swa/files/transcript-richard-johnstone.docx>>.

⁵¹ Ibid.

⁵² Explanatory Memorandum to the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012* (Cth), pp 1 and 32.

- In late March and early April 2017, one prohibition notice and three improvement notices were issued to three organisations in respect of the Atwood Osprey facility, including in relation to safety-critical equipment.
 - In September and October 2015, three improvement notices were issued to Noble Contracting II GmbH.
 - In July and August 2015, one prohibition and two improvement notices were issued to Saipem (Portugal) Comercio Maritimo, Sociedade Unipessoal, LDA in respect of the Castorone facility.
 - In July 2015, four improvement notices were issued to Quadrant Energy Australia Limited in respect of the Stag CPF facility.⁵³
31. The NOPSEMA needs to improve its strategic enforcement activity to achieve maximum impact. We note that the NOPSEMA Enforcement Policy provides that the NOPSEMA ‘will consider prosecution action in circumstances where ... there has been repeated non-compliance with the legislation’.⁵⁴ We would like to see the NOPSEMA putting this policy into action and utilising its more serious available sanctions, including prosecution, where there is repeated non-compliance with the legislation. Such action would be more effective in achieving cooperative compliance. The NOPSEMA has advised us that it does not prosecute because prosecution takes too long,⁵⁵ but we do not accept this reasoning. As discussed, prosecution at the top of the regulatory pyramid is necessary to maximise cooperative compliance at the bottom. Further, in many – if not most – instances, the defendant will correct the non-compliance while the prosecution is on foot.

Recommendations

4. That the penalties in both the OPGGS Act and the WHS Act be significantly increased, in line with best practice responsive regulation.
5. That the NOPSEMA’s Enforcement Policy be amended so that its response escalates for each instance of non-compliance by the same organisation or in respect of the same facility.
6. That the NOPSEMA be directed to comply with the Enforcement Policy in respect of taking prosecution action where there has been repeated non-compliance with the legislation.

Problems with the planned inspections system

32. Currently, the NOPSEMA conducts planned safety inspections of offshore petroleum facilities at least twice per year, where practicable.⁵⁶ The NOPSEMA will generally issue an inspection brief not less than two weeks prior to the inspection,⁵⁷ which we are advised provides the duty holder with information as to what will be inspected. Our affiliates advise that their members have reported two serious problems with the planned inspection model. Firstly, the duty holder is able to cover up or hide issues before the inspector arrives. Secondly, if and when the NOPSEMA does perform an unannounced inspection, the duty holder often assumes that it was triggered by a report from an HSR and puts pressure on the HSRs for allegedly approaching the regulator.

Recommendations

7. That the NOPSEMA carry out regular unannounced inspections as part of its standard inspection regime.

⁵³ NOPSEMA, ‘Published Notices’ <<https://www.nopsema.gov.au/resources/published-notices/>>.

⁵⁴ NOPSEMA, *Enforcement Policy*, March 2017, p 7.

⁵⁵ See, also, the NOPSEMA’s submission to this inquiry, p 21.

⁵⁶ NOPSEMA, ‘Inspections’ <<https://www.nopsema.gov.au/safety/inspections/>>.

⁵⁷ NOPSEMA, *Inspection Policy*, March 2017, p 3.

c. The accountability framework to which NOPSEMA is subject with respect to work health and safety matters, and whether this needs to be strengthened

33. The ACTU repeats its recommendations under terms of reference b, d and e (regarding the latter, specifically in respect of the relationship between the NOPSEMA and Safe Work Australia).

d. The role and structure of the NOPSEMA Board and options for improving the effectiveness of their stakeholder engagement

34. One of the objects of Schedule 3 of the OPGGS Act is 'to foster a consultative relationship between all relevant persons concerning the health, safety and welfare of members of the workforce at those facilities'.⁵⁸ Yet multiple reviews of the NOPSEMA and its predecessor constituent body, the NOPSA, have found poor stakeholder engagement and a failure to earn a social licence to regulate. The 2008 Review recommended that NOPSA should 'consider establishing a small forum for consultation consisting of relevant stakeholders. The representatives should have standing, with authority to participate in decision-making and take on commitment on behalf of their stakeholder group'.⁵⁹ The government response at the time, being that there were already forums for consultation in place including the NOPSEMA advisory board, failed to take into account the lack of workforce representation on the board and the lack of any tripartite consultation forum.

35. The *Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority* in 2011 (**2011 Review**) commented that:

*In the 2008 Operational Review and the 2009 Bills and Agostini NOPSA review, concerns were raised about NOPSA being too legalistic and insufficiently consultative. Similar issues arose in the Montara Commission of Inquiry. Each report found those concerns to be warranted (in one report, NOPSA was described as 'overly hands-off and narrowly legalistic').*⁶⁰

36. The 2011 Review noted that similar concerns continued to be expressed⁶¹ and recommended that the NOPSEMA and the NOPSA should 'strengthen ongoing, constructive engagement, directly and through their representatives, with the industry and the offshore workforce'.⁶² The 2011 Review commented that 'work should continue as a priority on overcoming the perceived remoteness and over-detachment of the agency through ongoing, constructive engagement, directly and through their representatives, with the industry and the offshore workforce'.⁶³ The 2011 Review further recommended that, 'in developing and improving its policies and practices for stakeholder engagement, NOPSA should ensure that they are underpinned by a clearly stated commitment to representative, tripartite and consultative engagement (this could be included in a service charter)'.⁶⁴

37. Notwithstanding the findings and recommendations of the 2008, 2009 and 2011 Reviews, the 2015 Review identified that a need for the NOPSEMA to build its social licence to regulate and address perceived regulatory capture persisted.⁶⁵ The 2015 Review recognised a perceived inappropriate influence on the NOPSEMA's

⁵⁸ Section 1(e).

⁵⁹ Recommendation 19.

⁶⁰ Paragraph [193], p 74 (citations omitted).

⁶¹ Paragraph [198], p 75.

⁶² Recommendation 3(a).

⁶³ Paragraph [89](b), p 46.

⁶⁴ Recommendation 8(a).

⁶⁵ Section 8.2, p 67.

agenda held by special interest groups⁶⁶ and found that ‘lack of trust’ is ‘the key barrier to NOPSEMA earning a social licence to regulate’.⁶⁷ The 2015 Review commented:

It is important that NOPSEMA continues to ensure that industrial associations have a forum to provide feedback on a regular basis and have access to NOPSEMA that compares with that of industry. The Panel believes that regular ongoing engagement with all stakeholders is a key component of any future improvement in NOPSEMA’s engagement processes, and its ability to act as a trusted regulator.⁶⁸

38. The 2015 Review made several recommendations directed to assisting the NOPSEMA to improve its stakeholder engagement and earn a ‘social licence to regulate’.⁶⁹ In particular, the 2015 Review recommended that the NOPSEMA should provide more engagement mechanisms to collaborate with the workforce. Although these recommendations were accepted by the Australian Government,⁷⁰ from the perspective of the workforce little change has been observed in the three years since.
39. The lack of progress in respect of stakeholder engagement persists despite the Australian Government continuing to echo the recommendations of the 2015 Review. The Australian Government, in its 2017 report on the implementation of the recommendations from the Montara Commission Inquiry (which followed Australia’s largest offshore oil spill), noted that the 2011 and 2015 Reviews considered the NOPSEMA’s relationship, and engagement approach to, stakeholders.⁷¹ The Ministerial Statement of Expectations of 11 April 2017 stated that ‘Engagement with stakeholders including industry, government and the broader public is crucial to effective objective-based regulation, and to building and maintaining a social licence to regulate’ and stated an expectation that the NOPSEMA will ‘encourage continuous and systematic cooperation with industry, workforce representatives and the community in a proactive and consultative manner’ and ‘continue to seek opportunities to improve its stakeholder engagement mechanisms and to increase transparency of its own decision-making processes, and to promote public access to matters within its regulatory remit’. The NOPSEMA CEO Statement of Intent said that it will ‘continue’ to do so, but from our perspective the level of stakeholder engagement continues to be lacking.
40. The ACTU repeats the concerns that it has raised over many years in several reviews and inquiries into work health and safety in the offshore petroleum industry: the NOPSEMA is subject to regulatory capture by industry. Engagement with the workforce and its representatives is token at best. In contrast, best practice work health and safety regulation adopts a tripartite approach between the regulator, industry and the workforce and ensures participation by workers and their representatives in the management of work health and safety.
41. It is clear from the history outlined above that the effectiveness of the NOPSEMA’s stakeholder engagement will not improve without a legislative mandate for it to do so. Indeed, the NOPSEMA Chief Executive Officer told the ACTU at a meeting on or about 6 June 2017 that a tripartite approach to work health and safety in the industry cannot be achieved because there is ‘no appetite’ from employers or industry.
42. Given the importance of shared management of work health and safety, the OPGGS Act ought to be amended to provide for equal industry and worker representation on the NOPSEMA Board. The Board’s advisory function makes it an appropriate mechanism by which the regulatory approach of the NOPSEMA can be informed and

⁶⁶ Section 8.2, p 67.

⁶⁷ Section 8.5.2, p 97.

⁶⁸ Section 8.3.8.1, p 79.

⁶⁹ Recommendations 4, 5, 16.

⁷⁰ 2015 Operational Review of the National Offshore Petroleum Safety and Environmental Management Authority, Australian Government Response, December 2015.

⁷¹ Australian Government Report on the Implementation of the Recommendations from the Montara Commission of Inquiry, September 2017.

guided by the unique expertise of the workforce. Further, consistent with the recommendations of the 2008, 2009, 2011 and 2015 reviews, equal representation of workers and industry in this high-level forum would address the lack of trust and perception of regulatory capture that has prevented the NOPSEMA from earning its social licence to regulate. We note that the membership of Safe Work Australia provides for equal representation of workers and employers.⁷²

Recommendations

8. That the OPGGS Act be amended to provide for:
 - (i) equal representation of industry and the workforce on the NOPSEMA Board (the latter representatives to be nominated by the ACTU); and
 - (ii) a requirement that the NOPSEMA consult with workers and their representatives in the exercise of its functions pertaining to work health and safety.

e. The workings of NOPSEMA's collaboration, and working relationships, with other work health and safety regulators and bodies, including Safe Work Australia

NOPSEMA and AMSA

43. The NOPSEMA's effectiveness as a health and safety regulator is hampered by the split between its jurisdiction and that of the Australian Maritime Safety Authority (**AMSA**). Further, there are perceived gaps in the jurisdictional coverage of work health and safety legislation in the maritime industry, including the offshore petroleum industry. To address this, the Government must conduct a comprehensive review to develop a legislative reform package to ensure complete coverage.
44. Currently, vessels and facilities in the offshore petroleum industry often move between the NOPSEMA and the AMSA jurisdictions and the responsibility for regulating activities transfers between the two agencies.⁷³ The 2015 Review therefore concluded that 'It is essential AMSA and NOPSEMA work collaboratively to ensure effective management of maritime safety around oil and gas facilities.'⁷⁴
45. The split jurisdiction poses particular problems. For example, the NOPSEMA Annual Report 2016/17 noted that the decline in occupational health and safety inspections conducted by the NOPSEMA in the reporting period may have been in part attributable to it being difficult for the NOPSEMA 'to access construction and diving vessels for inspection as these vessels are only facilities for a short period of time due to the type of work they often undertake'.⁷⁵
46. The 2015 Review found that over the preceding three years there had been limited collaboration in the working relationship between the AMSA and the NOPSEMA and that the joint inspection of vessels' certification, agreed to in the authorities' 2013 Memorandum of Understanding (**MOU**),⁷⁶ had ceased.⁷⁷ The Bills and Agostini review on improving the interface between (what was then) the NOPSA and the AMSA in 2009 found that joint

⁷² *Safe Work Australia Act 2008* (Cth), s 10.

⁷³ The ACTU understands that this situation will not change even if the *Seafarers and other Legislation Amendment Bill 2016* (Cth) is enacted.

⁷⁴ 2015 Review, section 8.3.2, p 69.

⁷⁵ Page 22.

⁷⁶ 'Fatality on board the *Skandi Pacific* off the Pilbara coast, Western Australia 14 July 2015', ATSB Transport Safety Report, Marine Investigation 322-MO-2015-005, 23 November 2016, p 12.

⁷⁷ 2015 Review, section 8.3.2, pp 69-70.

inspections are 'one way of integrating the ship safety inspectorate strengths of AMSA and the offshore petroleum OHS inspectorate strengths of NOPSA.'⁷⁸

47. In addition, the disapplication of the *Navigation Act 2012* (Cth) (**Navigation Act**) to vessels while facilities as defined under the OPGGS Act results in the disapplication of International Maritime Organisation and International Labour Organisation Conventions given effect by the Navigation Act. The 2015 Review found that there are a number of issues which relate to a lack of clarity in the touch points between the OPGGS Act and the Navigation Act. This finding essentially repeated many of the findings and associated recommendations of the Bills and Agostini report in respect of the disapplication of the Navigation Act. The Bills and Agostini report found, among other things, that 'the effect of the disapplication of Commonwealth maritime legislation in its entirety was not fully thought through and consultation with stakeholders appears to have been deficient' and that 'the potential for Australians not to be covered by Australian maritime and OHS legislation is an unacceptable risk'.⁷⁹
48. The 2015 Review found that the relationship between the NOPSEMA and the AMSA is constrained by a lack of clarity on the touch points between the two agencies and their legislations.⁸⁰ The 2015 Review recommended that a proactive approach from both agencies and the policy departments could be useful in clarifying the interaction between the two agencies and the two pieces of legislation and that the NOPSEMA and the AMSA should refresh their MOU and in doing so seek clarity on their commitments and responsibilities under their respective Acts.⁸¹ Disappointingly, although the Australian Government accepted this recommendation, the NOPSEMA's response was simply to state that it will 'continue to effectively collaborate with AMSA as appropriate'.⁸²
49. The investigation of the Australian Transport Safety Bureau into the death of Andrew Kelly on board the *Skandi Pacific* in July 2015 noted that the MOU between the NOPSEMA and the AMSA had not been revised since 2013 but found that the vessel's location and status meant that it was outside the jurisdiction of both the NOPSEMA and the AMSA.⁸³ The ACTU understands that this issue may be addressed by the *Seafarers and other Legislation Amendment Bill 2016* (Cth), if enacted, but that would *still* leave the jurisdictional gap highlighted by the previous fatality of Trevor Moore on the *Karratha Spirit* in 2008.⁸⁴
50. Sadly, these issues are not new and Mr Kelly's death occurred despite issues of jurisdiction having been known for some time. The 2011 Review, for example, recommended that 'agreed legislative changes should be given priority attention, including the issues of when jurisdiction ceases to apply'.⁸⁵ This recommendation followed a range of recommendations regarding jurisdictional issues in the Bills and Agostini report, as noted above. Bills and Agostini found that risk can be reduced by reducing the opportunity for silos to form and by ensuring a sufficiently wide skill base.⁸⁶ The ATSB investigation into Mr Moore's death, handed down in 2010, echoed Bills and Agostini's finding that it is possible for some facilities to fall outside the jurisdiction of any Australian safety regime.

⁷⁸ *Offshore Petroleum Safety Regulation: Marine Issues*, June 2009, paragraph 2.14, p 9.

⁷⁹ *Offshore Petroleum Safety Regulation: Marine Issues*, June 2009, paragraph 3.53, p 23.

⁸⁰ 2015 Review, section 8.3.2, p 69.

⁸¹ 2015 Review, recommendation 12.

⁸² Progress Report on Implementation of the 2015 NOPSEMA Operational Review Recommendations, p 10.

⁸³ 'Fatality on board the *Skandi Pacific* off the Pilbara coast, Western Australia 14 July 2015', ATSB Transport Safety Report, Marine Investigation 322-MO-2015-005, 23 November 2016, p 12.

⁸⁴ 'Independent investigation into the fatality on board the Australian registered floating storage and offloading tanker *Karratha Spirit* off Dampier, Western Australia, 24 December 2008', ATSB Transport Safety Report, Marine Occurrence Investigation No 261, MO-2008-013.

⁸⁵ Recommendation 3(b).

⁸⁶ *Offshore Petroleum Safety Regulation: Marine Issues*, June 2009, paragraph 2.23, p 11.

51. The Ministerial Statement of Expectations of 11 April 2017 stated an expectation that the NOPSEMA will work collaboratively with the AMSA 'in pursuit of streamlined regulation of the offshore petroleum sector and enhanced coordination of emergency response arrangements'. The CEO Statement of Intent said that it will continue to do so, but evidence of such and formal mechanisms to facilitate such appear to be lacking or are not transparent.

Recommendations

9. That a comprehensive assessment of coverage of Australian safety regulation in the maritime industry, including offshore petroleum, be conducted to develop a legislative reform package to ensure complete coverage.
10. That the NOPSEMA and the AMSA update their MOU, with particular focus on:
 - (i) achieving clarity on the touch points between the two agencies and their legislations;
 - (ii) reinstatement of joint inspection of vessels' certification; and
 - (iii) mechanisms to facilitate access to and inspections of vessels and facilities that transfer between their respective jurisdictions, including, for example, dual recognition of suitably qualified inspectors.
11. That the necessary legislative amendments be enacted to ensure the application of all International Maritime Organisation and International Labour Organisation Conventions given effect by the Navigation Act to vessels and facilities in the offshore petroleum industry.

NOPSEMA and Safe Work Australia

52. The 2011 Review recommended that the NOPSEMA's predecessor constituent body, the NOPSA, should consult Safe Work Australia about how the National OHS Strategy 2002-12 and its replacement could assist strategic planning over safety performance and its measurement in the offshore oil and gas industry.⁸⁷ The Australian Government accepted this recommendation, noting that it would 'allow NOPSEMA to draw on the experience and work of Safe Work Australia, particularly in relation to improving measuring and reporting on OHS performance and data management.'⁸⁸
53. The ACTU is concerned that such opportunities for the NOPSEMA to draw on the experience and work of Safe Work Australia are being missed because the NOPSEMA operates outside of the general work health and safety regulatory system. The ACTU submits that the NOPSEMA needs to be 'brought inside the tent' with other work health and safety regulators and bodies in Australia. Greater collaboration would improve the sharing of best practice and help to mitigate the NOPSEMA's regulatory capture by the petroleum industry.

Recommendations

12. That s 6 of the *Safe Work Australia Act 2008* (Cth) be amended to confer on Safe Work Australia a statutory function to monitor and coordinate the activities and performance of all Commonwealth and State and Territory bodies with responsibility for work health and safety, including the NOPSEMA.
13. That the necessary legislative amendments be enacted to require quarterly or six monthly meetings between the NOPSEMA and Safe Work Australia.

⁸⁷ 2011 Review, recommendation 2(b).

⁸⁸ *Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority Report, November 2011: Final Government Response, May 2012, p 10.*

14. That the necessary legislative amendments be enacted to require the NOPSEMA to report on its industry performance data to Safe Work Australia, and for Safe Work Australia to collect and publish oil and gas industry data in a manner that distinguishes the onshore and offshore industries.

15. That the NOPSEMA be directed to attend the Heads of Workplace Safety Authorities meetings.

f. Challenges in attracting and retaining health and safety representatives

54. The ACTU submits that there are two key challenges in attracting and retaining HSRs in the offshore petroleum industry: insecure work and a lack of support for HSRs from the NOPSEMA. These factors are further discussed under terms of reference (g) to (i) below. In summary, however: the offshore petroleum industry is characterised by insecure work. Our affiliates report that a significant and increasing proportion of the offshore petroleum workforce is employed on a casual or labour hire basis.

55. The effect of insecure work on attracting and retaining HSRs is that workers are fearful that taking on the role of HSR, or being active in their role as HSR, will threaten their job security. Raising an issue in the workplace is commonly known among workers in the industry as 'booking a window seat on the next flight out of here'; meaning that the worker will be removed from the roster or the worksite for speaking up. This expression typifies the workplace culture that insecure work generates. In this environment, adequate support from the regulator and protections for HSRs is critical.

g. The adequacy of the protections afforded to health and safety representatives performing their functions under the relevant legislation

56. In light of the issues discussed above, the operator or employer should be required to notify the NOPSEMA of any intention to terminate the employment of an HSR or otherwise alter the position of the employee to the employee's prejudice and to consult with the HSR and their representative about the proposed change before the change can be implemented. Further, there needs to be higher penalties for victimisation of HSRs to give HSRs comfort that they can perform their functions without fear of retribution.⁸⁹

57. The NOPSEMA has stated that its inspectors seek to engage with HSRs and the workforce on every inspection conducted on 'manned' facilities where available.⁹⁰ However HSRs have reported to their unions that they feel intimidated engaging with an inspector whilst on board a facility where that engagement can be observed and monitored by the facility operator. Engagement with HSRs during inspections therefore does not provide an effective forum for engagement, nor does it provide the HSR with any protection from persecution for engaging with the inspector.

Recommendations

16. That the operator or employer should be required to notify the NOPSEMA of any intention to terminate the employment of an HSR or otherwise alter the position of the employee to the employee's prejudice and to consult with the HSR and their representative about the proposed change before the change can be implemented.

17. That the NOPSEMA regularly communicate directly with HSRs, and provide an opportunity for HSRs to communicate *confidentially* with an inspector *prior to* and *after* the inspection. Consideration should also be

⁸⁹ See paragraphs [28] to [29] and recommendation 4 above.

⁹⁰ Progress Report on Implementation of the 2015 NOPSEMA Operational Review Recommendations, p 11.

given to amending the OPGGS Act to require the operator to provide the inspector with a private room to meet with HSRs and workers during an inspection and to not unreasonably prevent more than one worker meeting with the inspector at a time.

h. Policies and practices which could be adopted by NOPSEMA to better support health and safety representatives

58. The NOPSEMA continues to fail to give sufficient recognition and support to HSRs, despite significant support in international law and international best practice for the active involvement of the workforce in work health and safety as a primary driver of safety performance.⁹¹ The 2015 Review noted that 'Industry health and safety representatives (HSRs) are an important link between NOPSEMA inspectors and the workforce. Engaging with HSRs builds trust between the NOPSEMA and the industry stakeholders'.⁹² The 2015 Review recommended that the 'NOPSEMA should provide more engagement mechanisms to collaborate with the workforce and health and safety representatives.'⁹³ Notably, this recommendation was supported by both union and industry submissions to the 2015 Review. Our recommendations below are in addition to those outlined under term of reference (a) above.

Annual forum and online portal

59. Both the ACTU and the Australian Petroleum Production & Exploration Association submitted to the 2015 Review that the NOPSEMA should sponsor and lead an annual HSR forum and reinstate the online portal for HSRs to communicate and share knowledge and experience with each other. Leadership by the NOPSEMA would signal to HSRs that the regulator acknowledges and values the importance of their role. These measures would also provide opportunities for HSRs to collaborate with and support each other, which would assist to mitigate some of the effects of insecure work discussed above. Disappointingly, although the Australian Government accepted the recommendation, the NOPSEMA's response was simply to state that it will 'continue to participate in the relevant forums for health and safety representatives and the workforce as appropriate'.⁹⁴

Advice and support phone line

60. The NOPSEMA should operate a dedicated advice and support phone line for HSRs to speak directly and confidentially to an inspector or other expert for advice and support in performing their role and to report a health or safety issue. This service would be an invaluable resource for HSRs in managing daily work health and safety issues in their workplace. The NOPSEMA says in its submission to this inquiry that HSRs are able to contact inspectors outside of inspections,⁹⁵ but our affiliates report that this service is not well advertised or understood by HSRs.

Right to attend to HSR business during work hours

61. HSRs have reported to their unions that they do not have sufficient time to conduct work health and safety meetings, discuss work health and safety issues with workers or otherwise perform their role as an HSR during work hours or while on board a facility. As a result, they are either unable to properly attend to HSR business, or they do so during their rest periods on board a facility or outside of work hours during their off swing (discussed further under term of reference (i) below).

⁹¹ See paragraphs [5]-[6] above.

⁹² Section 8.3.8.1, p 79.

⁹³ Recommendation 16.

⁹⁴ Progress Report on Implementation of the 2015 NOPSEMA Operational Review Recommendations, p 11.

⁹⁵ Paragraph [173], p 32.

62. Section 30(1) of Schedule 3 of the OPGGS Act provides that ‘a health and safety representative for a designated work group must undertake a course of training relating to occupational health and safety that is accredited by NOPSEMA’, and yet the NOPSEMA collects no data that would enable it to monitor or enforce this provision. The NOPSEMA is unable to identify the number or identity of HSRs or whether they have received the mandatory training.

Recommendations

18. That the NOPSEMA develop, in consultation with stakeholders, an HSR engagement policy.
19. That the NOPSEMA sponsor and lead an annual HSR forum.
20. That the NOPSEMA establish an online portal for HSRs to communicate with each other confidentially.
21. That the NOPSEMA establish an advice and support phone line for HSRs to speak directly and confidentially to an inspector or other expert for advice and support in performing their role and to report a safety issue.
22. That the OPSSG Act be amended to provide for:
 - (i) a right for HSRs to attend to work health and safety business during work hours or while on board a facility, including a requirement for the person conducting the business or undertaking to provide HSRs time to hold meetings and discussions with workers in respect of work health and safety matters during work hours or while on board a facility; and
 - (ii) a requirement that the NOPSEMA maintain a register of HSRs, recording at least their name, employer, facility, the date on which they were elected to the position and the date on which they completed the mandatory training.⁹⁶

i. Factors impacting on the work health and safety of workers in the offshore petroleum industry

63. The insecure nature of work in the offshore petroleum industry is the key factor impacting on the work health and safety of workers. This is for two reasons. First, as discussed above, job insecurity creates a workplace culture in which workers feel unable to voice health and safety concerns. Second, job insecurity is a major source of stress for workers, which impacts significantly on their physical and mental health.⁹⁷ A 2006 British study found that insecure work is the primary factor associated with a poor health and safety workplace climate.⁹⁸ Workers in insecure work often have poorer work health and safety outcomes because they are more marginally attached to the workplace, with lower rates of training and fewer opportunities to develop knowledge of the particular workplace and its particular potential risks.

64. In 2017, NOPSEMA surveyed facility operators regarding the types of safety performance improvement initiatives being implemented.⁹⁹ The survey found that the use of safety culture/climate perception surveys was reported by 66 percent of respondents. Only 53 percent reported implementation of safety culture improvement strategies and only 38 percent indicated that a plan is in place to introduce a safety culture improvement strategy in the

⁹⁶ See further paragraph [23](c) and recommendation 2(ii) above.

⁹⁷ See, eg, *Lives on Hold: Unlocking the Potential of Australia's Workforce – The report of the Independent Inquiry into Insecure Work in Australia*, 2012.

⁹⁸ Andrew M Robinson and Clive Smallman, ‘The Contemporary British Workplace: A Safer And Healthier Place?’ (2006) 20 *Work, Employment & Society* 87.

⁹⁹ NOPSEMA Report, *Safety Improvement Initiatives in the Australian Offshore Petroleum Industry*, January 2018.

near future. These figures are concerning given the concerns of workers in the offshore petroleum industry about raising work health and safety issues.

65. A second important factor adversely affecting the work health and safety of workers in the offshore petroleum industry is that workers are increasingly being forced to engage with work in their off swing, during what should be much-needed downtime. This engagement typically takes the form of checking emails, responding to phone calls, and undertaking training or inductions. Workers are not having sufficient uninterrupted time off work, which is causing fatigue and stress issues and placing pressure on workers' personal and family relationships.
66. In addition, workers are not being given enough time to conduct a proper handover between the incoming and outgoing crew at shift or roster change. This has direct implications for work health and safety, as workers are not able to inform the incoming crew of relevant issues, and is particularly concerning in respect of HSRs and safety committees not being able to adequately handover between each other.
67. The lack of sufficient handover time also compounds the problem of workers being forced to attend to work matters outside of work hours or during their off swing as they are required to respond to emails or phone calls from the other crew. The OPGGS Regulations currently include fatigue avoidance provisions in respect to continuous periods of work but do not address the need for continuous, uninterrupted periods away off work and away from the workplace. The NOPSEMA 'Avoiding Fatigue' Guidance Note addresses some of these crewing and rostering issues, but the ongoing prevalence of these issues – as reported to our affiliates by their members – suggest that greater regulatory rigour is required to successfully address these issues.
68. Due to the work being undertaken in remote locations, all workers in the offshore petroleum industry work on a fly-in, fly-out basis. The ACTU notes that there have been several significant parliamentary inquiries into the health impacts of fly-in, fly-out work.¹⁰⁰ Many of the issues identified in those inquiries are relevant to the offshore petroleum industry. The ACTU recommends that findings and recommendations of those inquiries be considered in the present inquiry. In particular, we recommend that particular attention to paid to rostering arrangements to ensure that workers are not away from their home and family life for extended periods and have sufficient rest time between swings.

Recommendations

23. That consideration be given to circumscribing or regulating contracting arrangements to maximise job security in the offshore petroleum industry.
24. That consideration be given to mechanisms that would achieve better work health and safety standards and outcomes for workers in insecure forms of employment such as casual and labour hire, including additional training specific to those employment categories or roving HSRs to assist these types of workers.
25. That consideration be given to circumscribing or regulating rostering arrangements to ensure that workers are not away from their home and family life for extended periods and have sufficient rest time between

¹⁰⁰ Commonwealth of Australia, 'Cancer of the bush or salvation for our cities? Fly-in, fly-out and drive-in, drive-out workforce practices in Regional Australia', House of Representatives Standing Committee on Regional Australia, February 2013, paragraphs 4.34-4.54 [https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ra/fifodido/report.htm]; Parliament of Queensland, 'Inquiry into fly-in, fly-out and other long distance commuting work practices in regional Queensland', Report No. 9, 55th Parliament Infrastructure, Planning and Natural Resources Committee, October 2015, [<https://www.parliament.qld.gov.au/documents/committees/IPNRC/2015/FIFO/02-rpt-009-09Oct2015.pdf>]; Parliament of Western Australia, 'The impact of FIFO work practices on mental health : final report', Education and Health Standing Committee, June 2015, [[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/D421339FD0A9DCB848257D3B0021E569?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/D421339FD0A9DCB848257D3B0021E569?opendocument)]

swings; for example, by amending r 95 of the OPGGS Regulations to require minimum continuous and uninterrupted periods off work and away from the workplace.

26. That consideration be given to requiring a minimum handover period between crew change which must occur during the workers' normal working hours and rostered on swing, particularly between HSRs and safety committee members.

I. The role of Government in providing a coordinated strategic approach to health and safety outcomes in the offshore petroleum industry

69. The ACTU commends the work that has been done by the Seacare Authority to update the *Code of Practice: Health and Safety in Shipboard Work, including Offshore Support Vessels*. This Code of Practice includes a full chapter on the work of Offshore Support Vessels (**OSVs**) and references the cross over situation that OSVs may find themselves in when working with offshore installations regulated by the NOPSEMA. Excellent tripartite consultation has taken place over a number of years to result in a useful finished product. The Code of Practice was forwarded to the Minister on 3 April 2018 and is now awaiting ministerial approval.
70. While some sections of the industry have advocated that no Australian guidance on OSVs be included in the Code, the ACTU reiterates the importance of the offshore chapter that has been drafted. The *Guidelines on Offshore Marine Operations* that some advocate using for OSVs is insufficient, as this international guidance has been developed by offshore employers without any consultation with unions or workers, and many sections of it are not compliant with Australian safety law.
71. The ACTU further refers to recommendations 9 to 15 above.

Recommendations

27. That the Minister for Jobs and Small Business approve the *Code of Practice: Health and Safety in Shipboard Work, including Offshore Support Vessels*, as soon as possible, and well before the previous Code expires on 1 April 2019.

m. Any other related matters

72. Our affiliates report a concern that productivity takes precedence over work health and safety, and that the NOPSEMA will not jeopardise its relationships with major oil and gas companies and employers by adequately investigating and prosecuting poor practice and breaches.
73. The NOPSEMA is currently reviewing a saturation dive campaign undertaken by DOF Subsea in June and July 2017 from the *Skandi Singapore* vessel on the Inpex Ichthys project. Divers who participated in the diving operations have presented with prolonged high-pressure neurological syndrome effects and other medical conditions.
74. The NOPSEMA has a regulatory obligation to assess diving safety management systems (**DSMS**) and to assess and approve certain diving project plans (**DPP**). The NOPSEMA inspects diving operations against the diving DSMS and DPP.¹⁰¹

¹⁰¹ For a more detailed summary, see: NOPSEMA *Diving Submission Assessment Policy*, 28 June 2016.

75. DOF Subsea has reportedly stated that, 'The diving operations were conducted in accordance with our National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) accepted Diving Operations Manual and recognised industry standards'.¹⁰²
76. DOF Subsea has reportedly and has confirmed that it has provided the NOPSEMA with a report into the campaign.¹⁰³ The NOPSEMA has confirmed that has commenced a review to gather further information.¹⁰⁴
77. These events raise two important concerns. First, as to whether the NOPSEMA performed its role in assessing the DSMS and DPP and inspecting the diving operations effectively, particularly given that the diving campaign was reportedly the deepest commercial dive in Australian history.¹⁰⁵ Second, whether it is appropriate that the NOPSEMA conduct the investigation and potential enforcement role where there is potential that its own failings contributed to the incident. There is concern that an investigation carried out by the approving authority will not be transparent and presents a conflict of interest.

Recommendations

28. That the inquiry closely monitors the NOPSEMA's review of the DOF Subsea June/July 2017 diving incident.
29. That consideration be given to a requirement that an independent investigator be appointed where a conflict arises that compromises the ability of the NOPSEMA to carry out an independent investigation.

¹⁰² See, eg, David Foxwell, 'DOF divers suffering prolonged high-pressure neurological syndrome', *Offshore Support Journal*, 2 January 2018.

¹⁰³ Ibid.

¹⁰⁴ NOPSEMA, 'Media Reporting on Diving Incident', 2 January 2018.

¹⁰⁵ See, eg, David Foxwell, 'DOF divers suffering prolonged high-pressure neurological syndrome', *Offshore Support Journal*, 2 January 2018.

LIST OF RECOMMENDATIONS

1. That the OPGGS Act be amended to provide for:
 - (i) a requirement for consultation with the relevant unions in the development of the initial safety case;
 - (ii) a requirement for a review of the safety case to take place with the workforce once hired (and before the commencement of operations, where possible) to ensure that they understand the safety case, its risks and the safety management system;
 - (iii) a requirement for HSRs to be provided with a copy of the safety case, including by remote online access; and
 - (iv) an ability for an HSR to trigger a review and revision of the safety case in certain circumstances.
2. That the OPGGS Act be amended to provide for consistency with the WHS Act in respect of:
 - (i) recognition of the role of industrial organisations in the statutory objects;
 - (ii) the rights, powers and entitlements of HSRs, including but not limited to the matters identified in paragraph [23] above;
 - (iii) union right of entry for work health and safety purposes (subject to the necessary modifications in recommendation 3); and
 - (iv) a licensing system for workers performing high risk work.
3. That any right of entry for work health and safety purposes established under the OPGGS Act provide for:
 - (i) a requirement for the occupier to facilitate transport of the permit holder for right of entry purpose;
 - (ii) the cost of transport of the permit holder for right of entry purposes to be recovered from industry by the levy revenue to the NOPSEMA; and
 - (iii) an ability for the permit holder to exercise one entry for the purpose of inquiring into multiple suspected contraventions of the OPGGS Act, including additional contraventions identified during the course of the entry.
4. That the penalties in both the OPGGS Act and the WHS Act be significantly increased, in line with best practice responsive regulation.
5. That the NOPSEMA's Enforcement Policy be amended so that its response escalates for each instance of non-compliance by the same organisation or in respect of the same facility.
6. That the NOPSEMA be directed to comply with the Enforcement Policy in respect of taking prosecution action where there has been repeated non-compliance with the legislation.
7. That the NOPSEMA carry out regular unannounced inspections as part of its standard inspection regime.
8. That the OPGGS Act be amended to provide for:
 - (i) equal representation of industry and the workforce on the NOPSEMA Board (the latter representatives to be nominated by the ACTU); and
 - (ii) a requirement that the NOPSEMA consult with workers and their representatives in the exercise of its functions pertaining to work health and safety.
9. That a comprehensive assessment of coverage of Australian safety regulation in the maritime industry, including offshore petroleum, be conducted to develop a legislative reform package to ensure complete coverage.

10. That the NOPSEMA and the AMSA update their MOU, with particular focus on:
 - (i) achieving clarity on the touch points between the two agencies and their legislations;
 - (ii) reinstatement of joint inspection of vessels' certification; and
 - (iii) mechanisms to facilitate access to and inspections of vessels and facilities that transfer between their respective jurisdictions, including, for example, dual recognition of suitably qualified inspectors.
11. That the necessary legislative amendments be enacted to ensure the application of all International Maritime Organisation and International Labour Organisation Conventions given effect by the Navigation Act to vessels and facilities in the offshore petroleum industry.
12. That s 6 of the *Safe Work Australia Act 2008* (Cth) be amended to confer on Safe Work Australia a statutory function to monitor and coordinate the activities and performance of all Commonwealth and State and Territory bodies with responsibility for work health and safety, including the NOPSEMA.
13. That the necessary legislative amendments be enacted to require regular meetings between the NOPSEMA and Safe Work Australia (eg quarterly or six monthly).
14. That the necessary legislative amendments be enacted to require the NOPSEMA to report on its industry performance data to Safe Work Australia, and for Safe Work Australia to collect and publish oil and gas industry data in a manner that distinguishes the onshore and offshore industries.
15. That the NOPSEMA be directed to attend the Heads of Workplace Safety Authorities meetings.
16. That the operator or employer should be required to notify the NOPSEMA of any intention to terminate the employment of an HSR or otherwise alter the position of the employee to the employee's prejudice and to consult with the HSR and their representative about the proposed change before the change can be implemented.
17. That the NOPSEMA regularly communicate directly with HSRs and provide an opportunity for HSRs to communicate *confidentially* with an inspector *prior to* and *after* the inspection. Consideration should also be given to amending the OPGGS Act to require the operator to provide the inspector with a private room to meet with HSRs and workers during an inspection and to not unreasonably prevent more than one worker meeting with the inspector at a time.
18. That the NOPSEMA develop, in consultation with stakeholders, an HSR engagement policy.
19. That the NOPSEMA sponsor and lead an annual HSR forum.
20. That the NOPSEMA establish an online portal for HSRs to communicate with each other confidentially.
21. That the NOPSEMA establish a dedicated advice and support phone line for HSRs to speak directly and confidentially to an inspector or other expert for advice and support in performing their role and to report a safety issue.
22. That the OPSSG Act be amended to provide for:
 - (i) a right for HSRs to attend to work health and safety business during work hours or while on board a facility, including a requirement for the person conducting the business or undertaking to provide HSRs time to hold meetings and discussions with workers in respect of work health and safety matters during work hours or while on board a facility; and

- (ii) a requirement that the NOPSEMA maintain a register of HSRs, recording at least their name, employer, facility, the date on which they were elected to the position and the date on which they completed the mandatory training.
- 23. That consideration be given to circumscribing or regulating contracting arrangements to maximise job security in the offshore petroleum industry.
- 24. That consideration be given to mechanisms that would achieve better work health and safety standards and outcomes for workers in insecure forms of employment such as casual and labour hire, including additional training specific to those employment categories or roving HSRs to assist these types of workers.
- 25. That consideration be given to circumscribing or regulating rostering arrangements to ensure that workers are not away from their home and family life for extended periods and have sufficient rest time between swings; for example, by amending r 95 of the OPGGS Regulations to require minimum continuous and uninterrupted periods off work and away from the workplace.
- 26. That consideration be given to requiring a minimum handover period between crew change which must occur during the workers' normal working hours and rostered on swing, particularly between HSRs and safety committee members.
- 27. That the Minister for Jobs and Small Business approve the *Code of Practice: Health and Safety in Shipboard Work, including Offshore Support Vessels*, as soon as possible, and well before the previous Code expires on 1 April 2019.
- 28. That the inquiry closely monitors the NOPSEMA's review of the DOF Subsea June/July 2017 diving incident.
- 29. That consideration be given to a requirement that an independent investigator be appointed where a conflict arises that compromises the ability of the NOPSEMA to carry out an independent investigation.

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