

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (Cth)

Submission by the Australian Council of Trade Unions to the Senate Economics Legislation Committee of the Australian Parliament Inquiry into the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (Cth)*

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About the ACTU

The Australian Council of Trade Unions (**ACTU**) is the peak union body in Australia, consisting of affiliated unions and State and regional trades and labour councils whose members are engaged across a broad spectrum of industries and occupations in the public and private sector. Since its formation in 1927, the ACTU has played the leading role in advocating for the improvement of employment conditions of workers. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and union regulation over that period.

Background

On 28 March 2018, the Government introduced the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018* (Cth) (**Bill**) into the Parliament. The Bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**).

The ACTU has significant concerns in relation to Schedule 16 of the Bill. Schedule 16 amends the OPGGS Act to enable the Chief Executive Officer of the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) to accept and enforce undertakings in relation to compliance with provisions of the OPGGS Act and regulations regarding work health and safety (**WHS**).

The ACTU has two concerns in relation to these amendments. First, in certain circumstances enforceable undertakings are not an appropriate regulatory tool and should be prohibited. Second, the NOPSEMA is a regulator that has demonstrated an overreliance on the lower levels of the regulatory pyramid. This problem could be exacerbated if the NOPSEMA is given this additional enforcement tool without appropriate legislative safeguards. This submission recommends an amendment to the Bill to address these concerns.

In considering the ACTU's recommendation, the industry context must be taken into account. Offshore petroleum is one of Australia's most dangerous industries. It is dangerous because the nature of the work performed is inherently high risk, and because it is performed in remote locations where medical assistance is not at hand. In this context our WHS laws ought to be at their most rigorous.

As the law currently stands, however, Australia's WHS laws are weakest in the offshore petroleum industry. The ACTU has elsewhere called for significant reform to the OPGGS Act to bring it into line with modern best practice WHS regulation and to afford offshore petroleum workers the same measure of protection as onshore workers.¹ This Bill does next to nothing to address the glaring and urgent deficiencies in WHS regulation in the offshore petroleum industry.

¹ See 'Other relevant inquiries' below and the attached ACTU submissions.

Recommendations

We recommend that the Bill be amended as follows:

Enforceable undertakings are prohibited in the following circumstances, except where exceptional circumstances exist:

- a. the contravention is connected to a fatality;*
- b. the contravention involves reckless conduct;*
- c. the applicant has a recent prior conviction connected to a work-related fatality; or*
- d. the applicant has more than two prior convictions arising from separate investigations.*

This recommendation is consistent with the ACTU's submission to the current independent review of the operation and content of the national model WHS laws.

Rationale

Maximising voluntary compliance

Enforceable undertakings are an alternative to court-imposed sanctions and, when properly utilised, can achieve long-term, sustainable improvements to WHS culture and practice in workplaces and across sectors. However, when overused or misused, enforceable undertakings have the potential to undermine compliance. The ACTU is supportive of enforceable undertakings being available to WHS regulators, but only if they are subject to appropriate safeguards and strict guidelines and their usage is consistently monitored.

There are two necessary characteristics of an enforcement regime to maximise voluntary 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.² Enforceable undertakings are a graduated enforcement measure. Making them generally available for serious contraventions, such as contraventions involving a fatality or reckless conduct, or utilising them in relation to a repeat offender where prior convictions have failed to deter a further contravention, has the potential to undermine the effectiveness of the enforcement regime as a whole.

² Richard Johnstone, 'Rethinking Regulation', video transcript, p 8, <<https://www.safeworkaustralia.gov.au/sites/swa/files/transcript-richard-johnstone.docx>>.

The NOPSEMA as a regulator

This concern is particularly relevant in the case of the NOPSEMA, which has demonstrated an overreliance on the lower levels of the regulatory pyramid and an unwillingness to sensibly penalise or prosecute repeat offenders.³ 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.
- 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.⁴

³ ACTU submission to the current Senate Education and Employment References Committee inquiry into the WHS of workers in the offshore petroleum industry, term of reference (b), paragraphs 29-31, recommendations 4-6, pages 9-10 of the ACTU submission.

⁴ NOPSEMA, 'Published Notices' <<https://www.nopsema.gov.au/resources/published-notices/>>.

The ACTU believes that 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'.⁵ However the NOPSEMA fails to enact this policy and does not utilise its more serious available sanctions, including prosecution, even where there is repeated non-compliance with the legislation. The NOPSEMA says that it does not prosecute because prosecution takes too long,⁶ 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.

The ACTU is therefore concerned, given the NOPSEMA's failure to properly exercise its enforcement powers, and given the inherently dangerous nature of the offshore petroleum industries, that appropriate limitations on the use of enforceable undertakings need to be provided for in legislation and not in policy, which is developed and enforced by the regulator.

Harmonisation

The consensus position in Australia since the national occupational health and safety review in 2008 is that separate regulation in specific industries or in relation to specific hazards should *only* exist where it is periodically and objectively justified. As far as possible, the separate regulation should be consistent with the nationally harmonised laws. An independent review of the NOPSEMA's operational activity in 2008 similarly recommended that all laws in the industry that affect WHS should be reconsidered with the aim of achieving consistency with the content and operation of the national model WHS laws.⁷ This recommendation was reiterated by a further independent review of WHS in the industry in 2009.⁸ The Senate Education and Employment References Committee is currently conducting an inquiry into the WHS of workers in the offshore petroleum industry, with specific reference to providing for appropriate consistency between the OPGGS Act and the model WHS laws.

None of the harmonised WHS jurisdictions allow enforceable undertakings to be accepted where the contravention of alleged contravention of the *Work Health and Safety Act 2011* (Cth) relates to a Category 1 offence for reckless conduct. At least the majority of the harmonised WHS jurisdictions have further restrictions on when enforceable undertakings may be accepted, particularly in relation to fatalities and very serious injuries.⁹

⁵ NOPSEMA, *Enforcement Policy*, March 2017, p 7.

⁶ NOPSEMA submission to the Senate Education and Employment References Committee inquiry into the WHS of workers in the offshore petroleum industry, page 21.

⁷ *Review of the National Offshore Petroleum Safety Authority Operational Activities 2008* (Recommendation 5).

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

⁹ An overview of the enforceable undertakings schemes nationally is provided in the *Best Practice Review of Workplace Health and Safety Queensland Final Report*, 3 July 2017, ch 3.7, pp 75-80.

Best practice enforceable undertakings schemes

WHS regulation ought to be best practice in the offshore petroleum industry given its inherently dangerous nature. The *Best Practice Review of Workplace Health and Safety Queensland Final Report (Best Practice Review)* considered in detail the use of enforceable undertakings in WHS regulation and recommended that, among other things, in relation to the enforceable undertakings framework:

- a. *The Work Health Safety Act 2011 be amended to expressly prohibit enforceable undertakings being accepted for contraventions or alleged contraventions of the WHS Act 2011 that relate to circumstances involving a fatality.*
- b. *The Guidelines for the acceptance of an enforceable undertaking be amended to provide a general exception (unless exceptional circumstances exist) where the applicant has a recent prior conviction connected to a work-related fatality; the applicant has more than two prior convictions arising from separate investigations, or the application relates to an incident involving a very serious injury.*
- c. *For consistency, 'very serious injury' should be defined as stated in the WorkCover New South Wales Enforceable undertakings: Guidelines for proposing an enforceable undertaking.¹⁰*

The Victorian and Western Australian jurisdictions represent best practice in respect of the use of enforceable undertakings in WHS regulation. In Western Australia, an enforceable undertaking can only be entered into if a person is convicted of one or more relevant offences and the court orders as an alternative to paying the fine that an undertaking be entered into.¹¹ Additionally, enforceable undertakings can only be entered into for minor offences where there has been no physical harm to any person.¹²

The Victorian Government WHS regulator, WorkSafe, *Policy on Enforceable Undertakings* provides that enforceable undertakings are not appropriate and will be rejected where any of the following circumstances exist, unless WorkSafe accepts that exceptional circumstances exist:

Death: *The contravention is connected to the death of a person, whether or not the contravention can be said to have directly caused the death.*

Serious breach /High culpability: *Matters involving significant departure from the duty owed. Section 32 offence: The contravention involves reckless endangerment, being an alleged contravention against section 32 of the Act.*

Criminal history – death: *The applicant has a recent prior conviction or finding of guilt against the Act which was connected to the death of a person, whether or not the prior matter is said to have directly*

¹⁰ Ch 3.7, pp 79-80.

¹¹ *Occupational Safety and Health Act 1984 (WA)*, s 55I(1).

¹² *Occupational Safety and Health Act 1984 (WA)*, s 55I(2).

caused the death, unless the prior matter was more than 5 years prior to the contravention the subject of the proposed EU.

Criminal history - repeated: *The applicant has two or more recent prior convictions or findings of guilt against the Act arising from separate investigations, unless the last prior matter concluded more than 5 years prior to the contravention the subject of the proposed EU.*

Note: The criminal history of associated corporate entities such as holding companies and wholly owned subsidiaries is included for the purposes of determining the criminal history of the applicant in all considerations.

The ACTU's recommended amendments to the Bill are based on this policy and the recommendations of the Best Practice Review. We strongly urge the Committee to recommend these amendments to the Bill and not to leave these matters to policy. We say that, given the industry context, these matters need to be addressed in the legislation. The offshore petroleum industry is one of Australia's most dangerous industries, due to the high-risk nature of the work performed and the fact that this high-risk work is performed in remote locations. Offshore petroleum is an industry characterised by the potential for major accident events in which multiple fatalities or serious injuries are incurred. Despite this industry context, the NOPSEMA is reluctant to utilise prosecution as an enforcement tool and unduly relies on the lower levels of the regulatory pyramid.

Other relevant inquiries

The ACTU draws the Committee's attention to three other relevant inquiries which are on foot. As noted, the Senate Education and Employment References Committee is currently conducting an inquiry into the WHS of workers in the offshore petroleum industry. At the same time, an independent reviewer has been appointed by Safe Work Australia (at the request of the WHS Ministers) to examine and report on the operation and content of the model WHS laws to ensure that they are operating as intended. The ACTU's submissions to these inquiries are enclosed for ease of reference.¹³ The Department of Industry, Innovation and Science has now also commenced a review of the WHS regime for offshore petroleum workers in Australian waters.

¹³ In respect of the issues raised in this submission, see, especially: ACTU submission to inquiry into WHS of workers in the offshore petroleum industry, term of reference (b), paragraphs 29-31, recommendations 4-6, pp 9-10; ACTU submission to the review of the model WHS laws, question 36, paragraphs 153-156, pp 68-69.

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