

Work Health and Safety of Workers in the Offshore Petroleum Industry

Supplementary submission of the Australian Council of Trade Unions

ACTU Submission, August 2018
ACTU D. No 167/2018

ACTU Supplementary Submission

1. The Australian Council of Trade Unions (**ACTU**) makes this brief supplementary submission in response to other submissions and to evidence provided to this inquiry in the public hearings on 13 June and 10 to 11 July 2018.

A culture of fear

2. The inquiry heard significant evidence from workers and their representative unions about the pervasive culture of fear and reprisal that characterises the offshore petroleum industry, in which workers believe that to raise work health and safety (**WHS**) concerns for fear will cost them their job. But perhaps the most telling evidence on this issue was from the regulator itself:

Mr Gunn: That's very common because most of that information comes from the workforce and the HSRs. We're there 24/7 and have our badges and everything. We'll have informal meetings. *We have workers who say, 'Can I come and see you behind this door and have a chat?' That happens quite often.*

...

CHAIR: At one of these facilities, how to meet privately with someone?

Mr Gunn: *They say, 'Can you meet me after tea in my room or at the back of the control room?' They arrange the private meeting because obviously, as you can say, they don't want to be seen talking to—*

CHAIR: *Self-protection.*

Mr Gunn: *Yes. That does occur...¹*

3. This evidence confirms that workers are fearful. It confirms the need for reforms directed to ensuring that health and safety representatives (**HSRs**) and workers are confident to raise WHS concerns with the regulator, such as:
 - a) requiring rather than inviting HSRs to accompany inspectors on their inspections;
 - b) requiring inspectors to meet separately and privately with HSRs and workers during their inspections;
 - c) granting accredited HSRs and the relevant unions the right to inspect facilities prior to commissioning;
 - d) funding of dedicated HSR support officers;

¹ Evidence of Mr Rodney Gunn, Manager Assessment and Inspection Melbourne, National Offshore Petroleum Safety and Environmental Management Authority, 11 July 2018, p 6 (emphasis added).

- e) the NOPSEMA maintaining a publicly available and up-to-date register of all HSRs and the training that they have received;
- f) mandating the ability for HSRs to gain remote electronic access to the safety case;
- g) better training for HSRs based on HSR courses accredited by the NOPSEMA after a tripartite panel of key stakeholders, including unions, has assessed the merits of proposed training programs and providers (consistent with the current approach to approving training under the Seacare and Comcare regimes).

Not all of these recommendations were included in our original written submission to this inquiry, but the evidence received by the Committee in the public hearings by workers from the industry revealed that they are critical reforms.

Harmonisation with the model WHS laws

4. The inquiry also heard significant evidence regarding the issue of harmonisation with the model WHS laws. It needs to be emphasised that the ACTU is not calling for the end of separate WHS regulation in the offshore petroleum industry. What we are calling for is harmonisation in respect of several key areas in which WHS regulation in the offshore petroleum industry is deficient and outdated relative to the model WHS laws.² The evidence of WorkSafe Victoria to the inquiry provided an excellent summary of these areas.³
5. The consensus position in Australia since the national occupational health and safety review in 2008 is that occupational health and safety in specific industries or in relation to specific hazards *should only be separately regulated where it is periodically and objectively justified*. As far as possible, the separate legislation should be consistent with nationally harmonised occupational health and safety laws.
6. An independent review of the National Offshore Petroleum Safety and Environmental Management Authority's (NOPSEMA) operational activity in 2008 similarly recommended that all laws in the petroleum industry that affect occupational health and safety should be reconsidered with the aim of achieving consistency with the content and operation of the national laws.⁴ This recommendation was reiterated by a further independent review of WHS in the offshore petroleum industry in 2009.⁵

² Please note that the ACTU submission dealt with terms of reference (a)(ii) and (iii) as one because the *Work Health and Safety Act 2011* (Cth) largely mirrors the 2011 model laws. The model laws were amended on 21 March 2016, although no jurisdictions have implemented these amendments. The ACTU does not support the 2016 amendments.

³ Evidence of Mr Michael Coffey, Head, Hazardous Industries and Industry Practice, WorkSafe Victoria, 11 July 2018, pp 49-52.

⁴ *Review of the National Offshore Petroleum Safety Authority Operational Activities 2008* (Recommendation 5).

⁵ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority*, June 2009.

7. Only three witnesses opposed to harmonisation gave any reason for their opposition. None gave a reason that constituted an objective justification for the disparities between the model WHS laws and WHS regulation in the offshore petroleum industry.
8. The Australian Mines and Metals Association (**AMMA**) opposed harmonisation in respect of a union WHS entry permit system on the basis that WHS entry permits might be misused for industrial purposes.⁶ This submission was unashamedly politically motivated and should be discounted because of its lack of concern for what should be the paramount issue – the health and safety of workers.
9. The NOPSEMA Advisory Board gave evidence which suggested that it opposed harmonisation on the basis that the safety case system gives a better outcome than a system of prescriptive regulation. However this position appeared to be based on a (subsequently qualified) misunderstanding that harmonisation – particularly the degree of harmonisation that we are calling for – would somehow disrupt or displace the safety case system.⁷ That is not correct.
10. The Department of Industry, Innovation and Science (**the Department**) gave evidence which appeared to oppose harmonisation on the basis that, ‘the current regime, based on broad performance goals with the onus of responsibility placed on duty holders and regulated for compliance by an independent regulator, remains leading practice regulatory approach internationally for high-hazard industries’ and that, ‘Greater prescription of processes and requirements in the regulatory regime, which has been called for by some stakeholders, is not necessarily the best approach and won't necessarily achieve optimal safety outcomes.’⁸ However the areas of harmonisation that we have called for do not change the fundamental basis of the current regime nor lead to a prescriptive approach. In any event, the Department (and the Department of Jobs and Small Business) conceded that they had not in fact undertaken an analysis of the aspects of the model WHS laws that do not apply in the offshore petroleum industry.⁹
11. In respect of harmonisation, when asked about licensing for high-risk work the Department said, ‘...whilst the language is a little different, there is still a permit to work requirement in the OPGGSA.’ The ACTU is concerned that the permit to work requirement in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) is substantially different from, and less

⁶ Submission 9.

⁷ Evidence of Ms Erica Smyth, Chair, NOPSEMA Advisory Board, 11 July 2018, pp 22-23.

⁸ Evidence of Ms Lisa Schofield, General Manager, Offshore Resources Branch, Resources Division, Department of Industry, Innovation and Science, 11 July 2018, p 42.

⁹ Evidence of Ms Lisa Schofield, General Manager, Offshore Resources Branch, Resources Division, Department of Industry, Innovation and Science, and Mr Adrian Breen, Branch Manager, Work Health and Safety Policy, Department of Jobs and Small Business, 11 July 2018, p 47.

rigorous than, the licensing system in the model WHS laws. This issue is addressed at paragraph [25] of our submission to this inquiry.

The AMSA jurisdiction compared to the NOPSEMA jurisdiction

12. During the hearing on 11 July 2018, Senator Marshall asked Mr Michael Doleman, International Executive Officer, Maritime Union of Australia, to explain the differences between the offshore petroleum WHS regime and the maritime industry WHS regime that the Australian Maritime Safety Authority (AMSA) regulates.¹⁰
13. In addition to Mr Doleman's evidence,¹¹ the ACTU notes that the *Seafarers and Other Legislation Amendment Bill 2016* (Cth), which is currently before the House of Representatives, will largely end separate WHS regulation in the maritime industry (other than the offshore petroleum industry) and bring it under the *Work Health and Safety Act 2011* (Cth). As a result, workers in the maritime industry will have the same WHS protections as onshore workers, including a union WHS entry system and a high-risk work licensing system, and offshore petroleum workers will be left even further behind.
14. The ACTU further notes that there is a proposed phase-in period for high-risk work licencing, and other matters that come under WHS regulations (as opposed to the legislation itself), and which do not currently exist in the maritime industry.¹² A similar phase-in period could be considered in the offshore petroleum industry if necessary, although none of the industry representatives have provided any evidence or submissions to this inquiry to that effect.

Jurisdictional issues between the NOPSEMA and the AMSA

15. Also at the hearing on 11 July 2018, Mr Stuart Smith, CEO of NOPSEMA, gave the following evidence in relation to jurisdictional issues between the NOPSEMA and the AMSA:

The *Karratha Spirit* issue, which occurred in 2008, was the responsibility of NOPSA. That's certainly accepted. At the time there was discussions with AMSA. They confirmed their view was the same as NOPSA, our predecessor—that it was within the jurisdiction of the Offshore Petroleum and Greenhouse Gas Storage Act. That wasn't in dispute and is not in dispute today. It wasn't in dispute throughout.

The second matter is the *Skandi Pacific*. There is no dispute between us or AMSA. That was an event in 2015. I was actually the CEO of NOPSEMA when it occurred. I spoke to the CEO of AMSA, Mick Kinley, and we both agreed that it was AMSA's responsibility. It was not covered by the OPGGSA. There was no dispute,

¹⁰ Evidence of Ms Lisa Schofield, General Manager, Offshore Resources Branch, Resources Division, Department of Industry, Innovation and Science, 11 July 2018, p 42

¹¹ The ACTU also refers the Committee to the earlier evidence on the same issue from Mr Michael Cross, National Safety and Training Officer, Construction, Forestry, Maritime, Mining and Energy Union, 10 July 2018.

¹² Explanatory Memorandum to the *Seafarers and Other Legislation Amendment Bill 2016* (Cth), p xliv.

disagreement, misunderstanding or anything. However, there is a jurisdictional issue, as I understand it, for vessels as to whether they fall within the maritime provisions. I'm not across the detail of that. You'll appreciate it's not our jurisdiction, but there is an issue, as I understand it, regarding foreign flagged vessels versus Australian flagged vessels. There may well need to be some clarification through legislation or otherwise, but it is not our legislation that has the jurisdictional issue and nor has there been a jurisdictional issue between us and AMSA on either of those matters at any stage.

16. Mr Smith's evidence followed information that he had previously provided to Mr Stephen Palethorpe, Secretary of the Committee, in which he stated that the *Karratha Spirit* was subject to regulation by NOPSA at the relevant time and that the *Skandi Pacific* was not.¹³
17. In respect of Mr Trevor Moore's death on the *Karratha Spirit* in 2008, the ACTU's understanding is that, while the consensus of the regulatory authorities was that the *Karratha Spirit* was under NOPSA's jurisdiction according to the OPGGS Act, the Australian Transport Safety Bureau (ATSB) investigation found that was not necessarily correct. The ATSB identified the following and classified it as a 'significant safety issue':

...the point at which *Karratha Spirit* became 'navigable' is not clearly defined in the OPGGSA and is open to interpretation. Consequently, during some operations, it is possible that the ship would not come under the jurisdiction of any Australian safety regulatory regime.¹⁴

The ATSB's findings and recommendations in respect of this issue echoed those of a previous independent review in 2009. That review recommended that the Commonwealth undertake legislative change to ensure that any floating facility which reverts to a 'navigable form' is covered.¹⁵ The ACTU understands that this issue remains unaddressed. We call on the Government to develop a legislative reform package to ensure complete coverage of Australian WHS regulation in the maritime and offshore petroleum industry.¹⁶

18. In respect of Mr Andrew Kelly's death on the *Skandi Pacific* in 2015, the ATSB found that 'the vessel's location and status meant that it was outside the jurisdiction of both the NOPSEMA and the AMSA'.¹⁷ We hope that the Government follows through with its commitment to address this issue with the passage of the *Seafarers and other Legislation Amendment Bill 2016* (Cth), as indicated in the letter of 29 January 2018 from Ms Sandra Parker, then Deputy Secretary of the Department of Jobs and Small Business, to the ACTU ([attached](#) for information).

¹³ Letter from Mr Stuart Smith, CEO, NOPSEMA, to Mr Stephen Palethorpe, Secretary, Senate Standing Committee on Education and Employment, 27 June 2018.

¹⁴ '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, pp 33-36, 48-49.

¹⁵ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation: Marine Issues*, June 2009, pp 13-16.

¹⁶ Recommendation 9 of the ACTU submission to this inquiry.

¹⁷ '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 (emphasis added).

19. The ACTU refers the Committee to paragraphs [43] to [51] of the ACTU's submission to this inquiry and recommendations [9] to [11] for further discussion of these issues.

Memorandum of understanding between the NOPSEMA and the AMSA

20. On 6 July 2018, the NOPSEMA wrote to the Mr Palethorpe and provided further information regarding the NOPSEMA's 'collegiate engagement' with the AMSA. The NOPSEMA referred to a 2009 memorandum of understanding (**MOU**) between the parties. The AMSA subsequently tabled a copy of the MOU.
21. The ACTU is concerned that the MOU appears to have not been reviewed for some time and/or that the 2009 MOU may not be the most recent version. The ATSB investigation into Mr Kelly's death found that, 'The MoU was last revised *in 2013*, when AMSA and NOPSEMA agreed to further joint inspections of floating facilities.'¹⁸ The *2015 Operational Review of the National Offshore Petroleum Safety and Environmental Management Authority (2015 Review)* noted with concern that joint inspections of vessels' certification had ceased and recommended that the parties refresh their MOU.¹⁹ An earlier 2009 review had discussed the importance of joint inspections.²⁰
22. The NOPSEMA claims that the extent and strength of engagement between the NOPSEMA and the AMSA is independent of the MOU. Nonetheless, it is nonetheless disappointing that the recommendation of the 2015 Review that the MOU be refreshed has not been enacted. Further and perhaps more importantly, the 2009 MOU provides for several important joint initiatives and protocols, including jointly conducted audits and inspections,²¹ protocols for WHS investigations where jurisdiction is not clear²² and the development of complementary WHS promotion and education material, codes, guidelines and programs.²³ Neither agency has provided any information as to whether these joint initiatives and protocols are actually occurring.

State and territory conferral of powers to the NOPSEMA

23. Several parties have called for this inquiry to encourage legislative action needed from the states and the Northern Territory to confer regulatory powers and functions in respect of petroleum activities in coastal waters to the Commonwealth.²⁴

¹⁸ '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 (emphasis added).

¹⁹ Noetic Solutions Pty Limited, *2015 Operational Review of the National Offshore Petroleum Safety and Environmental Management Authority*, Report for the Minister for Industry and Science, September 2015, pp 69-70.

²⁰ Kym Bills and David Agostini, *Offshore Petroleum Safety Regulation: Marine Issues*, June 2009, paragraph 2.14,p 9.

²¹ Clause 7.1.

²² Clause 7.2.

²³ Clause 9.4.

²⁴ Submission from the NOPSEMA Board (submission 2); the NOPSEMA (submission 5); the APPEA (submission 8); and the AMMA (submission 9).

24. The ACTU supports the retention of the NOPSEMA as the national WHS regulator for Australia's offshore petroleum industry, but opposes the NOPSEMA's handling of its regulatory functions. The ACTU condemns the NOPSEMA's 'hands off' approach and its impact on safety performance in the offshore petroleum industry. Until such time as the NOPSEMA becomes a more effective, full service regulator, the ACTU opposes any attempts to introduce legislative change enabling the states and the Northern Territory to confer their regulatory powers and functions in respect of petroleum activities in coastal waters to the Commonwealth.

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