



Australian Government
Department of Industry,
Innovation and Science

Offshore Safety Review: Discussion Paper

A review of the offshore safety regulatory regime

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Part 1: Introduction

The Department of Industry, Innovation and Science (the department) is undertaking a review of the offshore petroleum and greenhouse gas storage regulatory regime for safety.

The review will consider:

- the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (Safety Regulations)
- Schedule 3 (Occupational health and safety) to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act)
- any other matters under the OPGGS Act which are incidental to the above items, but necessary for a comprehensive review of the Safety Regulations and Schedule 3 of the OPGGS Act.

The Safety Regulations are due to sunset in 2020 and must be reviewed before they can be remade to ensure they are fit-for-purpose, up-to-date and leading practice. This review will inform the remaking of the Safety Regulations.

For ease of reading, throughout this paper the offshore petroleum and greenhouse gas storage industries will be referred to collectively as the offshore oil and gas industry. When referred to individually, be aware that this does not represent both industries (i.e. 'offshore petroleum' does not include 'greenhouse gas storage', and vice versa).

The safety review

The objective of the review is to determine whether the current legislative provisions effectively secure and protect offshore workers from risks to health and safety arising from these activities. The full Terms of Reference for the review are at Appendix A and also on [the department's website](#). The review will consider:

1. the extent to which the Occupational Health and Safety (OHS) regime is securing the health and safety of persons engaged in offshore petroleum operations and driving continuous improvement in safety performance
2. the effectiveness of the safety case provisions as a mechanism for achieving health and safety performance at offshore facilities
3. the effectiveness of the diving safety management systems (DSMS) and diving project plans (DPPs) for achieving safety performance in diving operations
4. the appropriateness of definitions of facilities, vessels and structures, and associated offshore places for the purpose of ensuring OHS for persons working in the offshore resources operations.
5. the effectiveness of the framework of duties in protecting the health and safety of workers in the offshore oil and gas industry
6. the appropriateness and effectiveness of provisions for workplace arrangements
7. the transparency of current arrangements, including provision of information to the workforce

8. the effectiveness of routine and non-routine notification and reporting arrangements
9. the effectiveness of compliance and enforcement mechanisms for improving OHS performance
10. alignment of terminology throughout the OHS regime and related legislation.
11. any other changes that may be necessary to ensure the OHS regime reflects current Australian Government policy and guidance on best practice regulation
12. any other matter raised during the process considered relevant.

The review process

The review will be informed by thorough consultation with relevant stakeholders (the offshore workforce, industry, government agencies and unions), analysis of policy, and international and domestic leading-practice comparisons.

This paper has been developed to inform a public consultation process on the key issues and concerns surrounding the offshore regulatory regime for safety. Submissions received during the public consultation period will be used to inform the development of a policy framework, which will propose policy recommendations, supported by relevant evidence, to improve the offshore regulatory regime for safety. Stakeholders will be consulted on policy recommendations through targeted meetings, the Stakeholder Safety Group (a consultative group established for this review, outlined below) and a second public consultation process on policy options.

The final policy framework will be provided to the Minister for Resources and Northern Australia for approval, followed by legislative and regulatory amendments, where appropriate, to implement the reforms. Any proposed amendments will be subject to parliamentary and Executive Council processes for legislative and regulatory change.

The preparation of this discussion paper has been informed by stakeholder engagement through two Safety Workshops (Melbourne, August 2018 and Perth, October 2018) and close consultation with the Safety Stakeholder Group.

Safety Stakeholder Group

The Safety Stakeholder Group is an important consultation avenue that allows key stakeholders with significant interest in offshore oil and gas safety to be involved in the offshore safety review process.

The Safety Stakeholder Group was established to ensure a broad range of perspectives and views are taken into account when considering issues and developing policy options. It serves as a consultation group, not a decision-making body, to allow ideas and issues to be tested and discussed prior to a final policy framework being developed by the department.

The Safety Stakeholder Group has a diverse range of participants with membership comprised of representatives from industry, the Commonwealth and state governments, the offshore workforce and unions.

Members include:

- the department (Chair)
- the Australian Petroleum Production & Exploration Association
- an offshore operator representative: Santos
- the Australian Council of Trade Unions (ACTU)
- an offshore Health and Safety Representative (HSR)
- WorkSafe Victoria
- the New South Wales (NSW) Resources Regulator
- the Western Australian (WA) Department of Mines, Industry Regulation and Safety
- the International Association of Drilling Contractors
- the Australian Maritime Safety Authority (AMSA)
- the Attorney-General's Department
- the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

How to contribute your views

We encourage everyone involved in or affected by the offshore regulatory regime for safety to participate in the review. Further information on the stakeholder engagement and consultation approach can be found in the consultation plan published on the department's [website](#).

As part of this public consultation period, we invite you to share your views of, and experiences with, the offshore regulatory regime for safety through written submission. In particular, we welcome comments regarding any or all of the issues raised in this discussion paper, and responses to the questions posed throughout.

Parts 1 and 2 of this discussion paper provide background and context for the Safety Review. Parts 3 to 7 outline issues for consideration by stakeholders which are within the scope of the Terms of Reference for this review. Questions are posed throughout Parts 3 to 7 which can be addressed through written submission.

If you would like to provide comments in a different format or have any questions, please contact the department at OffshoreRegulations@industry.gov.au.

All submissions and comments must be provided by **5 August 2019**.

Submissions will be published and may be referred to in subsequent reports. You can request that your name be withheld, or that all or part of your submission be treated as confidential, when you lodge your submission. Please be aware that even where you request information be treated as confidential, there may be circumstances in which the department is authorised or required by law to release that information, for example, in accordance with the *Freedom of Information Act 1982* or for the purpose of parliamentary processes.

Part 2: Background to the safety review

Overview of the offshore oil and gas safety regime

Role of the Government and the department

The Australian Government's role in relation to the oil and gas sector is to:

- establish the macroeconomic environment (broad economic policy)
- provide a regulatory framework for exploration, development, safety, environmental assessment and revenue collection
- reduce commercial risk in petroleum exploration by collecting and disseminating geoscientific information
- investigate ways to remove impediments to industry competitiveness.

The department is responsible for providing upstream offshore oil and gas-related policy advice to the Australian Government. This includes supporting the Minister with responsibility for resources in their role as the Commonwealth member of the Joint Authorities for the offshore areas of each state and the Northern Territory, the Joint Authority for the offshore areas of the External Territories and of the Eastern Greater Sunrise, and as the Commonwealth Resources Minister.

The department manages the OPGGS regime to ensure the sustainable and safe development of Australia's offshore oil and gas resources, while encouraging further investment. It also provides regulatory and policy oversight for the OHS of people involved in offshore petroleum and greenhouse gas activities, environmental management and offshore well integrity issues.

History of Australia's offshore oil and gas safety regime

Until the early 1990s, the offshore oil and gas industry in Australia was regulated by a combination of State and Commonwealth legislation. This legislation prescribed specific laws that had to be complied with. In practice, it was the regulator that identified what was safe or not safe for the industry. Rapid changes in technology and operations meant that legislation and regulation were constantly trying to catch up.

A key international turning point in how governments and the offshore oil and gas industry manage the health and safety of workers involved in offshore oil and gas activities was the Piper Alpha disaster in the United Kingdom (UK) in 1988 and the subsequent introduction of the safety case regime.

The massive leakage of gas condensate and explosion at Piper Alpha, a large North Sea oil platform, resulted in the deaths of 167 people. A public inquiry into the circumstances of the accident was led by the Honourable Lord Cullen. Its landmark report examined the causes of the incident, the lessons learned and issued 106 recommendations for change, all of which

were accepted.¹ The result was the adoption of a goal-setting safety regime that prompted change across offshore oil and gas exploration and development sectors worldwide, and changed the face of offshore safety.

In 1991, an Australian Consultative Committee on Safety in the Offshore Petroleum Industry recommended that key outcomes of the UK's public inquiry into the Piper Alpha disaster be implemented in Australia.

The Australian Government made a policy decision to adopt a safety case regime and new objective-based regulations to replace the then-prescriptive safety regulations made under the *Petroleum (Submerged Lands) Act 1967* (PSLA). In 1992, the PSLA was amended to require the preparation and submission of a safety case for every offshore petroleum facility, and in 1996 the safety case regime was enacted in Australia through the commencement of the *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations*.

In 1999, the Australian Government commissioned a review into the adequacy of offshore safety regulation in Australia. At the time, the state and Northern Territory governments carried out day-to-day offshore safety regulation in Commonwealth waters. The review recommended the establishment of a national petroleum safety regulatory authority.

In 2001, the Council of Australian Governments (COAG) accepted the review's proposals and recommended that there be a single Commonwealth offshore safety regulator, and in 2005 the National Offshore Petroleum Safety Authority (NOPSA) was established.

In 2006, the PSLA was replaced by the *Offshore Petroleum Act 2006*, and in 2008 became the OPGGS Act, which continued the established approach to safety for offshore petroleum and greenhouse gas activities and extended it to the storage of greenhouse gas offshore.

Work health and safety harmonisation

In July 2008, the Commonwealth, state and territory governments committed to harmonising work health and safety (WHS) legislation and regulation by 1 January 2012 through the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the IGA). The IGA committed all states, territories and the Commonwealth to adopt uniform WHS laws based on a model WHS Act, supported by model Regulations and Codes of Practice. It was agreed that a nationally consistent approach to compliance and enforcement would be finalised by December 2011.

¹Hon Lord Cullen, 1990, The Public Inquiry into the Piper Alpha Disaster, Department of Energy, <http://www.hse.gov.uk/offshore/piper-alpha-disaster-public-inquiry.htm>

The National Review into Model Occupational Health and Safety Laws (the OHS Review) was conducted in 2008/2009 to make recommendations on the optimal structure and content of a model WHS Act that was capable of being adopted in all jurisdictions.²

The model laws have been adopted, allowing for minor variations where necessary, by the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. Western Australia and Victoria have not implemented the model WHS framework but their WHS laws broadly align with the model laws.

In 2018, Ministers responsible for WHS asked Safe Work Australia to review the content and operation of the model WHS laws in order to meet the Ministers' commitment to review the model WHS laws regularly and ensure they continue operating effectively. Safe Work Australia appointed an independent reviewer, Ms Marie Boland, to conduct the review and the review's final report was publicly released in February 2019.³ In examining issues for discussion throughout this paper, we have, where relevant, provided a comparison to the Commonwealth WHS laws that are currently in force. We have also indicated any relevant recommendations from the review, noting that these are being considered by WHS Ministers across Commonwealth, state and territory jurisdictions.⁴

WHS harmonisation and offshore safety

When the Commonwealth, state and territory governments committed to the harmonisation of the WHS laws in 2008, the responsible Ministers agreed that industry-specific laws, in particular for high risk industries, should continue where objectively justified.

The second report of the OHS Review in January 2009,⁵ by the independent advisory panel, considered whether the principal health and safety Acts in each jurisdiction should continue to be supplemented or replaced for the purposes of regulating health and safety in relation to specific industries or hazards that would otherwise come within its scope.

The OHS Review found that the majority of industry-specific health and safety Acts contained similar Robens-style principles⁶ to that of the principal WHS Acts, in that they place duties on certain parties to eliminate or minimise hazards and risks. Stakeholders

² Department of Jobs and Small Business, Occupational Health and Safety Harmonisation, <https://www.jobs.gov.au/occupational-health-and-safety-harmonisation>

³ Safe Work Australia, 2018, Review of the model WHS laws, <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws>

⁴ Ibid

⁵ National Review into Model Occupational Health and Safety Laws, 2009, Second Report, https://docs.jobs.gov.au/system/files/doc/pdf/national_review_into_model_ohs_laws_secondreport.pdf

⁶ Australia's WHS laws have historically been based on the UK's health and safety laws which are often referred to as Robens-style legislation. Principles of Robens-style legislation include a principal Act with broad 'general duties' imposed on certain parties to achieve a health and safety standard, while allowing flexibility in the manner in which the standard is achieved.

consulted during the OHS Review expressed a preference for consistency across health and safety laws, but noted that industry-specific regulation should continue alongside the general duties expressed in the principal WHS Acts where appropriate.⁷

In May 2009, the Ministers responsible for WHS agreed with the report's recommendation⁸ that industry-specific laws should continue where 'objectively justified', and where adopted, should normally be provided by regulations under the principal WHS laws, to keep separate legislation to a minimum.

The OPGGS Act and Safety Regulations have been maintained as specific health and safety legislation for the offshore petroleum industry, providing a more tailored form of regulation to address its high hazard work environment, characterised by accident events that are low frequency, yet potentially high consequence.

COAG has continued to endorse an industry-specific regulatory framework for the offshore petroleum sector, demonstrated by NOPSA's establishment in 2005, and the formation of NOPSEMA in 2012.

Other high risk sectors also continue to have industry-specific health and safety legislation. These include the aviation, electrical, agricultural and veterinary chemicals, and radiation and nuclear industries.

In line with the principles of best practice regulation, the department is committed to ensuring that the offshore regulatory regime for safety remains relevant and effective over time. The need for continuous improvement means that any regime, including the offshore regulatory regime for safety, is subject to regular review and amendment where the change is justified, effective and proportional to the issue being addressed. This will include an assessment of whether separate and specific OHS laws for the offshore petroleum industry continue to be justified.

Australia's offshore safety regime principles

While there is no internationally agreed definition of what constitutes an effective health and safety regime for the offshore oil and gas industry, it is generally accepted that core principles include:

- a leading practice regulatory framework
- an independent, competent regulator
- involvement of all relevant parties in health and safety issues.

⁷ National Review into Model Occupational Health and Safety Laws, 2009, Second Report, https://docs.jobs.gov.au/system/files/doc/pdf/national_review_into_model_ohs_laws_secondreport.pdf

⁸ WRMC Response to Recommendations of the National Review into Model OHS Laws, 2009, Recommendation 76, <https://www.safeworkaustralia.gov.au/system/files/documents/1702/wrmc81outcomesmay09.pdf>

Leading practice regulatory framework

Australia's offshore regulatory regime for safety, underpinned by the OPGGS Act and the Safety Regulations, provides a framework that addresses and reflects these principles.

Since the 1990s, Australia's offshore regulatory regime for safety has adopted an objective-based regulatory approach and safety case model. The objective-based approach means that high-level requirements are stated, but the legislation does not prescribe how these requirements must be met. Objective-based legislation sets out that the onus is on the creator of the risk to identify, evaluate and manage the risks to ensure offshore oil and gas activities are safe and risks have been reduced to as low as reasonably practicable. This approach imposes an ongoing obligation on duty holders to reduce risk and does not equate to self-regulation by industry.

The safety case model means that hazards, risks and controls must be documented by a duty holder for assessment by the regulator. The intent is to ensure duty holders carry the responsibility for identifying and managing safety risks, rather than simply responding to risks pre-identified in regulations. The safety case model, while not diminishing focus on personal safety matters, also ensures adequate attention is placed on the prevention of major accident events.

Independent and accountable regulator

Integral to the objective-based regulatory approach and safety case regime is the necessity to have an independent, accountable and competent regulator. A regulator must act independently from the government and from industry to be credible in its decision-making. Further, it must be accountable for its functions and be subject to periodic independent reviews.⁹

NOPSEMA was established to be the single Commonwealth regulator for offshore petroleum and greenhouse gas, a legally distinct and functionally independent agency which has accountability processes and regulatory powers embedded in legislation.

As an independent statutory authority, NOPSEMA's decision making function is focused exclusively on the technical and scientific merits of risk management plans and is independent of economic, commercial and political factors and the workings of government. The Ministers with responsibility for resources and the environment, and their respective departments, do not have any involvement in NOPSEMA's regulatory decision-making processes.

⁹ OECD, 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, https://www.oecd-ilibrary.org/governance/the-governance-of-regulators_9789264209015-en

Workforce involvement

An important feature of the offshore regulatory regime for safety is consultation with all relevant persons concerning the health and safety of the workforce. Involvement of the workforce, in particular, is essential, given that to carry out offshore oil and gas activities, or any complex activity for that matter, requires front line workers and their supervisors to undertake these operations.

Workforce involvement was emphasised by Lord Cullen in his public inquiry into the Piper Alpha disaster, where he reflected that “it is essential that the whole workforce is committed to and involved in safe operations”. And further, “... each [first-line supervisor] is personally responsible for ensuring that all employees, whether the company’s own or contractors, are trained to and do work safely and that they not only know how to perform their jobs safely but are convinced that they have a responsibility to do so”.¹⁰

The Australian offshore regulatory regime for safety makes formal provision for workforce involvement in the current legislation. This is demonstrated through:

- worker involvement in safety at the workplace (including the development and access to relevant safety documents and the ability for the workforce to appoint people to represent their health and safety interests)
- the ability for HSRs to accompany NOPSEMA inspectors during their inspections¹¹
- the protection of the workforce against threats (such as unfair dismissals)
- participation in governance arrangements which guide and inform health and safety issues (including the establishment of health and safety committees (HSCs) and consultation by NOPSEMA with the workforce and unions on the development of safety guidance).

Australia’s offshore safety performance

Safety statistics

The offshore oil and gas industry faces a number of hazards due to remote locations, unpredictable weather and working with complex equipment. Worldwide, the sector is also moving toward building larger and more complex projects located in deeper water.¹² The safety performance of Australia’s offshore petroleum industry continues to outperform other comparable industries, domestically and internationally. The following statistical information,

¹⁰ Hon Lord Cullen, 1990, The Public Inquiry into the Piper Alpha Disaster, pp.300-301

¹¹ OGPPS Act 2006, Schedule 3, Part 3, Subparagraph 34 (1)(iv)

¹² Bureau of Safety and Environmental Enforcement Director, <https://www.bsee.gov/newsroom/latest-news/statements-and-releases/press-releases/bsee-director-driving-offshore-safety>

published in NOPSEMA's 2018 annual offshore performance report,¹³ highlights key safety performance outcomes:

- for the sixth consecutive year, there were no fatalities
- a total injury rate of 3.48 per million hours worked, the lowest injury level to date since NOPSEMA (formerly NOPSA) began recording data in 2005.

However, industry must remain vigilant and focus its attention on learning from events to prevent future occurrences.

The report also identified that there were:

- eight workers that received major injuries, up from four in 2017
- 386 dangerous occurrences in 2018, which is an increase from 291 in 2017
- a notable increase in near-miss incidents, at 26, up from 16 in 2017.

International and domestic comparison

In Australia, the remoteness of facilities, the number of facilities producing liquid natural gas (LNG) and the associated challenges and risks is different to offshore petroleum industries in countries such as Norway, the UK, the USA and Canada. In those countries, oil is the primary resource drilled and produced.¹⁴ In relation to comparable¹⁵ international jurisdictions, Australia outperforms with lower injury and fatality rates.

NOPSEMA represents Australia on the International Regulators' Forum (IRF), a group of ten countries' independent regulators of health and safety in the offshore oil and gas industry. The purpose of the IRF is for regulators to share information and collaborate on joint programs to drive improvements in health and safety offshore. IRF members also share performance data for offshore activities using a common set of definitions and criteria.¹⁶

Australia's offshore oil and gas sector compares favourably to other jurisdictions internationally as well as high-risk industries domestically, as demonstrated in tables 1-3. However, there is always room for improvement. It is important that offshore injury rates and accidents remain low, and that the recent trend - with major injury occurrences offshore rising from zero in 2016 to four in 2017, and the number of accidents rising from four in 2016 to 10 in 2017¹⁷ - is reversed.

¹³ NOPSEMA, 2018, Annual Offshore Performance Report to 31 December 2018, <https://www.nopsema.gov.au/assets/Publications/A674653.pdf>

¹⁴ Senate Inquiry into the WHS of workers in the offshore petroleum industry, 2018, NOPSEMA submission

¹⁵ This refers to jurisdictions which have similar offshore regimes to Australia (Canada, the Netherlands, Norway and the UK).

¹⁶ International Regulators' Forum, <https://irfshoresafety.com/about-irf/>

¹⁷ NOPSEMA Charts – Annual performance, <https://www.nopsema.gov.au/assets/Data-and-statistics/Charts-Annual-performance.pdf>; NOPSEMA Annual Offshore Performance Report - to 31 December 2017, <https://www.nopsema.gov.au/assets/Publications/AA624610.pdf>

In order to lower these injury and accident rates there needs to be involvement and commitment by all relevant parties in the regime – regulator, government, workforce, union and industry – to ensure that Australia remains one of the world’s safest places for offshore workers.

Table 1: Average fatalities and number of major injuries in Australia relative to IRF members in 2017¹⁸

Fatalities and major injuries per million hours worked	Australia	All IRF Members
Average fatalities rate	0.00	0.01
Number of major injuries	0.31	0.41

Table 2: Number of Fatalities and major injuries in all IRF members in 2017¹⁹

No.	Australia	Brazil	Canada	Denmark	The Netherlands	NZ	Norway	Mexico	UK	USA
Fatalities	0	4	0	0	0	NA	1	NA	0	1
Major injuries	4	32	1	0	4	NA	29	NA	19	15

Table 3: Worker fatalities, comparison between selected industries^{20, 21}

Industry	2012	2013	2014	2015	2016	2017	Total 2012-17
Agriculture, forestry & fishing	56	55	45	56	44	52	308
Construction	30	22	32	34	35	30	183
Mining ²²	8	9	11	11	6	3	48
Offshore oil & gas	2	0	0	0	0	0	2

¹⁸ International Regulators' Forum, <https://irfshoresafety.com/wp-content/uploads/2019/02/2017.pdf>. Note that 2017 fatalities and injuries data for New Zealand and Mexico is not available. Average rate for all IRF members (right-hand column) is calculated based on the remaining eight member countries.

¹⁹ Ibid

²⁰ Safe Work Australia, Work-related Traumatic Injury Fatalities, Australia, <https://www.safeworkaustralia.gov.au/system/files/documents/1710/work-related-traumatic-injury-fatalities-report-2016.pdf>; <https://www.safeworkaustralia.gov.au/system/files/documents/1812/work-related-traumatic-injury-fatalities-report-2017.pdf>

²¹ NOPSEMA Charts – Annual performance, <https://www.nopsema.gov.au/assets/Data-and-statistics/Charts-Annual-performance.pdf>; <https://www.nopsema.gov.au/assets/Data-and-statistics/Tables-Annual-performance.pdf>

²² Mining fatalities include fatalities that occur in the coal mining, oil and gas extraction, metal ore mining, gravel and sand quarrying, and services to mining.

Table 4: Worker fatality rate per 100,000 workers, comparison between selected industries^{23, 24}

Industry	2012	2013	2014	2015	2016	2017	Average 2012-17
Agriculture, forestry & fishing	17.7	18.3	13.9	18.0	14.3	16.5	16.5
Construction	3.1	2.2	3.1	3.3	3.4	2.7	3.0
Mining²⁵	3.0	3.4	4.4	4.8	2.7	1.4	3.3
Offshore oil & gas	0.0	0.0	0.0	0.0	0.0	0	0.0

²³ Safe Work Australia, Work-related Traumatic Injury Fatalities, Australia, <https://www.safeworkaustralia.gov.au/system/files/documents/1710/work-related-traumatic-injury-fatalities-report-2016.pdf>

²⁴ NOPSEMA Charts – Annual performance, <https://www.nopsema.gov.au/assets/Data-and-statistics/Charts-Annual-performance.pdf>

²⁵ Mining fatalities include fatalities that occur in the coal mining, oil and gas extraction, metal ore mining, gravel and sand quarrying, and services to mining. <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>

Safety culture

Safety culture is the organisational culture which reflects the level of importance that is placed on safety beliefs, values, practices and attitudes by the majority of people within a workplace. Safety culture can be characterised as ‘the way we do things around here’.²⁶ A positive safety culture can assist in improved safety and organisational performance and a negative safety culture consequently results in poorer safety performance, i.e. more accidents and injuries.

An effective workplace safety culture can be developed through leadership, communication and training using systems, symbols and behaviours.²⁷ Safe Work Australia identifies five safety leadership principles to help create a workplace culture that promotes safety:

1. commit to safety
2. get involved
3. encourage participation
4. make WHS part of the business
5. review performance.²⁸

Although safety culture is difficult to regulate, the legislative framework, training and competency, leadership and a commitment by all involved are important to promote and support the development of a safety-conscious working environment. Instigating changes to embedded negative organisational safety culture is challenging, but doing so is likely to lead to better safety outcomes.

²⁶ WorkSafe Queensland, https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0004/82705/understanding-safety-culture.pdf

²⁷ Comcare, Workplace health and safety culture, https://www.comcare.gov.au/Forms_and_Publications/publications/services/safety_and_prevention/safety_and_prevention/workplace_health_and_safety_culture

²⁸ Safe Work Australia, Leadership and culture, <https://www.safeworkaustralia.gov.au/leadership-culture#organisational-culture-a-definition>

Part 3: Objects, safety cases and diving safety management systems

Introduction

Effective safety systems play a critical role in maintaining and improving the safety performance of an activity, asset or organisation, and play an equally important role in creating and encouraging a positive safety culture throughout the organisation.²⁹ This part outlines the objects of the legislation, which describe the principles and purposes of the safety regime that underpin the requirements of the safety systems, and then outlines the use of safety systems in the Australian offshore regulatory regime for safety, through the safety case, diving safety management system (DSMS) and diving project plan (DPP).

Objects in relation to occupational health and safety

An objects clause outlines the underlying purposes of the legislation and may set out its general aims or principles.³⁰ The OPGGS Act and Safety Regulations each include objects clauses that relate to health and safety.

Schedule 3 to the OPGGS Act provides that the objects of the Schedule are, in relation to facilities located in Commonwealth waters:

- to secure the health, safety and welfare of persons at or near those facilities
- to protect persons at or near those facilities from risks to health and safety arising out of activities being conducted at those facilities
- to ensure that expert advice is available on occupational health and safety matters in relation to those facilities
- to promote an occupational environment for members of the workforce at such facilities that is adapted to their needs relating to health and safety
- to foster a consultative relationship between all relevant persons concerning the health, safety and welfare of members of the workforce at those facilities.

²⁹ Lamb and Pegram, 2012, Health and Safety International, “Safety Case and Beyond”, 2012, <https://www.hsimagazine.com/article/safety-case-and-beyond-716>

³⁰ Australian Law Reform Commission, <https://www.alrc.gov.au/publications/5.%20The%20Privacy%20Act%3A%20Name%2C%20Structure%20and%20Objects/objects-act>

Importantly, the object to foster a consultative relationship between relevant persons is the overarching principle that guides consultative mechanisms described in Part 5: Workplace arrangements.³¹

The objects in the Safety Regulations focus on seeking to ensure that risks to the health and safety of persons at facilities and those carrying out diving activities are reduced to as low as reasonably practicable.

The objects of the Safety Regulations³² are to ensure that:

- facilities are designed, constructed, installed, operated, modified and decommissioned in Commonwealth waters only in accordance with safety cases that have been accepted by NOPSEMA
- safety cases for facilities and diving safety management systems make provision for the following matters:
 - the identification of hazards and assessment of risks
 - the implementation of measures to eliminate the hazards, or otherwise control the risks
 - a comprehensive and integrated system for management of hazards and risks
 - monitoring, audit, review and continuous improvement
- the risks to the health and safety of persons at facilities are reduced to a level that is as low as reasonably practicable
- diving to which the OPGGS Act relates is carried out in Commonwealth waters only in accordance with diving safety management systems that have been accepted by NOPSEMA
- the risks to the health and safety of persons who carry out diving to which the Act relates are reduced to a level that is as low as reasonably practicable.

Issues for discussion

The *Work Health and Safety Act 2011* (Cth) (WHS Act) sets out a wide range of objects that provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. The *Work Health and Safety Regulations 2011* (WHS Regulations) do not contain any objects. There are similarities between the WHS Act and the OPGGS Act, which both contain objects to ensure workers are protected against harm and risk; ensure the provision of health and safety advice; and encourage the fostering of consultative relationships. The WHS Act, however, contains objects that provide for:

- fair and effective workplace representation, consultation, co-operation and issue resolution

³¹ OPGGS Act 2006, Schedule 3, Part 1, Paragraph 1(e)

³² OPGGS Safety Regulations 2009, Chapter 1, Regulation 1.4

- encouraging unions and employer organisations to take a constructive role in promoting improvements in health and safety practices
- securing compliance through effective and appropriate compliance and enforcement measures
- ensuring appropriate scrutiny and review of actions
- a framework for continuous improvement
- a general principle that workers and other persons should be given the highest level of protection against harm to the health, safety and welfare from hazards and risks arising from work as is reasonably practicable.³³

During the 2018 Senate Inquiry into the Work health and safety of workers in the offshore petroleum industry, the absence of specific reference to the role of industrial organisations within the objects of the OPGGS Act was raised by stakeholders. Specifically, it was claimed that given the importance of representative involvement in the management of work, health and safety, it would be appropriate that the role of unions and employer organisations be acknowledged in legislation. While the OPGGS Act includes an object “to foster a consultative relationship between all relevant persons”, there is no specific reference to unions and employer organisations, and the term “relevant persons” is not currently defined in the OPGGS Act in relation to health and safety.

What are your views on the current objects in the OPGGS Act and Safety Regulations as they relate to OHS? Do you have suggestions for changes to the objects, or how they are defined?

Do you think the objects in the OPGGS Act should include specific reference to the role of unions and employer organisations, or is the current requirement to foster a consultative relationship with all relevant persons sufficient? Why/why not?

Safety case

Under the Safety Regulations, a facility cannot be constructed, installed, maintained, modified or decommissioned without a safety case that has been accepted by NOPSEMA.

A safety case is a comprehensive, integrated risk management system which identifies the safety-critical aspects of the facility, both technical and managerial, and defines appropriate performance standards for the operation of the safety-critical aspects. The requirements of what must be included in a safety case are set out in regulation 2.5 of the Safety Regulations. The responsibility for the safety case rests with the operator because the operator has the most in-depth knowledge of their installation and is best placed to assess their processes, procedures and systems to identify and evaluate risks and implement the appropriate controls. For more information on the history of the safety case regime refer to Part 2: Background to the safety review.

³³ WHS Act 2011, Part 1, Division 2, Section 3

Development of safety cases

The legislative requirements for the contents of a safety case are comprehensive and detailed. Under the Safety Regulations, a safety case must include:

- a description of the facility
- a detailed description of the formal safety assessment for the facility that:
 - identifies all hazards having the potential to cause a major accident event
 - is a detailed and systematic assessment of the risk associated with each of those hazards, including the likelihood and consequences of each potential major accident event
 - identifies the technical and other control measures that are necessary to reduce that risk to a level that is as low as reasonably practicable
- a detailed description of the safety management system
- all Australian and international standards that have been, or will be, applied
- for a facility that is manned, a description of the facility command structure.³⁴

The safety case must:

- describe the means by which the operator will ensure that each member of the workforce at the facility has the necessary skills, training and ability
- provide for a permit to work system to establish and maintain a documented system of coordinating and controlling the safe performance of all work activities of members of the workforce at the facility
- demonstrate effective consultation with, and participation of, members of the workforce in the development or revision of the safety case.³⁵

Further, there are requirements that must be documented in the safety case in the event of an emergency, including:

- a detailed description of an evacuation, escape and rescue analysis
- a detailed description of a fire and explosion risk analysis
- provision for communications systems that, in the event of an emergency in connection with the facility, are adequate
- adequate provision for the facility in the event of an emergency in respect of back-up power supply, lighting, alarm systems, ballast control and emergency shut-down systems
- a description of a response plan designed to address possible emergencies and provide for implementation of that plan
- emergency procedures for pipes

³⁴ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 1, Regulations 2.5-2.8

³⁵ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 1, Regulations 2.9-2.11

- a description of a system that is implemented or will be implemented to ensure, as far as reasonably practicable, the safe performance of operations that involve vessels or aircraft.³⁶

While the safety case must describe the means by which the operator will ensure the adequacy of the design, construction, installation, maintenance or modification of the facility,³⁷ there is currently no mandatory regulatory process for industry engagement with the regulator at the design and concept-selection stages of facility development.

Issues for discussion

The safety case approvals process is designed to take place after all design and construction decisions have been made, operational safety assessments have been carried out, the safety management system is in place and the facility is ready to commence construction or installation. In its current form, the regulatory regime does not provide for an early engagement mechanism that allows the regulator to assess the suitability of the design of a particular facility prior to commencement of construction. However, consideration of a safety case immediately before, during or even after construction of a facility has taken place provides limited scope to make changes to a facility, at least without significant additional costs being incurred.

Since mid-2010 (following amendments to the Safety Regulations and the then Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Regulations), proponents of most significant new developments have undergone early engagement with NOPSEMA on a voluntary basis using the safety case assessment and approvals framework. This early engagement has been highly valued by industry, particularly in terms of the increase in knowledge and awareness of potential safety issues gained by exchanging information and ideas with the regulator.

The UK regulatory regime requires the proponent of a production installation to prepare and send a design notification to the regulator prior to the submission of a field development plan. This requirement enables the regulator to comment on the design of the facility, and allows the proponent to take the regulator's comments in relation to health and safety into account in the design of the facility.³⁸ The current (informal) early engagement process in Australia that has been trialled for new facilities has been valued by both industry and NOPSEMA. However, the 2010 amendments were not designed to enable early engagement in the longer term, nor intended as a complete solution to the issue of design safety for production facilities. It is recognised that more effective engagement and improved

³⁶ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 1, Subdivision C

³⁷ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 1, Regulation 2.12

³⁸ The UK Offshore Installations (Offshore Safety Directive) (Safety Cases etc) Regulations 2015, Regulation 15

safety outcomes could be achieved by introducing an appropriate, targeted process in the Safety Regulations.

In its supplementary submission to the Senate Inquiry, the ACTU recommended that accredited HSRs and relevant unions should have the right to inspect facilities prior to commissioning.³⁹ However, this was not included in recommendations made by the Senate Committee.

What are your views on the current regulatory approach to design and installation of a facility, including the process for early engagement with the regulator?

Should early engagement with the regulator be voluntary or mandatory? Why?

Submission and acceptance of safety cases

An operator is required to submit their safety case to NOPSEMA for assessment. Prior to the safety case being submitted for a proposed facility, the operator is required to receive agreement from NOPSEMA on the scope of validation for the facility, unless the facility is proposed to be constructed outside 'Safety Authority waters' and is to be installed and operated in Commonwealth waters or in designated coastal waters of a State or the Northern Territory.⁴⁰

A validation of a proposed facility is a written statement made by an independent validator in respect of the design, construction and installation (including instrumentation, process layout and process control systems) of the facility. A validation of a proposed significant change to an existing facility is a statement in writing by an independent validator in respect of the proposed change.⁴¹ The validation must establish to the level of assurance reasonably required by NOPSEMA that:

- in the case of a proposed facility, will incorporate measures to protect the health and safety of persons at or near the facility and are consistent with the formal safety assessment for the facility
- in the case of an existing facility, that after any proposed change or changes, the facility incorporates measures that will protect the health and safety of persons at or near the facility.⁴²

An operator who has provided material for a validation must satisfy NOPSEMA that each person who undertook the validation had the necessary competence, ability and access to

³⁹ Senate Inquiry into the WHS of workers in the offshore petroleum industry, 2018, Australian Council of Trade Unions supplementary submission

⁴⁰ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 2, Regulation 2.24

⁴¹ OPGGS Safety Regulations 2009, Chapter 2, Part 3, Regulation 2.40 (2&3)

⁴² OPGGS Safety Regulations 2009, Chapter 2, Part 3, Regulation 2.40 (4)

data, in respect of each matter being validated, to arrive at an independent opinion on the matter.⁴³

Once a safety case has been submitted to NOPSEMA, NOPSEMA may request the operator provide further written information about any matter required by the Safety Regulations, which then becomes part of the safety case for assessment. The Safety Regulations outline the conditions by which NOPSEMA must accept a safety case,⁴⁴ including that the safety case is appropriate to the facility and to the activities conducted at the facility, and it complies with the relevant regulations. NOPSEMA must be satisfied that the arrangements set out in the document demonstrate that the risks to health and safety will be reduced to 'as low as reasonably practicable' or ALARP.

NOPSEMA may reject a safety case when it is not satisfied with any of the matters required by the regulations. If a safety case is rejected, NOPSEMA is required to give the operator a reasonable opportunity to change the safety case and resubmit it.⁴⁵

Following acceptance of a safety case, NOPSEMA undertakes compliance activities, including inspections, to monitor the operator's application of the safety case in practice. For further information about NOPSEMA's compliance and enforcement activities refer to Part 6: Compliance and enforcement.

Revision of safety cases

The safety case is a 'living document', which can be updated and changed through revision. The Safety Regulations require revised safety cases to be submitted to NOPSEMA under the following circumstances:

- because of a change of circumstances or operations including:
 - if there is a significant increase or series of increases in the level of risk to the health or safety of persons at or near the facility
 - if the technical knowledge relied upon to formulate the safety case has become outdated
 - the operator proposes to modify or decommission the facility and the proposed modification or decommissioning is not adequately addressed in the safety case
 - the operator proposes to significantly change the safety management system or there are reasonable grounds for believing that a series of proposed

⁴³ OPGGS Safety Regulations 2009, Chapter 2, Part 3, Regulation 2.40 (5)

⁴⁴ OPGGS Safety Regulations 2009, Chapter 3, Part 2, Division 2, Regulation 2.26

⁴⁵ Ibid

modifications to the facility would result in a significant cumulative change in the overall risk of major accident events.⁴⁶

- NOPSEMA has requested the operator of a facility for which a safety case is in force to submit a revised safety case.⁴⁷
- it has been five years after the date that the safety case was first accepted or a revised safety case was accepted.⁴⁸

Issues for discussion

The revision of safety cases was raised as a concern by some stakeholders during the Senate Inquiry, relating to the circumstances under which safety cases should be reviewed, in particular once the workforce has been hired, and the power of a HSR to trigger a review.

Worker involvement in the development of safety cases is outlined in Part 5: Workplace arrangements. It notes stakeholders' views that a review of the safety case following hiring of the workforce should be required to ensure the new workforce understands the safety case, the hazards and risks they will be exposed to, and the control measures in place to manage them. While the Safety Regulations do not explicitly require a revision of the safety case in situations where a new workforce has been hired, the regulations do not prohibit a revision of the safety case if the circumstance satisfies a requirement under the range of 'change in circumstance or operations' triggers or is requested by NOPSEMA.⁴⁹

During the Senate Inquiry, stakeholders also called for HSRs to be given the ability to trigger a review and revision of a safety case in certain circumstances, citing a need for greater consistency with the WHS Regulations. The Senate Committee recommended that HSRs have the ability to trigger a review and revision of the safety case in certain circumstances.⁵⁰

Under the WHS Regulations, HSRs have the ability to trigger a review of a variety of safety management-related documents, including the major hazard facility's safety assessment, emergency plan, safety management system and risk control measures.⁵¹ In these situations, HSRs must reasonably believe that the circumstances (for example, a new major hazard risk has been identified or a control measure does not minimise risk to ALARP) affect or may affect the health and safety of a member of a workgroup *and* the operator has not adequately conducted a review in response to the circumstance.⁵² A HSR cannot directly trigger a review of the safety case, but a review of the risk management plans described

⁴⁶ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 3, Regulation 2.30

⁴⁷ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 3, Regulation 2.31

⁴⁸ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 3, Regulation 2.32

⁴⁹ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 3, Regulation 2.30 and 2.31

⁵⁰ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 3

⁵¹ WHS Regulations 2011, Chapter 9, Part 9.3, Division 3, Regulation 559(4), 38(2e)

⁵² WHS Regulations 2011, Chapter 9, Part 9.3, Division 3, Regulation 559(4)

above would require the operator to review and revise the major hazard facility's safety case as necessary.⁵³

Under the OPGGS regime there is no equivalent ability for HSRs to trigger a review of the safety management-related documents, and revisions of safety cases can only be instigated by the operator or NOPSEMA.

What are your views on the current OPGGS provisions relating to how and when safety case revisions occur?

What are your views on the ability of a HSR to trigger a review of a safety management-related document, including a safety case?

Withdrawal of safety cases

NOPSEMA may withdraw acceptance of a safety case on the following grounds:

- the operator of a facility has not complied with:
 - Schedule 3 to the OPGGS Act
 - a notice issued by a NOPSEMA inspector
 - Safety Regulations 2.30, 2.31 or 2.32
- NOPSEMA has rejected a revised safety case under regulation 2.34 which, following reasonable opportunity to change and resubmit, still does not satisfy legislative requirements.⁵⁴

Diving safety management system (DSMS)

In addition to ensuring the health and safety of persons at or near facilities, the OPGGS regime provides a regulatory framework for ensuring risks to the health and safety of persons carrying out offshore diving operations are reduced to as low as reasonably practicable.⁵⁵

The Safety Regulations require the development of a DSMS which is accepted by NOPSEMA before any diving work can take place.⁵⁶ A DSMS is a comprehensive, integrated system for managing the safety of activities connected with a diving project. It must include information on the diving contractor's policies and operational protocols and procedures, equipment certification, maintenance and operating procedures, risk assessment procedures, and management arrangements to ensure that risks to the safety of personnel involved in the diving operations are reduced to a level as low as reasonably practicable. Similar to the safety management system within a safety case, the DSMS must provide for:

- all activities connected with a diving project

⁵³ WHS Regulations 2011, Chapter 9, Part 9.3, Division 4, Regulation 563

⁵⁴ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 4, Regulation 2.37

⁵⁵ OPGGS Safety Regulations 2009, Chapter 4

⁵⁶ OPGGS Safety Regulations 2009, Chapter 4, Part 2, Regulation 4.3

- the preparation of a diving project plan (including consultation with the members of the workforce in the preparation of the plan)
- the continual and systematic identification of hazards
- the continual and systematic assessment of the likelihood of the occurrence, during normal or emergency situations of injury or damage associated with those hazards and the likely nature of any injury or damage
- the elimination of risks to persons involved with the project or reduction of those risks to ALARP
- the inspection and maintenance of, and testing programs for, equipment and hardware integral to the control of those risk
- communications between persons involved in a diving project
- performance standards that apply to the DSMS
- a program of continuous improvement.⁵⁷

The DSMS must specify any standard or code of practice that is to be used in a diving project and require the diving to be carried out in accordance with those standards or codes.⁵⁸

NOPSEMA must reject a DSMS if the DSMS does not adequately comply with regulation 4.4 of the Safety Regulations (Contents of DSMS) or NOPSEMA is not satisfied that there was consultation with divers and other members of the workforce in the preparation of the DSMS.⁵⁹

NOPSEMA must keep a register of each DSMS and revised DSMS it receives in a form that allows public access.⁶⁰ The primary purpose of this requirement is to ensure that operators and diving contractors can readily satisfy themselves that a DSMS has been accepted and is current before allowing diving work to begin.⁶¹

Diving project plan (DPP)

In addition to the above requirements, a DSMS requires the preparation of a DPP. A DPP is a detailed plan developed by the diving contractor to manage a specific diving project. It is prepared in consultation with the operator, divers and other members of the workforce involved in the project, and must be approved by the operator before diving can commence on the project.⁶²

The DPP takes into account the specific requirements of the particular diving job and dive site, and must include:

⁵⁷ OPGGS Safety Regulations 2009, Chapter 4, Part 2, Regulation 4.4

⁵⁸ Ibid

⁵⁹ OPGGS Safety Regulations 2009, Chapter 4, Part 2, Regulations 4.7

⁶⁰ OPGGS Safety Regulations 2009, Chapter 4, Part 2, Regulation 4.9 and NOPSEMA DSMS Register: <https://www.nopsema.gov.au/assets/Safety-resources/A151.pdf>

⁶¹ OPGGS Safety Regulations 2009, Chapter 4, Part 2, Regulation 4.3

⁶² OPGGS Safety Regulations 2009, Chapter 4, Part 3, Regulation 4.12

- a description of the work to be done
- a list of legislation (including the Safety Regulations) that the diving contractor considers applies to the project
- a list of standards and codes of practice that will be applied in carrying out the project
- hazard identification
- risk assessment
- a safety management plan
- job hazard analyses for the diving operations
- an emergency response plan
- the provisions of the DSMS and the safety case that are relevant to the diving project in particular the arrangements in the DSMS and the safety case for simultaneous operations and emergency response
- details of consultation with divers and other members of the workforce working on the project.⁶³

Acceptance of a DPP by the operator is subject to two requirements: that the plan complies with the content requirements of a DPP; and there was effective consultation in the preparation of the plan.⁶⁴ This is different to the requirement in situations where there is no operator for a diving project, and the DPP is provided to NOPSEMA by the diving contractor for assessment. In these situations, the DPP will be accepted only if NOPSEMA is satisfied that the plan complies with relevant regulations; effective consultation took place in the preparation of the plan; and when the diving operations to which the plan relates are appropriate to be covered by a single plan.⁶⁵

Diving operations

Divers in offshore diving operations are subject to a number of requirements to ensure they are competent to safely carry out an activity that is reasonably likely to be necessary while the person is taking part in the operation. A diving contractor and diving supervisor must not allow a person to dive in the diving operation unless the person:

- is competent to carry out safely any activity that is reasonably likely to be necessary while the person is taking part in the operation
- has a current diving qualification under the Australian Diver Accreditation Scheme (ADAS)
- has a valid medical certificate that satisfies the regulations.⁶⁶

ADAS is the Australian national occupational diver certification scheme, and was developed by the Australian Government as a not-for-profit accreditation and certification scheme. It is currently administered on a cost-recovery basis by the ADAS Board. ADAS delivers its

⁶³ OPGGS Safety Regulations 2009, Chapter 4, Part 3, Regulation 4.16

⁶⁴ OPGGS Safety Regulations 2009, Chapter 4, Part 3, Regulation 4.12

⁶⁵ OPGGS Safety Regulations 2009, Chapter 4, Part 3, Regulation 4.13

⁶⁶ OPGGS Safety Regulations 2009, Chapter 4, Part 8, Regulations 4.25-4.26

training through Accredited Training Establishments (ATEs), which must meet stringent entry conditions and demonstrate ongoing compliance with robust administrative, operational, training and assessment standards to achieve and maintain accreditation.

ADAS has reciprocal recognition arrangements with international occupational diving schemes including the Health and Safety Executive of the UK, the Petroleum Safety Authority of Norway, and the Diver Certification Board of Canada. Each scheme is either a regulator of national legislation applicable to occupational diving, or has a formal agreement in place with a relevant national government department.

Diving start-up notice

The Safety Regulations require that, at least 14 days before the day when diving is to begin, or any other day agreed with NOPSEMA, the operator or if there is no operator, the diving contractor, must provide a start-up notice for a diving project to NOPSEMA. The start-up notice for a diving project is a written notice containing a range of information stipulated in the Safety Regulations, including; the contact details of the diving contractor for the project; the expected date of diving commencement; the project's location; purpose and depth to which divers will dive.⁶⁷

Issues for discussion

An operator must not approve a DPP unless satisfied that the plan meets the content requirements for a DPP, and that there was effective consultation in the preparation of the plan. There is nothing to require that the DPP includes content in relation to diving operations at more than one facility, which may or may not be similar in nature, nor to assess the appropriateness of having multiple diving operations covered by a single plan.

The purpose of having an approved DPP is to take into account the specific safety requirements of a particular diving project and dive site. This purpose cannot be satisfied if a plan relates to different facilities at which the risks associated with diving operations are different. Inclusion of diving operations at more than one facility in a single DPP is only appropriate where the risks being dealt with in the DPP are of the same kind. This concept was reflected in 2016 amendments to Part 5 of the *Offshore Petroleum Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011* regarding well operations. The amendments introduced a new criterion of acceptance for a well operations management plan, in which a plan, if it applies to more than well, must demonstrate that the risks to the integrity of each well are similar.⁶⁸

⁶⁷ OPGGS Safety Regulations 2009, Chapter 4, Part 7, Regulation 4.24

⁶⁸ OPGGS Resource Management and Administration Regulations 2011, Part 5, Division 3, Regulation 5.08

The WHS Regulations provide a regulatory framework for the carrying out of general, incidental and high risk diving work, including the management of risks to health and safety associated with diving activities. While the WHS Regulations provide for the development of a dive plan, its requirements are not as comprehensive nor detailed as requirements for a DSMS and DPP under the Safety Regulations.⁶⁹

Further, the requirements for competency and training of divers differs between the OPGGS regime and the WHS regime. Under the WHS Regulations, persons carrying out diving activities must hold a current certificate of medical fitness; relevant competencies specified in Australian/New Zealand Standards; and have acquired knowledge and skills relevant to the diving work where necessary.⁷⁰ This contrasts to the offshore regulatory regime for safety which specifically requires an ADAS qualification, in addition to a medical certificate and relevant competency.

What are your views on the current requirements for a DSMS and DPP, including the content requirements, approval and training and certification processes?

What are your views on the consultation requirements for a DSMS and DPP?

Do you think the OPGGS regime requirement for offshore divers to hold an ADAS qualification leads to optimal safety outcomes?

Should the offshore regulatory regime for safety impose additional requirements or recognise other qualifications? Why/why not?

⁶⁹ WHS Regulations 2011, Chapter 4, Part 4.8, Division 3, Regulations 178-179

⁷⁰ WHS Regulations 2011, Chapter 4, Part 4.8, Division 2 and Division 4

Part 4: Duties, training, competency and mental health

Introduction

All workers have the right to work in places where risks to their health and safety are properly controlled. This part outlines duties of care, appropriate training and competency of workers, and the creation and promotion of workplaces which support positive mental wellbeing. All these factors play a critical role in ensuring risks to the health and safety of persons in the workplace are effectively managed. These duties form part of the broader integrated OPGGS regime, which also includes duties for environmental management and well integrity.

Duties of care

Under the OPGGS regime, the operator of the facility is the principal duty holder, and is ultimately responsible for managing the risks to the health and safety of persons at or near the facility. Importantly, consistent with leading practice safety regulation, the OPGGS regime recognises that other parties and individuals, who create or have the greatest control of the health and safety risks, also have a responsibility to manage these risks.

Duties in relation to occupational health and safety

Schedule 3 to the OPGGS Act sets out the primary OHS duties of an operator. The operator has general duties to ensure the facility is safe and without risk to the health of any person at or near the facility, and to ensure that all work and other activities carried out on the facility are done so in a safe manner and without risk to persons at or near the facility. The OPGGS Act also contains a range of specific duties placed on the operator, including the operator's duty to: implement and maintain emergency procedures; ensure members of the workforce are provided with training necessary for them to carry out their activities; and develop an OHS policy and agreement in consultation with the workforce.⁷¹

The OPGGS Act also imposes OHS duties on specific persons and parties, including:

- persons in control of parts of a facility of particular work
- employers
- manufacturers of any plant or substance
- suppliers of facilities, plant and substances
- titleholders - in relation to wells

⁷¹ OPGGS Act 2006, Schedule 3, Part 2, Division 1, Clause 9

- persons erecting facilities or installing plant
- persons at a facility.⁷²

The general duty placed on persons at a facility requires that any person at a facility must take all reasonably practicable steps to ensure a person does not take any action, or make any omission, that creates a risk or increases an existing risk, to the health and safety of that person or any other person at or near the facility.⁷³ Further, this duty ensures that a person at a facility must also cooperate with the operator (or another person listed under an OHS law) to the extent necessary to enable the operator (or that other person) to fulfil their OHS obligation. This duty also imposes an obligation on persons to use equipment that is: supplied by the operator, an employer or any other person in control of work at the facility; and is necessary to protect the person's health and safety. The use of equipment must be in accordance with any instructions given by the equipment supplier, consistent with the safe and proper use of the equipment.⁷⁴ A breach of the requirements described in this paragraph is an offence under the OPGGS Act.⁷⁵

The OPGGS regime also places duties on the operator and other employers in relation to HSRs and HSCs. These are outlined in Part 5: Workplace arrangements.

Reasonably practicable and ALARP

Each OHS duty under the OPGGS regime is subject to a qualifier. For all duty holders, except petroleum and greenhouse gas titleholders in relation to wells, the qualifier is 'take all reasonably practicable steps'. For petroleum and greenhouse gas titleholders in relation to certain activities for wells,⁷⁶ the qualifier is 'as low as reasonably practicable (ALARP)'. Both stem from the concept of 'reasonable practicability' established in the key 1949 UK case of *Edwards v National Coal Board*,⁷⁷ in which the Court of Appeal held that the risk has to be weighed against the measures necessary to eliminate the risk, and that the greater the risk, less will be the weight given to the factor of cost.⁷⁸

The concept of ALARP and the reduction of risks to ALARP in safety management systems by duty holders is outlined in Part 3: Objects, safety cases and diving safety management systems.

⁷² OPGGS Act 2006, Schedule 3, Part 2, Division 1, Clauses 10-15.

⁷³ OPGGS Act, Schedule 3, Part 2, Division 1, Clause 15.

⁷⁴ OPGGS Act, Schedule 3, Part 2, Division 1, Paragraph 15(1) (c).

⁷⁵ OPGGS Act, Schedule 3, Part 2, Division 1A

⁷⁶ New clauses 13A and 13B of the OPGGS Act were added in 2010 to specifically address risks to the OHS of persons arising from wells and well operations, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Act 2010*

⁷⁷ *Edwards v National Coal Board* [1949] 1 All ER 743

⁷⁸ K. Bills and D. Agostini, 2009, Offshore Petroleum Safety Regulation: Better practice and the effectiveness of the National Offshore Petroleum Safety Authority

Breaches of an OHS duty and requirements under the related duty clauses of the OPGGS Act are an offence. The enforcement of OHS duties is outlined in Part 6: Compliance and enforcement.

Issues for discussion

Both the OPGGS and WHS Acts apply duties of care to a group of primary duty holders and other persons. The broad “general duties” approach covering a range of parties affecting workplace health and safety is consistent with the Robens-style principle of the “creation of a more unified and integrated system”.⁷⁹ The WHS Act sets out the primary WHS duty which applies to persons conducting a business or undertaking (PCBU) and particular duties of care for certain PCBUs, including designers, manufacturers, suppliers, importers of plant, substances or structure.⁸⁰ Both regimes apply the concept of ‘reasonable practicability’ in reducing risks to the health and safety of persons.

The key difference between the health and safety duties in the OPGGS and WHS Acts is that the offshore regime applies duties of care to a more specific set of persons directly relevant to offshore oil and gas activities, and in more detail. For example, the duties of titleholders relate to ensuring a well that has been used or constructed, is being used, maintained or altered, or is being prepared for use in connection with operations authorised by the title, is so designed, constructed, commissioned, altered, equipped, maintained and operated that risks to health and safety of persons at or near a facility are kept as low as reasonably practicable. The industry-specific language (such as ‘persons at or near a facility’) includes the persons who are engaged in a well-related activity, such as drilling the well, as well as any other persons who are at or near a facility. This also expressly extends to divers, who may be exposed to risk from a well while carrying out operations at a well that are not facility-related.

On the other hand, the WHS Act applies duties to a wider group of primary duty holders and extends their duty of care to a wider group of persons across a broader range of industry sectors. The term PCBU is a broad term used in the WHS Act to describe all forms of modern working arrangements.⁸¹ The Safe Work Australia review of the model WHS laws stated that the use of the PCBU concept was intended to be broad enough and flexible enough to incorporate new industries, new ways of working and new risks arising from work

⁷⁹ The Robens Report 1972, para 41, <http://regnet.anu.edu.au/research/centres/national-research-centre-ohs-regulation-nrcohsr/overview-work-health-and-safety-regulation-australia>

⁸⁰ WHS Act 2011, Part 2, Divisions 2 and 3, Sub-sections 19-26

⁸¹ Safe Work Australia, Interpretive Guideline Model WHS Act, The meaning of PCBU, https://www.safeworkaustralia.gov.au/system/files/documents/1702/interpretive_guideline_-_pcbu.pdf

into the model WHS framework,⁸² and included a recommendation to improve clarity on this issue.⁸³

Do you think the OHS duties of care under the OPGGS regime are clear and effective? If not, what do you think could be improved?

Training and competency of offshore workers

Permit to work system

In the Public Inquiry into the Piper Alpha Disaster Report,⁸⁴ the Hon Lord Cullen described a 'permit to work system' as a formal written system which is used to control certain types of work which are potentially dangerous. Within that system the permit is a formal written means of making sure that potentially dangerous jobs are approached and carried out with the use of appropriate safety procedures. Cullen further described a permit to work system as an essential part of a procedure to ensure that the work is done safely.

The OPGGS regime provides for a permit to work system. Prescribed in the Safety Regulations, the permit to work system requires that the safety case provide for the operator of a facility to establish and maintain a documented system for coordinating and controlling the safe performance of all work activities of members of the workforce. Some specific higher-risk activities are listed in the Safety Regulations, and must be documented in the safety case. These include:

- welding and other hot work
- cold work (including physical isolation)
- electrical work (including electrical isolation)
- entry into, and working in, a confined space
- procedures for working over water
- diving operations.⁸⁵

Further, the permit to work system must form part of the safety management system described in the safety case in force for the facility; identify the persons having the responsibility to authorise and supervise work; and describe how the operator will ensure members of the workforce are competent in the application of the permit to work system.

⁸² Safe Work Australia, 2018, Review of the model WHS laws, Discussion Paper

⁸³ Safe Work Australia, 2018, Review of the model WHS laws and Safety laws, Final report https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf

⁸⁴ Hon Lord Cullen, 1990, The Public Inquiry into the Piper Alpha Disaster, Department of Energy, <http://www.hse.gov.uk/offshore/piper-alpha-disaster-public-inquiry.htm>

⁸⁵ OPGGS Safety Regulations 2009, Chapter 1, Part 2, Regulation 2.10

The permit to work system places the onus on industry to ensure competency of their employees undertaking high-risk work, and must be assessed and accepted by NOPSEMA through the safety case.

Training and competency

The Piper Alpha Inquiry report emphasised that in order to have an effective permit to work system, it is essential that the personnel who are required to operate the system are thoroughly trained in all its aspects.⁸⁶ As the OPGGS regime is outcomes-based, the appropriate training is not prescribed in legislation or regulations, instead placing this obligation on the operator.

The training and competency of offshore workers is provided for under the OPGGS Act and Safety Regulations through a number of different legislative requirements, including:

- the duty of operators and other specified persons and parties to take all reasonably practicable steps to provide all members of the workforce with the information, instruction, training and supervision necessary for them to carry out their activities in a manner that does not adversely affect the health and safety of persons at the facility.⁸⁷
- the requirement that the safety case must describe the means by which the operator will ensure that each member of the workforce at the facility has the necessary skills, training and ability to undertake routine and non-routine tasks that might be reasonably given to them, and to respond and react appropriately in the event of an emergency.⁸⁸
- the requirement (described above) that the permit to work system must ensure members of the workforce are competent in the application of the permit to work system.⁸⁹

Issues for discussion

The WHS Regulations require that a person must not carry out a class of high risk work unless the person holds a high risk work licence for that class of high risk work. This requirement is subject to some exceptions including when a person: is currently undertaking training towards a certification in order to be licensed to carry out the high risk work; has completed their vocational education and training (VET) licensing course within 60 days; is under assessment of their competency in relation to the work; or is installing equipment,

⁸⁶ Hon Lord Cullen, 1990, The Public Inquiry into the Piper Alpha Disaster, Department of Energy, <http://www.hse.gov.uk/offshore/piper-alpha-disaster-public-inquiry.htm>, Volume 1, Chapter 11

⁸⁷ OPGGS Act 2006, Schedule 3, Part 2, Division 1, Clauses 9-11 and 15.

⁸⁸ Safety Regulations 2011, Regulation 2.9.

⁸⁹ Safety Regulations 2011, Regulation 2.10, 2(c).

testing equipment, and moving equipment.⁹⁰ The WHS Regulations outline the process for licencing of high risk work, including: the licencing process; amendment of a licence document; and renewal, suspension and cancellation of a high risk work licence.⁹¹ Further, the high risk work licence class and associated VET courses that are required to be completed are outlined at Schedule 4 of the WHS Regulations.

Under the WHS Act, a PCBU has a duty of care to ensure, so far as is reasonably practicable, the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.⁹² This WHS duty is consistent with the OHS duty under OPGGS regime.

The OPGGS regime differs to the WHS Regulations in that it does not dictate which licence specific employees must hold, nor which VET course employees must undertake to obtain the relevant licence. The OPGGS regime enables the offshore petroleum industry to specify and ensure the appropriate training of employees relevant to their needs. The training requirements of the workforce must be outlined in the safety case, which is assessed and accepted by NOPSEMA.

Witnesses during the Senate Inquiry raised the issue of a lack of, or deficiencies in, training and certification for high risk work required under the OPGGS regime. Specifically, some witnesses commented that they considered the OPGGS permit to work system to be less rigorous than training requirements under the WHS Act and WHS Regulations, and claimed that it does not require certification or licensing for high risk work. Some witnesses expressed a view that the operation of high risk equipment requires a license to ensure that appropriate training is undertaken to operate the equipment safely.

Further, they commented that the risks associated with high risk equipment are inherent and not confined to particular industries. Therefore, witnesses claimed that it was appropriate that equipment, which requires a license to operate onshore, should require a comparable licence to operate offshore.⁹³

The Senate Committee concluded that individuals working offshore should have the same calibre of qualifications as those required by individuals onshore, and recommended that the OPGGS Act be amended to provide for consistency with the WHS Act in regard to a licensing system for workers performing high risk work.⁹⁴

At a department-led Safety Workshop in 2018 some participants emphasised that training for offshore oil and gas participants should be improved. This view covered all levels of the workforce, such as middle and senior management, and was not just in relation to HSRs and

⁹⁰ WHS Regulations 2011, Part 4.5, Division 1, Subdivision 1, Regulations 81-82.

⁹¹ WHS Regulations 2011, Part 4.5, Division 1, Subdivision 1, Regulations 81-112.

⁹² WHS Act 2011, Part 2, Division 2, Section 19(3) (f).

⁹³ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018

⁹⁴ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 5.

frontline workers. Participants expressed views including: the right people should be trained for the right positions; requirements in safety cases for training are not consistent nor high enough; there needs to be a focus on new technology and training on risk and competency; there is a difference in training across companies; and there no specified standards. An outcome statement was proposed by participants describing what ‘good’ looks like in regards to the training of participants: *“Every person/worker understands their job role and how to do it safely through training, and each role has a list of Australian Qualifications Framework qualifications”*.⁹⁵

What are your views on the effectiveness of the OPGGS permit to work system? If you believe there are deficiencies, what are they and how should they be addressed?

What are the benefits and challenges of implementing a licencing system for high risk work, similar to that under the WHS Act and WHS Regulations, in the offshore oil and gas industry?

What are your views on the training of offshore oil and gas participants more broadly? Do you think current provisions under the OPGGS regime adequately provide for training of all participants?

Mental health of offshore workers

Understanding how to support positive mental wellbeing in the workplace, as well as those employees with mental health conditions, is critical to ensuring a safe and healthy workplace. Work on an offshore facility can present unique challenges for the management of mental health. Offshore workers face challenges such as:

- an isolated environment
- the transition between work and home life
- separation from family and community
- the stress of working in a high hazard industry
- shift work leading to higher risk of fatigue
- confined conditions
- lack of privacy.

These can all have an adverse impact on social, emotional and psychological well-being. Similar to physical health and safety, the management of mental health should involve the identification of hazards, assessment of risks, identification and implementation of controls, and review of the hazards and control measures to assess effectiveness. Managing risks to

⁹⁵ Offshore Safety Review Workshop, 2018, Report for the Department of Industry, Innovation and Science, Noetic Group

psychological health and safety should include prevention, early intervention and support of recovery.

Under the OPGGS Act, operators and other specified persons and parties have a duty to ensure they take all reasonably practicable steps to provide a physical environment at the facility that is safe and without risk to health. Further, adequate facilities must be provided and maintained for the welfare of all members of the workforce.⁹⁶ Within these duties, physical and psychological health are not differentiated.

Issues for discussion

Under the WHS Act, 'health' is defined as 'physical and psychological health'.⁹⁷ As such, all provisions that relate to health also explicitly apply to psychological health, such as through preventing workers and other persons against harm to their health, through providing for consultation and representation in relation to workplace health, promoting education and training in relation to health, and providing a framework for continuous improvement and progressively higher standards of workplace health. The Safe Work Australia Review of the Model WHS Laws recommended that regulations be developed to deal with psychosocial risk.⁹⁸ The OPGGS Act does not define 'health', and therefore the term should be interpreted to have its ordinary meaning as defined in a dictionary.

The WA Department of Mines, Industry Regulation and Safety has prepared a Code of Practice for mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors. The code of practice recognises that, while everyone has responsibility for their own and others' mental health and wellbeing, exposure to psychosocial hazards and factors in workplaces should be appropriately managed by employers. Further, it aims to reduce exposure to psychosocial hazards and risk factors for all workers, develop response strategies for workers and provide an environment that promotes and develops a mentally healthy workplace.⁹⁹ There is currently no equivalent code of practice or guidance on mental health in relation to the OPGGS regime.

At a Safety Workshop in 2018 led by the department, participants raised physical and mental health as a key issue regarding the offshore petroleum industry. Participants indicated that current legislation including the term 'without risk to health'¹⁰⁰ could be clarified to enable better interpretation and application.

⁹⁶ OPGGS Act 2006, Schedule 3, Part 2, Division 1

⁹⁷ WHS Act 2011, Part 1, Division 3, Section 4

⁹⁸ Safe Work Australia, 2018, Review of the model WHS laws, Final Report, Recommendation 2

⁹⁹ WA Department of Mines, Industry Regulation and Safety, Mentally healthy workplaces for FIFO workers in the resources and construction sectors – Code of Practice, 2 April 2019, http://www.dmp.wa.gov.au/Documents/Safety/MSH_MHW_FIFO_COP.pdf

¹⁰⁰ OPGGS Act 2006, Schedule 3, Part 2, Division 1

An outcome statement proposed by participants outlining what good looks like in relation to physical and mental health was - *“Take proactive and substantive steps to provide facilities, systems and support aimed at sustaining and improving physical and mental health and workforce wellbeing”*.¹⁰¹

Do you think the current provisions in the OPGGS Act effectively promote and support positive mental wellbeing workplaces in the offshore oil and gas industry?

Can you suggest strategies or measures to further promote and support positive mental wellbeing workplaces in the offshore oil and gas industry?

¹⁰¹ Offshore Safety Review Workshop, 2018, Report for Department of Industry, Innovation and Science, Noetic Group

Part 5: Workplace arrangements

Introduction

Workplace safety relies on strong collaboration and cooperation between government, industry, the regulator, the workforce and unions. Importantly, workplace arrangements must be supported by a legislative framework that promotes and ensures fair and effective workplace representation, consultation, participation and issue resolution in relation to health and safety matters.

The OPGGS Act provides for workplace arrangements including the establishment of designated work groups (DWGs), selection and powers of HSRs and the establishment of HSCs.

This part of the paper examines the current workplace arrangement provisions as set out in Part 3, Schedule 3 of the OPGGS Act, and also examines other consultation and participation issues including: consultation on the development of safety management plans, including safety cases; involvement of other stakeholders, such as unions, in health and safety matters in the workplace; protection against discrimination and coercion; and participation in governance arrangements.

Health and safety representatives

HSRs play a key role in promoting and ensuring a safe and healthy offshore workplace. HSRs represent the health and safety interests of workers within their DWG, develop and maintain a partnership between workers and the employer and give workers a voice in health and safety matters in the workplace. They can make a real difference to having health and safety issues addressed and helping to achieve better health and safety outcomes.

The adequacy of rights and protections of HSRs under the OPGGS Act was raised as a key area of concern in the Senate Inquiry, with the Senate Committee subsequently recommending that the OPGGS Act be amended to provide for consistency with the WHS Act in regard to the rights, powers and entitlements of HSRs.

This section of the paper outlines the current requirements in relation to key areas involving HSRs, provides further analysis, and poses questions for consideration by stakeholders to be addressed through written submissions.

Selection and election of health and safety representatives

The OPGGS regime provides that one HSR may be selected for each DWG by the members of that group, by one of two ways: if all members of the workforce unanimously agree, or if the person is selected by an election.¹⁰²

¹⁰² OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A

Under the first method the decision to choose a HSR must be unanimous. If a HSR has not been selected by the workforce within a reasonable time, the operator must invite nominations and an election must be held if there is more than one candidate. The operator must either conduct the election, or may leave it to the workforce or another appropriate body to conduct, at the operator's expense.

The OPGGS regime does not preclude workers from determining the manner in which they select their HSR. Instead, it allows for the workforce to control the process for selecting a HSR for a DWG. The regime clarifies that the election must be conducted in accordance with the regulations only if requested by the lesser of:

- 100 members of the workforce normally in the DWG; or
- a majority of the members of the workforce normally in the DWG.

Hence, unless it is requested by the lesser of the aforementioned categories, the election is not required to be held in accordance with the election process set out in the regulations. This provision allows the workforce to exercise control in determining the manner of an election.

Once selected, the maximum term of office for a HSR is two years, unless otherwise agreed by parties during consultations regarding the establishment and variation of DWGs. A HSR is eligible to be selected for further terms of office.

A person ceases to be a HSR if they:

- resign as a HSR
- cease to be a member of the DWG
- are not selected to be the HSR for the DWG for a further term after their term of office expires
- are disqualified under clause 32 of Schedule 3 of the OPGGS Act.

The provisions for the disqualification of HSRs protect others against the possibility of HSRs misusing their powers. An application to disqualify a HSR may be made by the facility operator, a work group employer, or a workforce representative at the request of a member of the work group, and must be made to NOPSEMA. Only NOPSEMA can disqualify a HSR, and can only do so if satisfied that the HSR has acted in an improper manner. While the OPGGS regime does not confer onto a court the power to disqualify a HSR directly, a decision by NOPSEMA to disqualify a HSR is an administrative decision subject to review by a court under the *Administrative Decisions (Judicial Review) Act 1977*.

Issues for discussion

During the Senate Inquiry, some witnesses indicated that the representation and selection of offshore HSRs could be more closely aligned with the WHS Act.

Witnesses expressed concern that the OPGGS Act does not include sufficient provision to allow workers to autonomously determine the manner in which they elect a HSR, however the regime, as described earlier, already provides for this autonomous determination.

Some concern has also been raised about the ability of NOPSEMA to disqualify a HSR under the OPGGS Act, with some witnesses expressing a view that it would be more appropriate that the power to disqualify a HSR, which is significant, should only be exercised by a court, consistent with provisions in the WHS Act. There are further differences in the disqualification provisions, between the OPGGS and WHS Acts, whereby a court can disqualify a HSR under the WHS Act for an indefinite period, while NOPSEMA can only disqualify a HSR for a specified period not exceeding five years.

What are your views on the current selection and election requirements of HSRs under the OPGGS regime? Why?

Do you think the current requirements sufficiently provide for workers to autonomously determine the manner in which they elect a HSR? If no, why not, and how do you think the election process should be determined?

What are your views on the disqualification process of a HSR under the OPGGS regime? Why?

Powers of and protections for health and safety representatives

In order for HSRs to effectively assist in promoting and ensuring the health and safety of group members, the OPGGS Act provides HSRs with a range of powers and functions.¹⁰³

The powers provided to HSRs allow them to:

- inspect the workplace if there has, in the immediate past, been an accident or a dangerous occurrence at the workplace, or if there is an immediate threat of such an accident or dangerous occurrence
- inspect the workplace if the HSR has given reasonable notice of the inspection to the operator's representative at the facility and to any other person having immediate control of the workplace
- make a request to a NOPSEMA inspector or to NOPSEMA that an OHS inspection be conducted at the workplace
- accompany a NOPSEMA inspector during any OHS inspection at the workplace by the inspector (whether or not the inspection is being conducted as a result of a request made by the HSR)
- if there is no HSC in relation to the members of the workforce at the facility—represent group members in consultations with the operator and any work group employer about the development, implementation and review of measures to ensure the health and safety of those members at the workplace

¹⁰³ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision B

- if a HSC has been established in relation to the members of the workforce at the facility—examine any of the records of that committee
- investigate complaints made by any group member to the HSR about the health and safety of any of the members of the workforce (whether in the group or not)
- with the consent of a group member, be present at any interview about health and safety at work between that member and a NOPSEMA inspector; or the operator; or a work group employer
- obtain access to any information under the control of the operator or any work group employer relating to risks to the health and safety of any group member and relating to the health and safety of any group member
- issue provisional OHS improvement notices.¹⁰⁴

In exercising their role, a HSR may be assisted by a consultant at the workplace or provide information to a consultant in cases where the operator, or NOPSEMA, has agreed in writing to the provision of consultant assistance. The consultant may be present at interviews relating to health and safety at work, involving a group member and a NOPSEMA inspector and/or the operator, with that group member's consent.¹⁰⁵

It is important to note that a HSR does not have a legal obligation to exercise any of the powers conferred on them by the OPGGS regime while they are a HSR, nor are they liable in civil proceedings because of a failure to exercise a power or the way it was exercised in their role as HSR.¹⁰⁶

Provisional improvement notices and direction to stop unsafe work

A provisional improvement notice (PIN) is a tool to improve health and safety in a workplace, encouraging employers and workers to openly discuss health and safety issues in their workplace. It is a written direction from a HSR to a responsible person (the person who is responsible for the contravention), requiring them to take action necessary to prevent any further contravention or the likely contravention of an OHS law. A PIN should only be used if agreement to rectify the problem cannot be reached through normal consultation processes.¹⁰⁷

The OPGGS regime outlines the processes through which PINs can be issued and notified; possible OHS inspections by NOPSEMA; compliance with a PIN; when a notice ceases to have effect; and a HSR's ability to appeal to the Fair Work Commission against a NOPSEMA inspector's decision to vary or cancel the PIN.

¹⁰⁴ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 34

¹⁰⁵ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 35

¹⁰⁶ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 37

¹⁰⁷ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 38

A HSR has, in circumstances where a supervisor cannot be contacted immediately, the authority under the OPGGS regime to direct a group member or members to cease, in a safe manner, to perform work, if the HSR has reasonable cause to believe that there is an imminent and serious danger to the health or safety of any person at or near the facility arising from that particular work.¹⁰⁸

Duties of the operator and other employers in relation to health and safety representatives

The OPGGS regime recognises that HSRs play an important part in the regulation of health and safety by affording the necessary powers required to undertake the role. While being a HSR is a very important role, it is not a full-time position, and it is a responsibility a worker takes on in addition to their everyday job. Importantly, therefore, it is necessary that the regime sufficiently imposes duties on operators and other employers, so they fully understand and comply with obligations they need to fulfill in relation to their HSRs.

Broadly, the operator of a facility has duties and obligations to their HSRs, including to:

- consult with HSRs on the implementation of changes at any workplace at which some or all of the group members perform work, where the changes may affect their health and safety
- allow HSRs to inspect the workplace and accompany a NOPSEMA inspector during an OHS inspection at the workplace by the inspector
- permit HSRs to be present at any interview about health and safety with the consent of the group member
- provide HSRs access to any information relating to risks to the health and safety, or the health and safety of any group member
- permit HSRs to take such time off work, without loss of remuneration or other entitlements, as is necessary to exercise the powers of a HSR
- provide HSRs with access to such facilities as are necessary for the purposes of exercising the powers of a HSR
- maintain and display an up-to-date list of all the HSRs of DWGs and ensure the list is available to NOPSEMA and the workforce at all reasonable times
- permit the HSR to attend training relating to OHS that is accredited by NOPSEMA, and permit the HSR to take such time off work, without loss of remuneration or other entitlements, as is necessary to undertake the training.

It is unlawful under the OPGGS Act to dismiss an employee, discriminate against an employee or perform an act that prejudicially alters the employee's position, or threaten to do any of those things, because the employee has complained about an OHS matter, assisted an OHS inspection or ceased work in accordance with a valid direction by a HSR.¹⁰⁹

¹⁰⁸ OPGGS Act 2006, Schedule 3, Part 3, Division 5, Clause 44

¹⁰⁹ OPGGS Act 2006, Schedule 3, Part 5, Clause 88

Protection against discrimination and coercion is outlined later within Part 5: Workplace arrangements.

Issues for discussion

During the course of the Senate Inquiry some witnesses stated that HSRs are disadvantaged in terms of their protections and rights under the OPGGS Act, compared with onshore HSRs covered by the WHS Act. These claimed inconsistencies, including the election and disqualification processes, training, membership of HSCs and engagement with NOPSEMA are detailed in other parts of this paper.

A consistent theme that arose in the Senate Inquiry and during introductory stakeholder workshops led by the department, is the perceived gap between the requirements set out in the legislation and how they are implemented in practice. Evidence presented during the Senate Inquiry outlined situations where HSRs have not felt supported or protected to perform their role by operators, other employers and NOPSEMA, and alleged occasions where HSRs have feared reprimand by their employers for raising health and safety issues. The Senate Committee considered that a culture of fear and reprisal exists, which it described as detrimental to achieving positive health and safety outcomes in the offshore petroleum industry.

Do you think the current provisions under the OPGGS regime on the powers and protections for HSRs are effective?

What evidence can you provide to support your views?

Are there any other powers of and protections for HSRs that should be provided for? If so, what are they and why do you think they are needed?

Are there any other operator duties and obligations to HSRs that should be provided for? If so, what are they and why do you think they are needed?

Training for health and safety representatives

To effectively and competently perform the role of a HSR and represent workers in their work group, it is important that HSRs receive the necessary training to ensure they understand their role, and know how, when and where they can exercise their legal powers. Not only is training important when HSRs are first nominated for the role, but also on an ongoing basis during their term of office to ensure the currency of their knowledge and skills.

The OPGGS regime mandates that HSRs must undertake training relating to OHS that is accredited by NOPSEMA. The operator of an offshore facility, or a person other than the operator who is the employer of the HSR, must permit the HSR to take time off work to complete training without loss of remuneration or other entitlements.¹¹⁰

¹¹⁰ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 30

The process for training accreditation involves NOPSEMA reviewing training material to ensure it conforms to NOPSEMA's course outline, reviewing the training provider's organisation and confirming the training provider's Registered Training Organisation status.¹¹¹

Issues for discussion

During the course of the Senate Inquiry and the department's workshops, some stakeholders expressed the view that the OPGGS regime is inadequate in relation to the training entitlements of HSRs compared to the WHS Act, with the following areas of particular concern:

- the WHS Regulations entitle a HSR to undertake an initial course of training of five days or an approved bridging course and then one day's refresher training each year
- the OPGGS Act does not prescribe the same terms as the WHS Act, such as the number of days for the initial training and the requirement for annual refresher training.¹¹²

However, the OPGGS Act does require that the HSR must take OHS training which has been accredited by NOPSEMA, with the operator required to ensure that the HSR does not experience loss of remuneration or entitlements to undertake the training. A single, independent accreditation process for training material and providers can be viewed as reducing the risk of generalised training. Generalised training can be potentially driven by economic factors and may not be specifically tailored to meet industry needs. There are no provisions in the OPGGS Act which prevent a HSR from choosing their training provider, subject to the requirement that training courses must be accredited the regulator.

The OPGGS and WHS Acts are different with regards to training provisions for HSRs. The WHS Act and WHS Regulations set out the requirement for PCBU to allow HSRs to undertake approved training if requested by a HSR for a work group for that business, and allow an initial course of training of five days and one day's refresher training each year.¹¹³

Further, the WHS Act allows HSRs to choose their OHS training course, in consultation with the PCBU, and requires the PCBU to, within 3 months after the request is made, allow HSRs time off work to attend the course of training and pay the course fees and any other reasonable costs associated with the HSR's attendance at the course of training. The Safe

¹¹¹ NOPSEMA, <https://www.nopsema.gov.au/safety/health-and-safety-representatives/#Training-for-HSRs>

¹¹² OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 30

¹¹³ WHS Act 2011, Section 72(2) and WHS Regulations 2011, Part 2, Division 2, Regulation 21

Work Australia Review of the Model WHS Laws recommended a mechanism for resolving disputes involving training.¹¹⁴

There are further differences between the OPGGS and WHS Acts, in that the OPGGS regime does not: prescribe periods of initial and refresher training; explicitly state that HSRs are entitled to choose the approved HSR training course they undertake; or explicitly prescribe that the operator or employer pay for OHS training course fees and any other reasonable costs associated with the HSR's attendance at the course.

The Senate Committee recommended that the OPGGS Act be amended to provide for consistency with the WHS Act in relation to HSR training.¹¹⁵

Some stakeholders have also queried the intent of the training clause, and the types of learning opportunities that should qualify under legislation as appropriate training for HSRs. Currently, HSR training is interpreted by NOPSEMA as training specific to the role of a HSR under the OPGGS regime, including: the use of powers, hazard identification, incident investigation and communications.¹¹⁶ Some stakeholders consider that other forms of learning opportunities broader than the current interpretation of legislation, such as workshops and forums, should also be able to be deemed HSR training under legislation.

What are your views on aligning the HSR training provisions under the OPGGS Act with the WHS Act?

What would be the benefits or risks of increased alignment of HSR training provisions with the WHS Act?

What are your views on whether additional types of learning opportunities should be considered as 'appropriate training' for HSRs under the OPGGS regime?

Health and safety committees

HSCs aim to ensure that workers' views are heard on health and safety matters. They are an effective way operators and employers can consult and work together with workers, and HSCs can facilitate cooperation in developing health and safety standards, rules and procedures. HSCs are another channel for workers' views to be raised on health and safety matters, in addition to through the work group HSR.

The OPGGS regime provides that an HSC must be established in each work group. An HSC consists of members chosen by the workforce representing the interests of the workforce,

¹¹⁴ Safe Work Australia, 2018, Review of the model WHS laws and Safety laws, Final report, Recommendation 10

¹¹⁵ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1

¹¹⁶ NOPSEMA, HSR Training Guidance 2012, <https://www.nopsema.gov.au/assets/Safety-resources/A213767.pdf>

and members chosen by the operator representing the interests of the operator. The HSC is responsible for assisting in the development, implementation, review, and update of measures designed to protect the health and safety of members of the workforce, and for facilitating cooperation between the operator and the workforce in relation to OHS matters. The OPGGS Act outlines the processes by which HSCs are established, including their constitution, the selection of members and meetings; and the functions of the HSC.¹¹⁷

The OPGGS regime also imposes duties on the operator and other employers in relation to HSCs, where they must make available to the HSC information relating to the risks to health and safety of members of the workforce, and permit any member of the HSC to take such time off work, without loss of remuneration or other entitlements, as is necessary for them to adequately participate in the performance by the committee of its functions.¹¹⁸

Issues for discussion

While the OPGGS and WHS Acts are broadly similar for HSCs, there is a difference with regards to the constitution of the committee. The WHS Act provides that if there is a HSR at a workplace, that representative, if they consent, is a member of the HSC.¹¹⁹ The OPGGS Act does not contain a similar provision, however it also does not preclude a HSR from being a member of the HSC. Some stakeholders have indicated that the OPGGS Act should be harmonised with the WHS Act to guarantee that a HSR is a member of the HSC if the HSR consents.

Is there a need to specify in the legislation that a HSR is guaranteed a place on the HSC if they consent? Why/why not?

Health and safety representatives' engagement with NOPSEMA

The participation of the workforce, and in particular HSRs, is central to the management of safety at an offshore facility. HSRs play a key role in the identification of health and safety risks and hazards and hence should have open engagement processes with NOPSEMA to raise these issues.

The OPGGS Act provides a number of formal channels in which HSRs can engage with NOPSEMA.

A HSR may:

¹¹⁷ OPGGS Act 2006, Schedule 3, Part 3, Division 4

¹¹⁸ OPGGS Act 2006, Schedule 3, Part 3, Division 4. Clause 43

¹¹⁹ WHS Act 2011, Part 5, Division 4, Section 76

- make a request to a NOPSEMA inspector or to NOPSEMA that an OHS inspection be conducted at the workplace
- accompany a NOPSEMA inspector during any OHS inspection at the workplace
- attend interviews between a group member (with their consent) and a NOPSEMA inspector.¹²⁰

Further to these provisions, NOPSEMA provided evidence during the Senate Inquiry that during inspections HSRs are invited to attend the entry and exit meetings with NOPSEMA and the facility operator, and meet with NOPSEMA inspectors privately to discuss the operator's implementation of the safety management system and the requirement for operators to consult with and enable the participation of the workforce, in relation to the risks and hazards on facilities. Additionally, NOPSEMA issues guidance that outlines how HSRs can contact a NOPSEMA inspector for their facility to raise concerns, or for assistance and advice on exercising their powers, understanding the legislation and engaging with facility management.¹²¹

Health and safety representative lists

Under the OPGGS regime the operator has a duty to prepare and keep an up-to-date list of HSRs for that facility, and make sure that it is accessible to both NOPSEMA and members of the facility workforce.¹²² The availability of the list to an inspector ensures that NOPSEMA is aware of who the HSRs are and who to contact if required. The OPGGS regime does not require the operator to additionally provide lists of HSRs to NOPSEMA directly.

Issues for discussion

During the course of the Senate Inquiry, witnesses raised concerns around NOPSEMA's approach to engaging and supporting HSRs and a perceived lack of engagement between NOPSEMA and HSRs. The Education and Employment References Committee (the Committee) subsequently recommended that a centralised HSR register be maintained by NOPSEMA¹²³ which may assist in addressing this concern by ensuring NOPSEMA has visibility of HSRs' details (including the HSR's position and contact details; their employer; details of HSR training and their work group) and increasing scope to communicate directly with HSRs.

¹²⁰ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision B, Clause 34

¹²¹ NOPSEMA Regulator Issue 2: 2018,

<https://www.nopsema.gov.au/assets/Publications/A619419.pdf>

¹²² OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A, Clause 27

¹²³ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 2

Under the WHS Act, the provision of an up-to-date list of HSRs must be provided by a PCBU to the regulator as soon as practicable after it is prepared.¹²⁴ However, the provision of a HSR list is not a current requirement in the model WHS laws.¹²⁵

The Committee noted a perceived gap between HSR arrangements as described by industry witnesses and NOPSEMA, and evidence provided by offshore workers. In particular, some stakeholders indicated HSRs are wary of raising OHS concerns with NOPSEMA due to fears of negative repercussions from the operator. A lack of opportunity for HSRs to confidentially communicate with the regulator was raised as a concern by workers, with witnesses indicating that HSRs are afraid to speak openly to NOPSEMA inspectors and that it is commonplace for HSRs to seek private meetings to avoid any repercussions.¹²⁶

While the OPGGS regime provides that HSRs may accompany NOPSEMA inspectors during inspections, witnesses stated during the senate hearings that there were instances where NOPSEMA has conducted a site inspection without a HSR present, resulting in NOPSEMA inspectors being unable to hear the safety concerns of HSRs. As a result, the Senate Committee recommended that HSRs be *required* to accompany NOPSEMA inspectors on their inspections, and that NOPSEMA inspectors be *required* to meet separately and privately with HSRs during inspections.¹²⁷

The instances mentioned in the Committee hearings may have been the result of a misconception, resulting from NOPSEMA conducting environmental management inspections under Schedule 2A of the OPGGS Act and the Environment Regulations. To address this, NOPSEMA has since implemented a new policy that all NOPSEMA inspectors should meet with HSRs at the beginning of every environmental management inspection.

Under the WHS Act, the provision allowing HSRs to accompany an inspector during an inspection is consistent with the OPGGS Act, in that the HSR *may* accompany an inspector, but is not required to do so.

Do you think the current legislative provisions for engagement between HSRs and NOPSEMA are effective?

Do you think proposed amendments to the provisions regarding HSR lists, and mandating that HSRs accompany and meet with NOPSEMA inspectors (as outlined above), would improve engagement?

Can you suggest further strategies (legislative or non-legislative) to improve engagement between NOPSEMA and HSRs?

¹²⁴ WHS Act 2011, Part 5, Division 3, Section 74

¹²⁵ Model WHS Act, Section 74

¹²⁶ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018

¹²⁷ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 8

Consultation and participation

An important feature of a leading practice health and safety regulatory regime is workforce involvement through consultation, representation and participation in health and safety matters in the workplace. Consultation and participation arrangements can range from involvement in safety at the workplace, participation in the development of health and safety guidance, to involvement in the governance structures of regulatory organisations.

Effective health and safety consultation contributes to greater awareness and commitment from workers, more positive working relationships, greater levels of cooperation and trust, and ultimately, improved health and safety performance.

Influenced by the 1972 UK Robens Report, which recognised the importance of worker cooperation with management to achieve and improve on health and safety outcomes, formal provision for workforce involvement was enacted in varying degrees across all Australian jurisdictions from the 1970s.¹²⁸ In relation to the offshore oil and gas industry, the importance of whole workforce commitment to, and involvement in, safe operations was emphasised by the Hon Lord Cullen in the Piper Alpha Inquiry. Specifically, Cullen recommended that the regulatory body, operators and contractors should support and encourage the involvement of the offshore workforce in safety.¹²⁹

The OPGGS regime provides for workforce consultation and participation at both tactical and strategic levels. This includes: involvement in the development of, and access to, safety cases and procedural documentation; the ability to appoint people to represent their interests; and the ability to participate in governance arrangements on health and safety issues.

Consultation with workers

Object and duties

Under the OPGGS regime, the principle of consultation is described in paragraph 1(e) in Schedule 3 to the OPGGS Act. Specifically, this paragraph describes that in relation to facilities located in Commonwealth waters an objective is “to foster a consultative relationship between all relevant persons concerning the health, safety and welfare of members of the workforce at those facilities”.

The OPGGS regime places a range of duties on operators, one of which relates specifically to consultation. The OPGGS Act requires that an operator must take all reasonably

¹²⁸ ANU, 2017, School of Regulation and Global Governance, <http://regnet.anu.edu.au/research/centres/national-research-centre-ohs-regulation-nrcohsr/overview-work-health-and-safety-regulation-australia>

¹²⁹ Hon Lord Cullen, 1990, The Public Inquiry into the Piper Alpha Disaster, Department of Energy, <http://www.hse.gov.uk/offshore/piper-alpha-disaster-public-inquiry.htm>, Recommendation 27

practicable steps to, in consultation with members of the workforce and any workforce representatives, develop a policy relating to OHS.¹³⁰ This OHS policy should describe how the operator and members of the workforce will cooperate effectively to promote and develop measures that ensure the health and safety of persons, and provide adequate mechanisms for reviewing the effectiveness of these measures. This OHS policy should also provide for the making of an agreement between the operator and members of the workforce and their representatives. This agreement must provide mechanisms for continuing consultation on OHS matters between the operator, the workforce and any workforce representatives.

An examination of duties more broadly is contained in Part 4: Duties, training, competency and mental health.

Designated work groups

Broad consultative provisions apply under the OPGGS regime, including the establishment of DWGs, the appointment of HSRs, use of consultants and the establishment of HSCs.

In relation to the establishment of DWGs, the OPGGS Act requires the operator to:

- enter into consultations with workers, their representatives, their employer and HSRs (for variations) to establish or vary DWGs in relation to the members of the workforce at the facility (either at the request of the workforce or at the initiative of the operator).
- establish or vary the DWG in accordance with the outcome of the consultations, by notifying members of the workforce.¹³¹

Workforce involvement in safety cases

Workforce involvement in the development and revision of safety cases is essential to achieving positive safety outcomes. Workforce involvement is necessary so that workers understand the hazards and risks and are able to arrive at informed opinions about the risks and hazards to which they may be exposed.

In turn, workers are more likely to do the right thing regarding safety because they know and understand why it is required. Further, workforce involvement encourages and promotes a positive safety culture, where workers are involved in major accident event identification and control and aware of safety issues and their own responsibilities.¹³²

Consultation with the workforce must be undertaken in the development and revision of safety cases, as set out in the Safety Regulations.¹³³ It requires that the operator effectively consult with, and ensure participation of, members of the workforce in the development or

¹³⁰ OPGGS Act 2006, Schedule 3, Part 2, Division 1, Clause 9

¹³¹ OPGGS Act 2006, Schedule 3, Part 3, Division 2, Subdivision A

¹³² NOPSEMA, 2019, Safety Case –Involving the workforce, <https://www.nopsema.gov.au/assets/Guidance-notes/A308788.pdf>;

¹³³ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Regulation 2.11

revision of a safety case. Involvement of members of the workforce includes members who are identifiable before the safety case is developed and working, or likely to be working on the relevant facility. Importantly, NOPSEMA must be reasonably satisfied that these requirements have been demonstrated.

Similarly for the development and revision of DSMS' and DPPs, the Safety Regulations prescribe that effective consultation with, and participation of, divers and other members of the workforce must take place.¹³⁴ Further, details of this consultation must be provided to NOPSEMA, including submissions or comments made during the consultation, and any changes to the DSMS as a result of the consultation. Further examination of safety management systems more broadly is contained in Part 3: Objects, safety cases and diving safety management systems.

Right of entry for health and safety matters

The WHS Act provides that WHS entry permit holders have a right of entry to investigate suspected contraventions and consult and advise workers.¹³⁵ It enables an employee representative to apply to the authorising authority for an official of that union to become a WHS entry permit holder. The WHS framework provides union officials with the ability to enter a workplace to inquire into safety issues, consult, and advise workers on WHS matters in certain circumstances. It also allows HSRs to accompany inspectors during site visits. It does not, however, provide for a right of transport for WHS entry permit holders.

The OPGGS regime does not have provisions for workplace entry by WHS entry permit holders, equivalent to those in the WHS Act. Arrangements for accessing offshore facilities is currently a matter for individual stakeholders to negotiate with the operator.

Issues for discussion

In regards to consultation with, and participation of, the workforce, the OPGGS regime is less prescriptive than the WHS Act, and does not contain provisions that are equivalent to those that are included in the WHS Act. For example, under the WHS Act, an object expressly refers to unions as a key stakeholder – “encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment”.¹³⁶

The WHS Act contains specific duties relating to consultation with workers, whereby a PCBU must, so far as reasonably practicable, consult with workers who carry out work for the business or undertaking, and are, or are likely to be, directly affected by a health and safety

¹³⁴ OPGGS Safety Regulations 2009, Chapter 4, Part 4, Regulation 4.18

¹³⁵ WHS Act 2011, Part 7, Division 1

¹³⁶ WHS Act 2011, Part 1, Division 2, Sub-section 3(c)

matter. The WHS Act specifies the nature of this consultation and the range of situations when consultation is required, and also imposes a penalty for non-compliance with this duty.¹³⁷ The WHS Act also contains a duty requiring consultation with other duty holders. If more than one person has a duty under the WHS Act in relation to the same matter, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter. No equivalent duties specifically relating to consultation are provided for under the OPGGS regime.¹³⁸

The OPGGS regime requirement to involve workers in the development and review of safety cases is consistent with the WHS Act. The WHS Regulations 2011 require that an operator of a major hazard facility must consult with workers at the major hazard facility in the preparation and review of the major hazard facility's safety case.¹³⁹

Worker involvement in the development of safety cases was the subject of discussion at both the Senate Inquiry and the department's Safety Workshops. Some stakeholders expressed a view that there is a need to improve worker involvement in the development of safety cases, including for greenfield projects. The Senate Inquiry recommended that the OPGGS Act be amended to provide a requirement for consultation with relevant unions in the development of the initial safety case, and a requirement of a review of the safety case to take place with the workforce once hired (and before the commencement of operations, where possible).¹⁴⁰

The Senate Inquiry report noted the views of some stakeholders that NOPSEMA's engagement and consultation with the workforce, in exercising its functions pertaining to work health and safety, could be improved.

During the Senate Inquiry, some witnesses expressed concerns that the OPGGS regime does not prescribe workplace entry by WHS entry permit holders, such as unions and employer organisations, claiming that right of entry for health and safety purposes positively contributes to OHS compliance at a workplace. The Senate Committee recommended that a right of entry for WHS purposes be established under the OPGGS Act requiring:

- the operator of the facility to, as soon as possible, facilitate transport for the permit holder for right of entry purposes

¹³⁷ WHS Act 2011, Part 5, Division 2

¹³⁸ WHS Act 2011, Part 5, Division 1

¹³⁹ WHS Regulations 2011, Subregulation 575 (1) (f); Safe Work Australia's final report into the review of the model WHS laws recommended that the model WHS Regulations dealing with major hazard facility are reviewed with a focus on administrative or technical amendments to ensure they meet the intended policy objective. Safe Work Australia, 2018, Review of the model WHS laws and Safety laws, Final report, Recommendation 32

¹⁴⁰ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 3

- the cost of transport for the permit holder to be recovered from industry by a levy revenue to NOPSEMA
- an ability for permit holders to exercise entry for the purposes of inquiring into multiple suspected contraventions of the OPGGS Act, including additional contraventions identified during the course of the entry.¹⁴¹

The Safe Work Australia Review of the Model WHS Laws made recommendations about right of entry for union officials assisting HSRs and notice periods for entry permit holders.¹⁴²

In response to the Review of the Model WHS Laws discussion paper, unions emphasised the importance of right of entry for WHS purposes. Many business representatives considered the WHS entry permit holder provisions worked well where they were used for genuine safety purposes, however, significant concerns about misuse were raised, mainly in the construction sector.¹⁴³ Similar concerns were raised at hearings of the Senate Inquiry, where some witnesses spoke of the potential risk for the manipulation and misuse of right of entry provisions in the offshore petroleum industry.

What are your views on the current consultation provisions provided under the OPGGS regime?

Which consultation provisions are working well?

Which consultation provisions could be further improved?

Would you support the introduction of a right of entry provision for the offshore petroleum industry, similar to that of the WHS Act? Would this provision lead to improved safety outcomes for the workforce?

Information sharing and transparency

Information sharing with HSRs and HSCs

Under the OPGGS regime, HSRs have the power to obtain access to any information under the control of the operator or any work group employer relating to risks to the health and safety, or the health and safety, of any group member.¹⁴⁴ Correspondingly, operators and other employers have a duty to provide the HSR access to any information which the HSR is entitled to access under the OPGGS Act¹⁴⁵ and make available to a HSC any information

¹⁴¹ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 4

¹⁴² Safe Work Australia, 2018, Review of the model WHS laws and Safety laws, Final report, Recommendations 8 and 15

¹⁴³ SafeWork Australia, WHS Model Laws Review, Discussion Paper Public Consultation Summary https://www.safeworkaustralia.gov.au/system/files/documents/1808/2018-review-public-consultation-summary_1.pdf

¹⁴⁴ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 34(1)(d)

¹⁴⁵ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 40(1)(d)

possessed by the operator or employer relating to the risks to health and safety to members of the workforce.¹⁴⁶

Certain information must not be made available to a HSR and/or their consultant and an HSC. In the case of a HSR, the operator must not permit a HSR to have access to information that is of a confidential medical nature (unless the person to whom the information relates consents or the information is in a form that does not identify the person) and the operator is not required to give a HSR access to information in relation to which the operator is entitled to claim, and does claim, legal professional privilege.¹⁴⁷

In the case of a HSC the operator or any employer must not make available to a HSC information of confidential nature relating to a person unless the person has authorised the provision of the information or the information is in a form that does not identify the person.¹⁴⁸ The operator, or any employer of a member of the workforce, is not required to make any information available to a HSC if the operator or the employer is entitled to claim, and does claim, legal professional privilege in relation to that information.¹⁴⁹

Transparency

Health and safety matters at an offshore facility directly affect workers, the operator and other employers (other than the operator). To ensure affected stakeholders have confidence in the current OHS regulatory decision making process, it is critical that the regulatory process is transparent and consultation mechanisms are in place at relevant stages of the decision-making process.

The OPGGS regime uses consultation and information-sharing requirements to ensure the involvement of these stakeholders in health and safety matters. The OPGGS Act and Safety Regulations do not require wider consultation with other stakeholders such as the community, nor publication of safety cases or diving-related safety management plans.

Issues for discussion

Access to information, in particular safety cases, by HSRs was raised during the Senate Inquiry. The Committee received evidence to suggest that HSRs are wary of accessing safety cases on offshore facilities for fear of being questioned or persecuted by management. While evidence was provided stating safety cases are available electronically at some facilities, there does not appear to be a consistent approach across the industry, nor is it a current legislative requirement. The Committee recommended that the OPGGS Act be

¹⁴⁶ OPGGS Act 2006, Schedule 3, Part 3, Division 4, Clause 43(1)

¹⁴⁷ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 36 and Subclauses 40(3) and (4)

¹⁴⁸ OPGGS Act 2006, Schedule 3, Part 3, Division 4, Subclause 43(3)

¹⁴⁹ OPGGS Act 2006, Schedule 3, Part 3, Division 4, Subclause 43(4)

amended to include a requirement that HSRs be provided with remote online access to safety cases.¹⁵⁰

During stakeholder workshops, challenges surrounding the provision of online access were raised, including the need for protection of commercial and proprietary information and potential for version control issues. Some participants indicated that some companies currently provide workers with online access to safety cases through the company intranet site.

What are your views on the current provisions for information sharing?

Do you think there is a need for increased transparency in relation to the regulation of health and safety? If so, what specific changes do you think should be made?

Participation in governance arrangements and forums

Workforce involvement includes participation in tripartite (industry, regulator and workforce) governance arrangements or forums which assist in the development of guidance on health and safety issues. Australia's WHS laws have historically been based on the UK's health and safety laws, often referred to as Robens-style legislation. One Robens principle was the concept of "a more effectively self-regulating system"¹⁵¹ that involved workers and management working together to achieve and improve upon, health and safety standards. The structure and composition of most of Australia's WHS advisory boards are based on the Robens-style principles, in that they require the participation and representation of employees in health and safety matters, including at a governance level.

The NOPSEMA Board is a governance mechanism provided for under the OPGGS regime. The Board provides advice and makes recommendations on the performance by NOPSEMA of its functions and on policy or strategic matters relating to occupational health and safety, well integrity and environmental management. Advice and recommendations can be provided to the NOPSEMA Chief Executive Officer, the responsible Commonwealth Minister, the relevant state and Northern Territory Petroleum Ministers, and to the Ministers responsible for mineral and energy resources matters.¹⁵²

In accordance with the OPGGS Act, Board members are selected for appointment by the state and territory Ministers responsible for mineral and energy resources matters, prior to being formally appointed by the responsible Commonwealth Minister.¹⁵³ It must be demonstrated that candidates can suitably contribute to the legislated functions of the Board.

¹⁵⁰ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 3

¹⁵¹ The Robens Report 1972, para 41, <http://regnet.anu.edu.au/research/centres/national-research-centre-ohs-regulation-nrcohsr/overview-work-health-and-safety-regulation-australia>

¹⁵² OPGGS Act 2006, Chapter 6, Part 6.9, Division 3

¹⁵³ OPGGS Act 2006, Chapter 6, Part 6.9, Division 3, Section 656

The use of tripartite forums, aimed at collaboratively developing guidance on important health and safety issues or specific hazards, is less explicit under the OPGGS regime than in some other regimes. For example, the UK's Offshore Major Accident Hazards Advisory Committee, established in line with European Union Directive,¹⁵⁴ aims at developing mechanisms for effective tripartite consultation to consider major accident hazard prevention and associated environmental issues in the offshore petroleum industry.¹⁵⁵ Further, the UK HSE Board¹⁵⁶ and Safe Work Australia¹⁵⁷ explicitly refer to their composition as tripartite, comprising governments, employees and employers.

Issues for discussion

During the Senate Inquiry, witnesses raised concerns about the lack of workforce representation on the NOPSEMA Board, which was viewed as a lack of commitment to a tripartite approach to health and safety issues in the offshore petroleum sector and ultimately an obstacle to NOPSEMA being seen as a trusted regulator. Whilst the legislation does not preclude workforce representatives or union representatives from being considered for nomination, so long as they can demonstrate they are suitably qualified, it does not explicitly prescribe that the board's composition will be on a tripartite basis.

While acknowledging the intent of the legislation, where board members do not represent any particular group or interest, the Committee noted that the current composition of the board only includes individuals with experience working for industry participants. This, in the Committee's view, does not satisfy the need for a tripartite approach to effectively promote strong health and safety practices across the industry. The Committee therefore recommended that the OPGGS Act be amended to provide for equal representation of industry and workforce participants on the NOPSEMA Board.¹⁵⁸

What are your views on the current provisions for workforce participation in governance arrangements?

Do you think the OPGGS Act should be amended to require representation of the workforce on the NOPSEMA Board?

¹⁵⁴ EU Directive 2013/30/EU

https://euoag.jrc.ec.europa.eu/files/attachments/osd_final_eu_directive_2013_30_eu1.pdf

¹⁵⁵ UK Health and Safety Executive, <http://www.hse.gov.uk/osdr/omahac.htm>

¹⁵⁶ UK Health and Safety Executive, <http://www.hse.gov.uk/aboutus/howwework/management/board-operating-framework2016.pdf>

¹⁵⁷ Safe Work Australia, <https://www.safeworkaustralia.gov.au/about-us>

¹⁵⁸ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 6

Protection against discrimination or coercion

To create a positive safety culture, workers must not be discouraged or prevented from raising health and safety issues or exercising any of their powers or functions under legislation. The provisions in the OPGGS Act state that an employer (whether the operator or another person) must not dismiss an employee, perform an act that results in injury to an employee or their employment, perform an act that prejudicially alters the employee's position, or threaten to do any of these things, because that employee has been involved in or raised OHS issues.¹⁵⁹ This provision aims to protect workers and encourage them to be involved as HSRs or HSC members, or to raise health and safety issues as and when they arise. Offences can be addressed through criminal proceedings and are subject to fines of 600 penalty units (\$126,000) for individuals or 3000 penalty units (\$630,000) for corporations.

Issue resolution

The OPGGS regime contains provisions, such as the use of HSRs, external consultants, HSCs and the development of an OHS agreement between the workforce and the operator, as consultation mechanisms for workers to raise health and safety issues. For example, the OHS policy and agreement required to be developed by the operator is intended for the parties to have an effective consultation and OHS issue resolution process for the various members of the offshore workplace. However, the OPGGS regime does not provide a specific provision for issue resolution should an OHS issue be raised at a workplace that cannot be resolved through the HSR, HSC or other consultation processes.

Issues for discussion

As part of the Senate Inquiry some witnesses claimed that within the offshore petroleum industry there is a culture of fear around raising safety concerns. The Committee noted that many HSRs claimed to be afraid to speak with NOPSEMA inspectors out of fear of reprisal, and that it is common place for HSRs to surreptitiously seek meetings with inspectors to avoid possible repercussions and pressure from the operator for approaching the regulator. Witnesses also discussed how casual and insecure employment conditions and limited engagement between NOPSEMA and HSRs contribute to a poor safety culture.¹⁶⁰

There is a need to consider whether there are limitations in the current provisions under the OPGGS regime for protection against discrimination and coercion, and the effectiveness of the existing provisions. Compared to the OPGGS Act, the WHS Act gives wider protection against coercive and discriminatory conduct.¹⁶¹ For example, in addition to the prohibition of

¹⁵⁹ OPGGS Act 2006, Schedule 3, Part 5, Clause 88

¹⁶⁰ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018

¹⁶¹ WHS Act 2011, Part 6

discriminatory conduct, the WHS Act also prohibits: the requesting, instructing, inducing, encouraging, authorising or assisting in discriminatory conduct; coercion or inducement of a person to exercise or not exercise a power or perform a legislated WHS function; and misrepresentation, where a person knowingly or recklessly makes a false or misleading representation to another person about their rights or obligations under the WHS Act.¹⁶²

Unlike the OPGGS Act, the protections under the WHS Act extend beyond the employment relationship to workers more generally.

To assist in resolving issues, the WHS Act provides that a PCBU, worker or their representative may ask for an inspector's assistance.¹⁶³ Prior to requesting the attendance of an inspector, the parties must make reasonable efforts to resolve the issue themselves. Further, the WHS Act provides that where a workplace has not developed its own issue resolution procedure, a default process is provided in the WHS Regulations.¹⁶⁴ The OPGGS regime does not contain an equivalent provision.

What are your views on the effectiveness of the provisions relating to the protection of workers who are involved in or raise workplace health and safety issues, or who take on a representative role and raise health and safety issues? Do you have any suggestions for improvements?

Do you think the current provisions for issue resolution of health and safety issues, such as the use of HSRs, HSCs and other consultative mechanisms, are effective? If not, what changes do you suggest?

¹⁶² WHS Act 2011, Part 6, Division 1, Sections 106-109

¹⁶³ WHS Act 2011, Division 5, Section 82

¹⁶⁴ WHS Regulations 2011, Regulations 22 and 23

Part 6: Compliance and enforcement

Introduction

The Organisation for Economic Co-operation and Development (OECD), in its Best Practice Principles for Regulatory Policy, asserts that ensuring effective compliance with rules and regulations is an important factor in creating a well-functioning society and trust in government. It further describes that, if not properly enforced, regulations cannot effectively achieve the goals intended by governments.¹⁶⁵

A challenge for the Australian Government in regards to the offshore oil and gas safety regime is to have efficient and effective enforcement strategies in place that achieve the highest possible level of compliance, whilst also ensuring that costs and burden are as low as possible. It is also important to ensure that the allocation of resources are proportional to the level of risk, and enforcement actions proportional to the seriousness of the violation.¹⁶⁶

The *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) provides a standard suite of provisions in relation to monitoring and investigation powers, as well as civil penalties, infringement notices, enforceable undertakings and injunctions. These provisions are considered to be the accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, providing adequate safeguards and protecting important common law privileges.¹⁶⁷ The OPGGS Act and the Safety Regulations set out compliance and enforcement provisions for the offshore safety regime, with certain monitoring and investigation powers subject to the requirements of Parts 2 and 3 of the Regulatory Powers Act.

NOPSEMA has compliance and enforcement functions in relation to environment, well integrity and OHS. This part examines compliance and enforcement provisions under the OPGGS regime, and specifically outlines the OHS functions of NOPSEMA, the compliance and enforcement regulatory framework, including inspections and inspector powers, and provisions for notification and reporting.

NOPSEMA's OHS functions

NOPSEMA has the following functions in relation to health and safety:

- promote the OHS of persons engaged in offshore petroleum operations or offshore greenhouse gas storage operations

¹⁶⁵ OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing

¹⁶⁶ Ibid

¹⁶⁷ Attorney-General's Department, Regulatory Powers Act Factsheet, <https://www.ag.gov.au/LegalSystem/Documents/regulatory-powers-act-factsheet.pdf>

- develop and implement effective monitoring and enforcement strategies to secure compliance by persons with their OHS obligations under the OPGGS Act and the Safety Regulations
- investigate accidents, occurrences and circumstances that affect, or have the potential to affect, the OHS of persons engaged in offshore petroleum or greenhouse gas operations
- advise persons on OHS matters relating to offshore petroleum or greenhouse gas operations
- make reports on investigations and other OHS related issues to the responsible Commonwealth Minister and each responsible State and Northern Territory Petroleum Minister
- provide information, assessments, analysis, reports, advice and recommendations to the responsible Commonwealth Minister when requested
- cooperate with other Commonwealth agencies and authorities having functions relating to regulated operations.¹⁶⁸

Compliance and enforcement framework

The OPGGS regime provides a comprehensive compliance and enforcement regulatory framework, a key element to safeguarding the health and safety of persons undertaking offshore oil and gas activities. The OPGGS Act and Safety Regulations provide a suite of provisions that allow NOPSEMA to:

- assess how the operator of a facility proposes to manage the OHS risks of their activity and determine whether the safety case¹⁶⁹ and/or DSMS is acceptable¹⁷⁰
- inspect the facility to determine whether the activity is being managed in accordance with the accepted safety plans and other legislative requirements¹⁷¹
- investigate where an incident occurs or where a potential non-compliance with the legislation is suspected¹⁷²
- take enforcement action where this is required to rectify and prevent recurrence of non-compliance¹⁷³
- promote and provide OHS-related advice to the offshore industry on learnings and robust OHS management practices.¹⁷⁴

The OPGGS Act also gives NOPSEMA the power to give the registered holder of a title a direction about any matter in relation to which regulations may be made.¹⁷⁵

¹⁶⁸ OPGGS Act 2006, Chapter 6, Part 6.9, Division 2, Section 646

¹⁶⁹ OPGGS Safety Regulations 2009, Chapter 2, Part, 2 Regulation 2.26

¹⁷⁰ OPGGS Safety Regulations 2009, Chapter 4, Part, 2 Regulations 4.5 and 4.6

¹⁷¹ OPGGS Act 2006, Schedule 3, Part 4, Division 2

¹⁷² OPGGS Act 2006, Schedule 3, Part 4, Division 2 and OPGGS Act, Chapter 6, Part 6.5, Division 1

¹⁷³ OPGGS Act 2006, Schedule 3, Part 4, Division 3 and OPGGS Act, Chapter 6, Part 6.5

¹⁷⁴ OPGGS Act, Chapter 6, Part 6.9, Division 2, Section 646

¹⁷⁵ OPGGS Act 2006, Chapter 6, Part 6.2, Division 2, Section 574

This section outlines the compliance and enforcement mechanisms as they are provided for in legislation, and does not describe the way they are currently implemented by the regulator or the effectiveness of this implementation.

Assessment

An operator cannot conduct any offshore oil and gas activity relating to facilities or diving activity without a relevant safety case and/or DSMS that has been assessed and accepted by NOPSEMA. The Safety Regulations stipulate the content requirements of these safety management plans and the conditions by which NOPSEMA will accept a safety case or DSMS.¹⁷⁶ For more information about safety management plans, refer to Part 3: Objects, safety cases and diving safety management systems.

Inspection

Inspections are one of the most important ways for a regulator to enforce regulations and to ensure regulatory compliance.¹⁷⁷ OHS inspections provide the regulator sufficient oversight of offshore oil and gas activities and facilities to ensure that all reasonably practicable steps are being taken to prevent major accident events and risks to the health and safety of persons have been reduced to as low as reasonably practicable.

Inspector powers

The OPGGS Act provides substantial powers for NOPSEMA inspectors to undertake OHS inspections. A NOPSEMA inspector may conduct an OHS inspection:

- to monitor compliance with listed OHS laws
- to investigate an accident or dangerous occurrence that has happened at or near a facility.

The inspection may be conducted at the inspector's own initiative or in compliance with a direction by NOPSEMA, and does not necessarily include a physical inspection of any facility, premises or thing.¹⁷⁸

NOPSEMA inspectors have a range of compliance powers which they can use for the purpose of an OHS inspection. The most significant of these powers are:

- issue an OHS 'do not disturb' notice to ensure the workplace, plant or substance is undisturbed, allowing the operator or titleholder to remove the immediate threat to the

¹⁷⁶ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 2, Regulation 2.26 and Chapter 4, Part 2, Regulations 4.5-4.7

¹⁷⁷ OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing.pp4

¹⁷⁸ OPGGS Act 2006, Schedule 3, Part 4

health or safety of any person, or allow the inspection, examination or measurement of, or the conducting tests relating to the facility or a particular plant, substance or thing at a facility¹⁷⁹

- issue an OHS prohibition notice to prohibit an activity that is occurring or may occur at a facility that involves, or would involve, an immediate threat to the health and safety of a person and it is reasonably necessary to issue the notice in order to remove the threat¹⁸⁰
- issue an OHS improvement notice when there has been a contravention of an OHS law, requiring action to be taken to remove the risk to health and safety that may result from the continuation or recurrence of a contravention of an OHS law.¹⁸¹

Inspection process

A NOPSEMA inspector has the power to enter and search a facility for the purpose of an OHS inspection. They may enter a facility at any reasonable time during the day or night to search the facility; inspect, examine, or conduct tests concerning the facility or any plant, substance or thing; take photographs or video recordings of the facility; or take extracts or make copies of any documents related to the OHS inspection.¹⁸²

The NOPSEMA inspector, immediately upon entering a facility for the OHS inspection, must take reasonable steps to notify the operator's representative at a facility, the HSR for the DWG likely to be affected by the subject of the inspection and the titleholder's representative (if any) at the facility.¹⁸³

The OPGGS Act also requires that if there is a HSR for a DWG with a group member likely to be affected by the subject of the inspection, the inspector must give the HSR a reasonable opportunity to consult on the matter.¹⁸⁴

The Senate Committee recommended that NOPSEMA and facility operators ensure that HSRs are present and fully engaged when NOPSEMA carries out its inspections by requiring HSRs to accompany NOPSEMA inspectors on their inspections and requiring NOPSEMA inspectors to meet separately and privately with HSRs during inspections.¹⁸⁵ These issues are explored in Part 5: Workplace arrangements.

Regulators are increasingly under pressure to do 'more with less', while still meeting demands to better protect the environment and health and safety of citizens. The

¹⁷⁹ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 76

¹⁸⁰ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 77

¹⁸¹ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 78

¹⁸² OPGGS Act 2006, Schedule 3, Part 4, Division 2, Clause 50(1)

¹⁸³ OPGGS Act 2006, Schedule 3, Part 4, Division 2, Clause 50(2)

¹⁸⁴ OPGGS Act 2006, Schedule 3, Part 4, Division 2, Clause 50(3)

¹⁸⁵ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 8

Organisation for Economic Co-operation and Development (OECD) asserts that enforcement needs to be risk-based and proportionate, and in particular, that the frequency of inspections and the resources employed should be proportional to the level of risk.¹⁸⁶ While the OPGGS regime provides the regulatory framework to allow for inspections as described above, the practical application of the legislation is undertaken by the regulator. In fulfilling its functions under legislation, the regulator is required to make explicit judgement in accordance with its regulatory strategy to determine the focus of the inspection effort which targets key aspects of risk. This risk-based approach is consistent with effective global practice.¹⁸⁷ NOPSEMA's risk based approach to inspections is outlined in its Compliance Strategy and Inspection Policy.¹⁸⁸

Issues for discussion

Unannounced inspections

During the Senate Inquiry several witnesses called for regular, unannounced inspections to be carried out by NOPSEMA as part of its standard inspection regime. This was also supported and recommended by the Senate Committee in its report.¹⁸⁹ Witnesses raised concerns that the current planned nature of inspections allows duty holders to rectify, cover up or hide issues before the inspector arrives, and if and when NOPSEMA does carry out an unannounced inspection, the duty holder may assume that it was triggered by a report from a HSR, and therefore put pressure on the HSR.

In response to questions from the Senate Committee, NOPSEMA advised that it has undertaken inspections of offshore facilities at short notice (less than five days notification), noting that NOPSEMA does not have its own helicopters to travel to a facility, and that it ensures that its activities do not pose any additional safety risks to the facility.¹⁹⁰

The OPGGS regime does not prevent NOPSEMA from carrying out unannounced inspections. It is a decision for NOPSEMA to assess whether the risks of carrying out unannounced inspections outweigh the benefits. Acknowledging the practical and logistical difficulties associated with offshore facilities, other stakeholders assert that unannounced inspections may pose a barrier to effective regulatory inspections and also create inadvertent safety risks to workers at or near the facility. Further, process safety hazards (those that can cause potentially catastrophic incidents) typically have controls that cannot be seen and therefore require access to information and people that need to be arranged prior to an inspection.

¹⁸⁶ OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing

¹⁸⁷ UK Health and Safety Executive's Hazardous Installations Directorate and Norway's Petroleum Safety Authority

¹⁸⁸ NOPSEMA, <https://www.nopsema.gov.au/about/our-regulatory-activities/compliance-strategy>

¹⁸⁹ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 7

¹⁹⁰ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, NOPSEMA answers to questions on notice, 25 July 2018

What are your views on the provisions for inspector powers and inspection process under the OPGGS regime?

Do you think that unannounced inspections are necessary on offshore facilities, and if so, why?

Monitoring compliance at vessel facilities

NOPSEMA inspectors have the power to conduct inspections at any offshore facility or premises. This may include a vessel that is used, or has been used, for offshore petroleum or greenhouse gas storage operations.¹⁹¹ Monitoring compliance at facilities that are vessels, however, presents regulatory challenges, as these vessels are often engaged in relatively short scopes of work, of which only a portion of the activities may cause them to meet the definition of a facility, and it is difficult for NOPSEMA to know when vessels are a facility and therefore within OPGGS jurisdiction and subject to inspection.

The OPGGS regime does not contain any requirements for duty holders to notify NOPSEMA when a vessel facility is going to be used for a relevant purpose defined under the OPGGS regime, and as a result no timely information on the transition from vessel to facility is provided to the regulator to facilitate compliance monitoring.

The interaction between the offshore oil and gas jurisdiction and maritime jurisdiction is examined in Part 7: Jurisdictional coverage.

What are your views on how compliance is monitored at vessel facilities?

Should the regime provide for any additional or different requirements for compliance monitoring?

Can you suggest ways (both regulatory and non-regulatory) in which monitoring compliance at vessel facilities could be enhanced?

Investigation

The OPGGS Act lists those offences and civil penalty provisions that are subject to investigation under the Regulatory Powers Act,¹⁹² which enable a NOPSEMA inspector to enter premises where there are reasonable grounds for suspecting there may be material on the premises related to the contravention of an offence or civil penalty provision. It includes powers of entry, search, inspection and seizure. The inspector may only enter the premises with the consent of the occupier of the premises or under a warrant. Evidence may only be seized if the inspector has entered premises under a warrant.

¹⁹¹ OPGGS Act 2006, Chapter 6, Part 6.5, Division 1, Section 602F

¹⁹² OPGGS Act 2006, Chapter 6, Part 6.5, Division 1, Section 602D

Enforcement

Effective compliance with regulations must be properly enforced to ensure regulations achieve the goals intended by governments.¹⁹³ Under the OPGGS regime, a graduated range of enforcement tools is available to NOPSEMA, to encourage and support improved compliance with the regime. The range of enforcement options provided to NOPSEMA, for the purpose of regulating OHS, include:

- power to take possession of plant and samples¹⁹⁴
- issuing of do not disturb notices¹⁹⁵
- issuing of prohibition notices¹⁹⁶
- issuing of improvement notices¹⁹⁷
- giving directions to titleholders¹⁹⁸
- requesting a revised permissioning document (for example safety cases and DSMS)¹⁹⁹
- withdrawal of acceptance of a permissioning document²⁰⁰
- infringement notices²⁰¹
- injunctions²⁰²
- civil and criminal prosecutions²⁰³
- adverse publicity orders²⁰⁴.

Further, a provisional OHS improvement notice may be issued by a HSR if the HSR for a DWG believes, on reasonable grounds, that a person is contravening, has contravened or is likely to contravene a provision of a listed OHS law; and has attempted to reach agreement with the person supervising the activity but has not reached agreement within a reasonable time.²⁰⁵ The provisional improvement notice is outlined in Part 5: Workplace arrangements.

Penalties

In 2013, the Australian Government amended the OPGGS Act to strengthen the compliance, monitoring, investigation and enforcement powers of the regulator and ensure that

¹⁹³ OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing

¹⁹⁴ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 75

¹⁹⁵ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 76 and 76A

¹⁹⁶ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 77 and 77A

¹⁹⁷ OPGGS Act 2006, Schedule 3, Part 4, Division 3, Clause 78 and 78A

¹⁹⁸ OPGGS Act 2006, Chapter 6, Part 6.2, Division 2, Sections 574, 576B, 586, 587

¹⁹⁹ OPGGS Safety Regulations 2009, Regulations 2.31 and 4.11

²⁰⁰ OPGGS Safety Regulations 2009, Chapter 2, Part 2, Division 4

²⁰¹ OPGGS Act 2006, Chapter 6, Part 6.5, Section 611F

²⁰² OPGGS Act 2006, Chapter 6, Part 6.5, Section 611J

²⁰³ OPGGS Act 2006, Chapter 6, Part 6.5, Section 611B and Part 6.9 Section 693

²⁰⁴ OPGGS Act 2006, Chapter 6, Part 6.5, Section 611L

²⁰⁵ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Clause 38

enforcement measures for contraventions of the Act are appropriate in the context of a high-hazard industry. Specifically, the amendments:

- introduced a civil penalty regime
- increased criminal penalty levels under the OPGGS Act, consistent with major hazard industry legislation
- harmonised with the WHS Act, or made greater, the penalties, including custodial penalties, for OHS offences under the OPGGS Act to reflect the greater consequences in a major hazard industry.

The criminal penalty increases were determined following careful consideration of the penalties that apply under comparable legislation, including the WHS Act and the *Environment Protection and Biodiversity Conservation Act 1999*, and were designed to ensure that the penalty applied is appropriate to reflect the potentially severe consequences of non-compliance.

The OPGGS penalties are framed in accordance with the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.²⁰⁶ Many jurisdictions have a similar approach to setting penalties, whereby, in general, a maximum penalty aims to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty is justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.

The OPGGS regime contains offences for recklessness and negligence, when a person, subject to a health and safety requirement, omits to do an act and breaches the requirement.²⁰⁷ The penalty for recklessness is 3,500 penalty units and negligence 1,750 penalty units, which currently equates to \$735,000 and \$367,500 respectively for an individual. For a body corporate these equate to \$3,675,000 for recklessness and \$1,837,500 for negligence.²⁰⁸

²⁰⁶ Attorney-General's Department, 2011, Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>

²⁰⁷ OPGGS Act 2006, Schedule 3, Part 2, Division 1A, Clauses 16A and 16B

²⁰⁸ Based on the current monetary value of a penalty unit of \$210. The penalty unit will be adjusted every three years from 1 July 2020 in accordance with the Consumer Price Index.

Issues for discussion

Use of enforcement options

The Senate Inquiry identified a number of stakeholder concerns relating to the Enforcement Policy of NOPSEMA and the way it uses its legislated enforcement powers. Some stakeholders commented that NOPSEMA relied too heavily on lower levels of the regulatory pyramid and does not use its more serious available sanctions, including prosecution, where there is repeated non-compliance. The Committee recommended that 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, and that NOPSEMA be directed to comply with the Enforcement Policy in respect of taking prosecution action where there has been repeated non-compliance with legislation.²⁰⁹

The OECD asserts that enforcement should be based on 'responsive regulation' principles, where regulatory enforcement agencies should adopt a differentiated enforcement strategy based on the behaviour and history of the businesses they deal with.²¹⁰ The OPGGS regime provides for a hierarchy of sanctions and regulatory strategies available for the regulator to use. The way in which the regulator moves within these hierarchies is determined by NOPSEMA. Within this hierarchy, while prosecution is one enforcement mechanism at the top of the enforcement pyramid, there is also provision for NOPSEMA to withdraw acceptance of a permissioning document or for the Joint Authority to decide not to renew or to cancel a title. These enforcement options would result in the titleholder/operator unable to legally continue to undertake operations, and arguably may result in a much higher financial loss and reputational damage for a company.

The Safe Work Australia Review of the Model WHS Laws made recommendations about increasing penalty levels, introducing a new offence of industrial manslaughter and a consistent approach to sentencing.²¹¹

What are your views on the current enforcement provisions under the OPGGS regime?

Do you think they provide sufficient and effective mechanisms and options to be utilised by the regulator? If not, how could they be improved?

²⁰⁹ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendations 10 and 11

²¹⁰ OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, pp.33

²¹¹ Safe Work Australia, 2018, Review of the model WHS laws, Recommendations 22, 23b and 25.

Penalties

During the Senate Inquiry, some witnesses asserted that the penalties in the OPGGS regime are significantly lower than those under the model WHS Act and the Victorian OHS laws. Further, it was claimed that the offences and penalties under both the OPGGS Act and the WHS Act fall short of levels desired by regulatory experts. The Committee recommended that the penalties in the OPGGS Act be significantly increased to bring them into line with best practice regulation.²¹² However, as noted in the Government Senators' dissenting report, the OPGGS regime already has stronger penalties than in some other regimes.

The OPGGS regime's penalty units for a breach of primary OHS duties, with a fault element of recklessness or negligence, are higher than the model WHS laws, WHS Act and the Victorian OHS Act. The penalties in the OPGGS regime are expressed as penalty units, where the penalty amounts are subject to ongoing indexation, helping to ensure continued maintenance of the deterrent effect of the penalties. The penalty for recklessness under the OPGGS regime is more than double the amount under the model WHS laws, WHS Act and Victorian OHS laws, with the exception of the penalty for a body corporate under the WHS Act (although the penalty under the OPGGS regime is still higher than under the WHS Act).

Specifically, the OPGGS regime contains offences for recklessness and negligence when a person, subject to a health and safety requirement, omits to do an act and breaches the requirement. As outlined above, the penalty for recklessness of an individual is 3,500 penalty units and negligence 1,750 penalty units (equating to \$735,000 and \$367,500 respectively). For a body corporate these equate to \$3,675,000 for recklessness and \$1,837,500 for negligence. The current model WHS laws and WHS Act have lower penalties than the OPGGS regime. For example, for a health and safety offence committed with a fault element of recklessness (Category 1), the maximum penalty is \$300,000 or 5 years imprisonment or both for an individual and \$3,000,000 for a body corporate. Under the Victorian *Occupational Health and Safety Act 2004*, the maximum penalty is 1800 penalty units (\$285,426) for an individual and 9000 penalty units (\$1,427,130) for a body corporate.²¹³

The strict liability offences under the WHS regime (of which there are two categories) are also lower than the OPGGS regime penalties for either recklessness or negligence, at \$150,000 for an individual and \$1,500,000 for a body corporate (Category 2) and \$50,000 for an individual and \$500,000 for a body corporate (Category 3).

In the Senate Committee report on the framework surrounding the prevention, investigation and prosecution of industrial death in Australia, the Committee recommended that Safe Work Australia work with Commonwealth, state and territory governments to review the

²¹² Senate Inquiry into the WHS of workers in the offshore petroleum industry, 2018, Recommendation 9

²¹³ *Occupational Health and Safety Act 2004* (Vic), 1800 penalty units for a person and 9000 penalty units for a body corporate

levels of monetary penalties in the model WHS legislation, with consideration as to whether there should be increased penalties for larger businesses or repeat offenders. In its response, the Government supported this recommendation in principle, highlighting its potential benefit whilst noting the practical difficulties involved in design and implementation. It was noted that the monetary penalties in the model WHS laws have not increased since introduction.²¹⁴ As noted above, the Safe Work Australia Review of the Model WHS Laws recommended increasing penalty levels.²¹⁵

What are your views on the penalty provisions under the current OPGGS regime?

Do the provisions provide effective incentive to comply with the regime? What evidence can you provide to support your comments?

Notification and reporting

The OPGGS Act and Safety Regulations impose a number of notification and reporting requirements on duty holders in relation to health and safety incident and risk management. The operator is primarily responsible for notification and reporting, however there are requirements in the regulations that apply to titleholders and diving supervisors. The notification and reporting requirements are outlined below:

- general provisions in the OPGGS Act²¹⁶ impose a duty on operators to give notice to NOPSEMA if, at or near a facility, there is:
 - an accident²¹⁷ that causes the death of, or serious injury to, any individual
 - an accident that causes a member of the workforce to be incapacitated from performing work
 - a dangerous occurrence²¹⁸
- the operator must provide oral or written notification to NOPSEMA of an accident or dangerous occurrence as soon as practicable after the first occurrence of the accident or dangerous occurrence, or at the time it has been detected²¹⁹

²¹⁴ Senate Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia 2018, Government Response, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialDeathsInAus

²¹⁵ Safe Work Australia, 2018, Review of the model WHS laws, Recommendation 22

²¹⁶ OPGGS Act 2006, Schedule 3, Part 5, Clause 82

²¹⁷ In a general sense, the term 'accident' may be an unforeseeable and unexpected turn of events that causes loss in value, injury and increased liabilities. Under Schedule 3 of the OPGGS Act, an accident includes the contraction of a disease.

²¹⁸ A 'dangerous occurrence' is an occurrence, at a facility, that is specified in the table at Regulation 2.41(2) of the Safety Regulations.

²¹⁹ OPGGS Safety Regulations 2009, Chapter 2, Part 4, Regulation 2.42(1)

- the operator must provide a written report to NOPSEMA of an accident or dangerous occurrence within 3 days (unless otherwise agreed by NOPSEMA) after the first occurrence or its detection²²⁰
 - the written report must contain material details about the accident or dangerous occurrence in line with the NOPSEMA determination.²²¹
- the operator must provide a monthly written report not later than 15 days after the end of each month summarising the number of deaths and types of injuries to persons at the facility²²²
- the titleholder must notify the operator and NOPSEMA as soon as practicable if it knows about a new risk or increased risk to health and safety²²³
- a diving supervisor must report to the operator (if there is an operator for the diving project) incidents including: the death of, or serious injury to, a person; the incapacitation of a person; and an event that could have led to these incidents.²²⁴

Issues for discussion

Duties and obligations

Under the Safety Regulations there are some inconsistencies in the duties and obligations imposed on parties in relation to notification and reporting. These inconsistencies may contribute to non-reporting by relevant duty holders and affect the effectiveness and accuracy of information provided to NOPSEMA.

For example, diving supervisors are required to report health and safety matters to the operator and only if there is an operator for the diving project. There is currently no requirement for diving supervisors to notify titleholders and NOPSEMA in the event there is no operator for that diving project, creating a gap in reporting requirements.

Additionally, while the titleholder is required to report a new health and safety risk related to the facility to both the operator and NOPSEMA, there is no current requirement for an operator to do so as well. The operator of a facility may more practicably identify such risks than the titleholder. While operators have a requirement to submit a revised safety case if there has been a significant increase, or series of increases, of risk, it may be more timely if the operator also reported new health and safety risks to NOPSEMA and the titleholder.

Monthly reports

Notification and reporting obligations should be placed on duty holders where a clear regulatory benefit is demonstrated. Where possible, duplicative reporting requirements

²²⁰ OPGGS Safety Regulations 2009, Chapter 2, Part 4, Regulation 2.42(2)

²²¹ OPGGS Safety Regulations 2009, Chapter 2, Part 4, Regulations 2.42(2)(c) and 2.42(3)

²²² OPGGS Safety Regulations 2009, Chapter 2, Part 4, Regulation 2.42(4)

²²³ OPGGS Safety Regulations 2009, Chapter 2, Part 5, Regulation 2.46(2)

²²⁴ OPGGS Safety Regulations 2009, Chapter 4, Part 6, Regulation 4.23(1)(c)

should be avoided to reduce confusion and increase the effectiveness of reporting requirements.

For example, the current requirements for a monthly report to NOPSEMA under regulation 2.42(4) of the Safety Regulations, require the operator to provide a summary of the number of deaths of persons and number and types of injuries at the facility.²²⁵ The intent of this requirement may duplicate the reporting requirement of accidents and dangerous occurrences under regulation 2.42(2), which requires the operator to provide a written report within 3 days unless otherwise agreed by NOPSEMA.

Further, the requirement to provide monthly reports under the Safety Regulations applies regardless of whether there have been any deaths or serious injuries at the facility. This appears to be inconsistent with the intent of the general provision to notify accidents and dangerous occurrences under the OPGGS Act, which outlines that the duty to notify is in situations *if* there is an accident or dangerous occurrence. The provision of reports by the operator of a facility with zero activity (nil response) does not provide a regulatory benefit. There may be benefit, however, if the monthly reports required reporting on different health and safety issues, such as non-notifiable leading indicators of safety performance, process safety indicators and data on person-hours worked.

Do you consider the current notification and reporting requirements for both duty holders and other entities under the OPGGS regime to be effective? If not, how could they be improved?

²²⁵ OPGGS Safety Regulations 2011, Chapter 2, Part 4, Regulation 2.42(2)

Part 7: Jurisdictional coverage

Introduction

The regulation of the OHS of workers engaged in offshore petroleum or greenhouse gas storage activities is primarily provided for by the OPGGS Act and Safety Regulations. However, different pieces of OHS legislation may apply as workers move through their duties, and for those persons working in an offshore maritime environment but not directly involved in offshore oil and gas industry activities. The broad range of activities related to the offshore oil and gas industry includes, but is not limited to, onshore office work, operating offshore support vessels, work aboard offshore facilities and offshore diving operations.

The Australian offshore oil and gas safety regime operates alongside the maritime industry safety regime and the various onshore OHS regimes, to protect workers engaged in the entire range of activities they may undertake for offshore oil and gas companies. The legislative frameworks of the offshore oil and gas industry and maritime industry sit closely together, and there are multiple points at which persons and vessels may transition to and from each jurisdiction. It is therefore of utmost importance that the governments, industries, regulators and workers involved have a clear understanding and consistent interpretation of the legislation and how, where and when it applies.

This part describes jurisdictional coverage of the offshore resources and maritime industries in relation to the regulation of health and safety and describes the interactions between the regimes.

Overview of offshore petroleum and greenhouse gas jurisdiction

Offshore Petroleum and Greenhouse Gas Storage Act 2006

The OPGGS regime provides for the health and safety regulation of persons at or near an offshore facility within Commonwealth waters. The jurisdictional coverage of the regime is defined through the OPGGS Act, and is intended to capture the execution of, and preparation for, all offshore petroleum and greenhouse gas storage activities, excluding those which take place in coastal waters. The boundaries of the regime are set through geographical boundaries and the definitions of offshore petroleum operations and greenhouse gas storage operations.

As defined by the OPGGS Act, Commonwealth waters comprise the offshore area of each state and of each territory²²⁶ that, with some exceptions, begins at the outer limits of coastal waters and extends to the outer limits of the continental shelf.²²⁷

Petroleum exploration and development in coastal waters is regulated under the relevant state or Northern Territory legislation, except where a jurisdiction has conferred powers or functions on to NOPSEMA.²²⁸ To date, Victoria is the only state or territory jurisdiction to have conferred OHS powers and functions to NOPSEMA.

Key terminology relating to NOPSEMA's OHS jurisdiction under the OPGGS Act includes the definition of offshore petroleum operations, greenhouse gas operations, facilities and associated offshore places. An awareness of these terms is important to understand the jurisdictional remit of the OPGGS Act, and NOPSEMA's health and safety functions.

As described in Part 6: Compliance and enforcement, the OPGGS Act grants NOPSEMA health and safety functions in relation to offshore petroleum operations and offshore greenhouse gas storage operations, and to secure compliance by persons with their OHS obligations under the OPGGS Act and Safety Regulations.

Offshore petroleum operations regulated by NOPSEMA are defined to mean any regulated operations, including diving operations, that take place in Commonwealth waters or at a facility and relate to the exploration for, recovery, processing, storage, offloading or piped conveyance of petroleum.²²⁹

Similarly, offshore greenhouse gas storage operations regulated by NOPSEMA are defined to mean any regulated operations, including diving operations, that take place in Commonwealth waters or at a facility and relate to the exploration for potential greenhouse gas storage formations or injection sites, the compression, processing, offloading, piped conveyance or pre-injection storage of a greenhouse gas substance, or the injection, permanent storage or monitoring of a greenhouse gas substance into the seabed or subsoil.²³⁰

The term facility includes vessels or structures, as well as associated offshore places in relation to a facility that is located in Commonwealth waters and is being used or prepared for use in:

- offshore petroleum operations such as:
 - the recovery, processing, storage and offloading of petroleum
 - the provision of accommodation for persons working on another facility
 - the drilling or servicing of a well
 - the laying of pipes for petroleum or doing work on an existing pipe

²²⁶ OPGGS Act 2006, Chapter 6, Part 6.9, Division 1, Section 643

²²⁷ OPGGS Act 2006, Chapter 1, Part 1.2, Division 1, Section 8

²²⁸ OPGGS Act 2006, Chapter 6, Part 6.9, Division 1, Section 646

²²⁹ OPGGS Act 2006, Chapter 6, Part 6.9, Division 1, Section 643

²³⁰ OPGGS Act 2006, Chapter 6, Part 6.9, Division 1, Section 643

- the erection, dismantling or decommissioning of a facility.
- or greenhouse gas operations such as:
 - the injection or storage of a greenhouse gas substance into the seabed or subsoil
 - the compression, processing, pre-injection storage, offloading of a greenhouse gas substance
 - the monitoring of a greenhouse gas substance stored in the seabed or subsoil
 - the provision of accommodation for persons working on another facility
 - drilling or servicing a well for injecting a greenhouse gas substance into the seabed or subsoil
 - laying pipes for conveying a greenhouse gas substance or for doing work on an existing pipe
 - the erection, dismantling or decommissioning of a facility.²³¹

Some vessels or structures are not considered facilities under the OPGGS Act. Excluded vessels and structures that are not facilities include off-take tankers, tugs or anchor handling vessels, vessels used for supplying facilities or for travelling between a facility and the shore, and any vessel or structure declared by the Safety Regulations not to be a facility, such as a vessel supporting a remotely-operated vehicle or diving operation that is being used in connection with inspection, cleaning or the recovering of debris.²³²

The definition of associated offshore places includes any offshore place near a facility where activities (including diving activities) relating to the construction, installation, operation, maintenance or decommissioning of the facility take place. This excludes another facility, a supply vessel, offtake tanker, anchor handler or tugboat, and any vessel or structure that is declared by the regulations not to be an associated offshore place.²³³

Safety zones

Under the OPGGS Act, safety zones are used to prohibit vessels from entering a specified area, and are established for the purpose of protecting a petroleum well, greenhouse gas well, a structure, or equipment.²³⁴ The prohibition may apply to all vessels, specified vessels, or all vessels other than specified classes of included vessels. Safety zones are established by the publication of a notice in the Gazette (by NOPSEMA for petroleum safety zones and by the responsible Commonwealth Minister for greenhouse gas safety zones), and may extend to a distance of 500 metres around the well, structure or equipment specified in the notice. Safety zones do not delineate the scope or extent of NOPSEMA's jurisdiction in relation to regulating OHS under the OPGGS Act and Regulations.

²³¹ OPGGS Act 2006, Schedule 3, Part 1, Clause 4

²³² OPGGS Act 2006, Schedule 3, Part 1, Clause 4(6) and OPGGS Safety Regulations 2009, Chapter 1, Regulation 1.6

²³³ OPGGS Act 2006, Schedule 3, Part 1, Clause 3 and OPGGS Safety Regulations 2009, Chapter 1, Regulation 1.7

²³⁴ OPGGS Act 2006, Chapter 6, Part 6.6, Division 2, Section 616 and Division 3, Section 617

Issues for discussion

Terminology

The scope of the OPGGS Act and Safety Regulations is clearly and narrowly defined in order to appropriately capture offshore petroleum and greenhouse gas operations, the persons that undertake these operations and the facilities where these operations take place.

This review of the offshore regulatory regime for safety provides an opportunity to review the key terminology of the OPGGS legislation and ensure it accurately captures those persons and operations. As an example, the department is aware that the way the current definition of vessels and structures that are not facilities is drafted under the Safety Regulations²³⁵ has unintended consequences. Under the OPGGS Act, a vessel or structure is not a facility or associated offshore place if it is used for *any* purpose declared by the Safety Regulations not to be a facility or associated offshore place. This automatic exclusion from being classified as a facility or associated offshore place does not take into account those vessels or structures that are *also* being used for operations that would otherwise mean it is included under the definition of a facility.

Do you think the current definitions of key terminology such as facility, offshore associated place, offshore petroleum operations, offshore greenhouse gas storage operations and other definitions are fit for purpose? Are any amendments or clarifications needed?

Overview of maritime industry jurisdiction

Occupational Health and Safety (Maritime Industry) Act 1993

The *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) provides specific health and safety regulation for a small section of the maritime industry known as the 'Seacare scheme'. The OHS(MI) Act was based on the repealed *Occupational Health and Safety Act 1991* (the Commonwealth's previous principal WHS Act). The Attorney-General's Department is responsible for administering the OHS(MI) Act.

Consistent with objects under the OPGGS Act, the OHS(MI) Act seeks to: secure the health, safety and welfare of maritime industry employees at work and to protect at or near those workplaces from OHS risks arising from the employees' activities; ensure expert OHS advice is available; promote an occupational environment adapted to the OHS needs of seafarers; and foster a cooperative consultative relationship between operators and employees.²³⁶

²³⁵ OPGGS Safety Regulations, Chapter 1, Regulation 1.6 and 1.7

²³⁶ OHS(MI) Act 1993, Part 1, Division 2, Section 3

Application of the OHS(MI) Act

The OHS(MI) Act provides specific health and safety regulation for the defined section of the maritime industry, specifically those persons employed on a prescribed ship or prescribed unit that falls in the application provision of the OHS(MI) Act. Prescribed ships or prescribed units are engaged in trade or commerce:

- between Australia and places outside Australia
- between two places outside Australia
- between the States
- within a Territory, between a State and a Territory or between two Territories.²³⁷

The OHS(MI) Act relies on Part II of the repealed *Navigation Act 1912* (Cth) to define the term 'prescribed ship'. This has led to some ambiguity in the interpretation of the exact coverage of the scheme. A ship is a 'prescribed ship' for the purpose of the OHS(MI) Act if it is:

- a ship which is registered in Australia
- a ship that is used to engage in coastal trading
- a ship of which the majority of the crew are residents of Australia and which is operated by: either a person who is resident of, or has his/her principal place of business, in Australia; a firm that has its principal place of business in Australia; or a company that is incorporated, or has its principal place of business, in Australia.²³⁸

The OHS(MI) Act makes explicit reference to a 'prescribed ship' *not* being a ship or offshore industry mobile unit to which the OPGGS Act applies.²³⁹

The OHS(MI) Act also applies to a vessel that is an offshore industry vessel or an offshore industry mobile unit within the meaning of the *Navigation Act 1912*.²⁴⁰ The OHS(MI) Act has separate provisions for a 'prescribed unit' which in general terms is an offshore industry mobile unit that is not self-propelled, but is under tow. An offshore industry mobile unit that is self-propelled falls within the 'prescribed ship' definition. As an offshore industry mobile unit under tow is not a facility,²⁴¹ the OPGGS Act will not apply to displace the OHS(MI) Act WHS provisions for a 'prescribed unit'.

The OHS(MI) Act was enacted with reference to the coverage of the *Navigation Act 1912*. After a significant review of that Act, the *Navigation Act 2012* (Navigation Act) was enacted to reform the 1912 Act. The 2012 Act has very different coverage provisions to the 1912 Act. At the time the Navigation Act was reformed, the provisions in the 1912 Act were

²³⁷ OHS(MI) Act 1993, Part 1, Division 3, Section 6

²³⁸ Navigation Act 1912, Part 2, Division 1, Section 10

²³⁹ OHS(MI) Act 1993, Part 1, Division 2, Section 4

²⁴⁰ Navigation Act 1912, Part 1, Section 8

²⁴¹ OPGGS Act 2006, Schedule 3, Part 1, Clause 4(7)(b)

grandfathered to ensure that the class of seafarers covered by the OHS(MI) Act WHS regime (and the related workers' compensation legislation covered by the Seacare scheme²⁴²) were not disadvantaged.

Maritime industry employees in the states and territories who are not covered by the OHS(MI) Act operate under the principal WHS Acts that apply to all businesses within the relevant state or territory.

Seacare Authority and Inspectorate

The Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) oversees the national scheme of OHS, rehabilitation and workers' compensation arrangements that apply to seafaring employees and other appropriate third parties that fall within the coverage of the Seacare scheme. The Seacare Authority's 2017-18 Annual Report noted there were 5140 employees covered by the *Seafarers Rehabilitation and Compensation Act 1992*, working on 168 vessels, of which 97 vessels were in the offshore industry.²⁴³

Under the OHS(MI) Act, AMSA is the Inspectorate for the purposes of ensuring compliance with the obligations imposed by the Act,²⁴⁴ and the CEO of AMSA is also a member of the Seacare Authority. As the OHS inspectorate, AMSA regulates seafarer health and safety issues on prescribed ships that fall within the application provision of the OHS(MI) Act. AMSA has trained inspectors who perform a range of functions, including audits, investigations of accidents and dangerous occurrences, issue of improvement and prohibition notices, advising employers on their duty of care as well as providing advice on health and safety matters. AMSA has the authority to initiate prosecutions for serious breaches which can result in heavy penalties.²⁴⁵

Harmonisation of health and safety laws in the maritime industry

In 2012, the Australian Government commissioned an independent Review of the Seacare scheme and the laws supporting that scheme (the Seacare Review).²⁴⁶ The Seacare Review made a number of recommendations to clarify the jurisdictional coverage of the Seacare scheme and rectify legislative inconsistencies to ensure consistency with the model WHS laws.

²⁴² *Seafarers Rehabilitation and Compensation Act 1992*

²⁴³ Seafarers Safety, Rehabilitation and Compensation Authority Annual Report 2017-18, http://www.seacare.gov.au/_data/assets/pdf_file/0006/191670/Seacare_Annual_Report_2017-18.pdf

²⁴⁴ OHS(MI) Act 1993, Part 4

²⁴⁵ AMSA, <https://www.amsa.gov.au/vessels-operators/seafarer-safety/occupational-health-and-safety-inspectorate>

²⁴⁶ Review of the Seacare scheme, March 2013, <https://www.jobs.gov.au/seafarers-rehabilitation-and-compensation-act-review>

Following further analysis and consultation with industry and employee representatives, the Government determined that retaining industry specific health and safety laws for a small section of the maritime industry was unnecessary.

The *Seafarers and Other Legislation Amendment Bill 2016* was introduced to Parliament in 2016 and contains measures that would repeal the OHS(MI) Act and extend the Commonwealth WHS Act to vessels presently covered by the OHS(MI) Act, with some industry specific modifications. This includes retaining the ability to implement regulations to address industry specific requirements. On 11 April 2019, the Australian Parliament was dissolved ahead of the 2019 federal election and the bill lapsed.

The Navigation Act 2012

The Navigation Act is the primary legislative Act by which the Australian Government regulates maritime safety, seafarers and the prevention of pollution of the marine environment. The Department of Infrastructure, Transport, Cities and Regional Development is responsible for administering the Navigation Act.

The objects of the Navigation Act are to promote the safety of life at sea and safe navigation; prevention of pollution of the marine environment; and ensure AMSA has the necessary power to carry out inspections of vessels and enforce national and international standards.²⁴⁷

AMSA, established as a statutory authority under the *Australian Maritime Safety Authority Act 1990* (Cth), is Australia's national agency responsible for maritime safety, protection of the marine environment and maritime aviation search and rescue.

Marine Orders made under the Navigation Act facilitate AMSA's implementation of regulatory matters.²⁴⁸ Two Marine Orders are directly related to the offshore oil and gas industry:

- Marine Order 47 (Mobile offshore drilling units) 2012²⁴⁹ - provides information about requirements for the design, construction, machinery and equipment of a mobile offshore drilling unit (MODU) and safe navigation and operation of a MODU
- Marine Order 60 (Floating offshore facilities) 2001²⁵⁰ - provides information about the safe operation and navigation of floating production, storage and offtake facilities (FPSOs), and floating storage units (FSUs). It also looks at those facilities and units with regard to the certification and survey requirements, certificates of compliance and safe manning.

²⁴⁷ Navigation Act 2012, Chapter 1, Part 2, Section 3

²⁴⁸ AMSA, Regulations and standards <https://www.amsa.gov.au/about/regulations-and-standards>

²⁴⁹ AMSA, Marine order 47—Mobile offshore drilling units <https://www.amsa.gov.au/about/regulations-and-standards/marine-order-47-mobile-offshore-drilling-units>

²⁵⁰ AMSA, Marine order 60—Floating offshore facilities <https://www.amsa.gov.au/about/regulations-and-standards-vessels/marine-order-60-floating-offshore-facilities>

Issues for discussion

Disapplication of the Navigation Act

The disapplication of the Navigation Act in relation to vessels defined as facilities, persons at or near a facility, and activities taking place at facilities under the OPGGS Act means these facilities are not subject to International Maritime Organisation and International Labour Organisation Conventions given effect by the Navigation Act. As discussed above, this is intended to ensure that an overlap between the offshore resources and maritime regulatory regimes does not occur. This issue was discussed extensively in the 2009 report of Bills and Agostini,²⁵¹ as noted by submissions to the Senate Inquiry.

While stakeholders have not raised specific concerns about the disapplication of IMO requirements, the department is aware that the disapplication of the Navigation Act can present regulatory challenges in relation to vessel facilities disconnecting from and re-entering the maritime regime. Marine Orders 47 and 60 require mobile offshore drilling units and floating offshore facilities to maintain safety certification under the International Convention for the Safety of Life at Sea (SOLAS). This Navigation Act requirement is disappplied, and replaced with the safety requirements under the OPGGS Act and Safety Regulations. While some operators maintain SOLAS certification voluntarily while defined as a facility, AMSA has limited knowledge of the condition of vessels which do not maintain certification while within the OPGGS jurisdiction, when they re-enter the maritime industry jurisdiction.

Does the disapplication of the Navigation Act under the OPGGS Act, and the international conventions it implements, affect offshore safety outcomes? Please provide evidence to support your views.

Interaction between the OPGGS Act, Navigation Act and OHS(MI) Act

Under the OPGGS Act, the Navigation Act and the OHS(MI) Act do not apply in relation to facilities, persons at or near a facility and activities taking place at that facility.²⁵² This includes vessels used for the purpose of undertaking offshore petroleum operations. The disapplication of Commonwealth maritime legislation ensures that the health and safety regime under the OPGGS Act and its regulations is administered without overlap with the maritime industry safety regime.

When vessel facilities move between the offshore resources and maritime industry regimes, the requirements under the originating jurisdiction cease and the other respective jurisdiction begins to apply. For example, when a vessel facility moves to undertake repairs, it ceases to

²⁵¹ K. Bills and D. Agostini, Offshore Petroleum Safety Regulation: Marine Issues, June 2009, https://archive.industry.gov.au/resource/Documents/upstream-petroleum/safety/Marine%20Issues_web.pdf

²⁵² OPGGS Act 2006, Chapter 6, Part 6.8, Section 640

be a facility under the OPGGS Act and becomes an offshore industry vessel or offshore industry mobile unit under the OHS(MI) Act for the purpose of regulating health and safety of its seafarers.

Due to the transition between jurisdictions, safety requirements vary under the OPGGS Act, OHS(MI) Act and Navigation Act, and therefore the applicable requirements for a particular vessel can change as it moves between each Act's jurisdictions. For example under the maritime industry regime, Marine Orders 47 and 60 require that MODUs, FPSOs and FSUs obtain appropriate safety certification, in order to adhere to SOLAS. Once a vessel transitions to become a facility, and enters the offshore oil and gas jurisdiction, this certification is no longer required under the OPGGS Act, in line with the disapplication of the Navigation Act.

Given the touch points between the offshore resources and maritime industry regimes, it is important for the respective regulators, NOPSEMA and AMSA, to work collaboratively where needed. In 2009, AMSA and NOPSA established a Memorandum of Understanding (MOU) to guide cooperation and mutual assistance between the agencies. This was replaced by a new MOU signed on 29 March 2019, which sets out the following three objectives:²⁵³

- the effective cooperation of parties in the improvement in OHS and environmental management outcomes in the offshore petroleum sector
- duplication of activities is avoided as far as reasonably possible in respect of facilities and vessels over which the parties have regulatory obligations
- that industry operations comply with relevant maritime and offshore legislation and regulations.

NOPSEMA and AMSA currently engage through the work program and committee meetings of the National Plan for Maritime Environmental Emergencies, and through ongoing collaboration on common issues of relevance. For example:

- the NOPSEMA CEO is a member of the AMSA Advisory Committee meeting that convenes twice a year
- NOPSEMA contributes resources to the National Response Team (NRT) and participates in the National Plan Strategic Coordination Committee and other governance arrangements related to the National Plan, including strategic issue working groups
- NOPSEMA personnel participate in AMSA Marine Pollution Controller Workshops and competency based oil spill training
- NOPSEMA and AMSA meet regularly to discuss common operational matters related to current industry activity in the field

²⁵³ MOU between AMSA and NOPSEMA concerning Cooperation on safety and environmental management arrangements for the offshore petroleum sector, March 2019, <https://www.nopsema.gov.au/assets/Corporate/A667383.pdf>

Issues for discussion

Legislative coverage

While the Senate Inquiry terms of reference directly referred to ‘the scope and necessity for amending and updating any legislative inconsistencies in the relevant work health and safety scheme’, it focused on providing for appropriate consistency between the OPGGS Act and the WHS Act, rather than the OHS regime in the OHS(MI) Act, where AMSA is the regulator, and on legislative changes to provide consistency with the model WHS Act. However, witnesses raised concerns about perceived gaps between the jurisdiction of NOPSEMA and AMSA relating to OHS, with the view that there is the need for clarification of, or consensus on, the touchpoints between the offshore resources and maritime regimes. These concerns were primarily in relation to vessels and vessel facilities that move between NOPSEMA’s jurisdiction and AMSA’s jurisdiction, depending on the location and the activity being carried out at the time. The Senate Committee concurred with witnesses’ concerns and subsequently recommended that the Commonwealth Government conduct a comprehensive assessment of the coverage of Australian safety regulation, including offshore petroleum, in order to develop a coherent legislative reform package.²⁵⁴

With regard to legislative coverage, hearings of the Senate Inquiry discussed deaths aboard a floating storage and offloading tanker in 2008 and an offshore supply vessel in 2015.

In respect of the death of a worker on the *Karratha Spirit* in 2008, the consensus of regulatory authorities was that, in accordance with the OPGGS Act, the *Karratha Spirit* was under NOPSA’s jurisdiction and NOPSA took responsibility for investigating the matter. The Australian Transport Safety Bureau (ATSB) report expressed the view that the point at which vessel facilities became navigable²⁵⁵ and cease to be facilities under the OPGGS Act was not clearly defined, leaving it open to interpretation.²⁵⁶

In relation to the death of a worker on board the *Skandi Pacific* supply vessel in 2015, NOPSEMA provided information to the Senate Committee confirming that at no time prior to, during or following the incident was the safety of the workforce on board the *Skandi Pacific* subject to regulation by NOPSEMA.²⁵⁷ This is consistent with the definitions outlined earlier

²⁵⁴ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 12

²⁵⁵ OPGGA Act, Schedule 3, Part 1, Clause 4(7)

²⁵⁶ 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, https://www.atsb.gov.au/publications/investigation_reports/2008/mair/261-mo-2008-013/

²⁵⁷ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, Additional information provided by NOPSEMA, 27 June 2018 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/WHSinoffshorepetroleum/Additional_Documents

in Part 7, specifically excluding supply vessels from the definition of a facility or an offshore associated place.

Are there any issues relating to the jurisdictional coverage and interaction of the OPGGS Act, Navigation Act and OHS(MI) Act that require clarification?

If so, is the issue one of legislative coverage or could it be addressed through communication and engagement between stakeholders?

Collaboration with other occupational health and safety regulators and agencies

NOPSEMA's collaboration and working relationships with other WHS regulators and bodies was highlighted in the Terms of Reference to the Senate Inquiry, with specific mention of Safe Work Australia.²⁵⁸

Safe Work Australia leads the development of national policy and strategies to improve WHS and workers' compensation across Australia, and assists with the implementation of the model WHS laws it developed in 2011. In its submission to the Senate Inquiry, Safe Work Australia stated that it and NOPSEMA meet from time to time to discuss WHS issues including data collection and availability.²⁵⁹ NOPSEMA also stated in its submission that it provides data to Safe Work Australia on various matters related to the OHS performance of the offshore industry, which is incorporated in safety publications produced by Safe Work Australia.²⁶⁰

Some stakeholders expressed concern that possible opportunities are being missed by NOPSEMA to draw on the experience and work of Safe Work Australia, and recommended that legislative amendments be enacted to require quarterly or six monthly meetings between NOPSEMA and Safe Work Australia.

The Senate Inquiry report made no recommendations in relation to Safe Work Australia, and the Government Senators' dissenting report noted that during its testimony Safe Work Australia indicated that it has not identified issues associated with the OPGGS Act through the implementation of their program.

Would increased collaboration between NOPSEMA and other OHS regulators, including Safe Work Australia, improve safety outcomes?

²⁵⁸ APH, Senate Standing Committee on Education and Employment, Terms of Reference, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/WHSinoffshorepetroleum/Terms_of_Reference

²⁵⁹ Submission to the inquiry into the WHS of workers in the offshore petroleum industry, Safe Work Australia, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/WHSinoffshorepetroleum/Submissions

²⁶⁰ Submission to the inquiry into the WHS of workers in the offshore petroleum industry, NOPSEMA, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/WHSinoffshorepetroleum/Submissions

What evidence can you provide to support this?

How should this collaboration be undertaken and what mechanisms are required to facilitate and support it?

Collaboration with AMSA

During the Senate Inquiry, witnesses asserted that NOPSEMA's effectiveness as a health and safety regulator is hampered by the split between NOPSEMA and AMSA's jurisdictions. The Committee recommended that NOPSEMA and AMSA should update their MOU, with a particular focus on achieving clarity on the common areas and interactions between the two agencies and their legislation.²⁶¹

This issue was also identified through the 2015 Operational Review of NOPSEMA, which recommended that NOPSEMA and AMSA should refresh their MOU and, in doing so, provide clarification on their commitments and responsibilities under their respective Acts.

The Government Response to the Operational Review²⁶² supported the agencies establishing a documented process for collaboration and consultation, whether through the means of a MOU or an exchange of letters, to ensure a shared contemporary understanding of each party's regulatory remit and approach.

In information submitted to the Senate Inquiry, NOPSEMA stated that it maintains a strong and collegiate relationship with AMSA on a range of matters including the regulation of offshore safety. This relationship includes a number of ongoing bilateral activities, standing meetings and national plan arrangements and the strength of the joint agency relationship is independent of the MOU.²⁶³

NOPSEMA and AMSA entered into a new MOU in March 2019, which provides for them to share information, participate in relevant training conducted by the other party, and cooperate and consult in relation to investigations, prosecutions, assessments, the preparation of guidelines and educational material, research, and data analysis.

Stakeholders have expressed support for the reinstatement of joint inspection of vessels' certification, provided for in previous versions of the MOU, as a way of strengthening the collaborative relationship and ensuring regulatory coverage.

Can you suggest any mechanisms (regulatory or non-regulatory) to further enhance collaboration between AMSA and NOPSEMA?

²⁶¹ Senate Inquiry Report into the WHS of Workers in the Offshore Petroleum Industry, August 2018, Recommendation 13

²⁶² Australian Government Response to the 2015 Operational Review of NOPSEMA, December 2015, <https://archive.industry.gov.au/resource/UpstreamPetroleum/Documents/GovernmentResponse2015OperationalReviewNOPSEMA.pdf>

²⁶³ NOPSEMA, additional information received 27 June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/WSinoffshorepetroleum/Additional_Documents

Summary of questions

Thank you for taking the time to consider this discussion paper. Below is a summary of the questions posed throughout the paper, but the department also encourages you to raise any other issues you find relevant, and does not expect all submissions to cover all the topics raised.

Part 3: Objects, safety cases and diving safety management systems

What are your views on the current objects in the OPGGS Act and Safety Regulations as they relate to OHS? Do you have suggestions for changes to the objects, or how they are defined?

Do you think the objects in the OPGGS Act should include specific reference to the role of unions and employer organisations, or is the current requirement to foster a consultative relationship with all relevant persons sufficient? Why/why not?

What are your views on the current regulatory approach to design and installation of a facility, including the process for early engagement with the regulator?

Should early engagement with the regulator be voluntary or mandatory? Why?

What are your views on the current OPGGS provisions relating to how and when safety case revisions occur?

What are your views on the ability of a HSR to trigger a review of a safety management-related document, including a safety case?

What are your views on the current requirements for a DSMS and DPP, including the content requirements, approval and training and certification processes?

What are your views on the consultation requirements for a DSMS and DPP?

Do you think the OPGGS regime requirement for offshore divers to hold an ADAS qualification leads to optimal safety outcomes?

Should the offshore regulatory regime for safety impose additional requirements or recognise other qualifications? Why/why not?

Part 4: Duties, training, competency and mental health

Do you think the OHS duties of care under the OPGGS regime are clear and effective? If not, what do you think could be improved?

What are your views on the effectiveness of the OPGGS permit to work system? If you believe there are deficiencies, what are they and how should they be addressed?

What are the benefits and challenges of implementing a licencing system for high risk work, similar to that under the WHS Act and WHS Regulations, in the offshore oil and gas industry?

What are your views on the training of offshore oil and gas participants more broadly? Do you think current provisions under the OPGGS regime adequately provide for training of all participants?

Do you think the current provisions in the OPGGS Act effectively promote and support positive mental wellbeing workplaces in the offshore oil and gas industry?

Can you suggest strategies or measures to further promote and support positive mental wellbeing workplaces in the offshore oil and gas industry?

Part 5: Workplace arrangements

What are your views on the current selection and election requirements of HSRs under the OPGGS regime? Why?

Do you think the current requirements sufficiently provide for workers to autonomously determine the manner in which they elect a HSR? If no, why not, and how do you think the election process should be determined?

What are your views on the disqualification process of a HSR under the OPGGS regime? Why?

Do you think the current provisions under the OPGGS regime on the powers and protections for HSRs are effective?

What evidence can you provide to support your views?

Are there any other powers of and protections for HSRs that should be provided for? If so, what are they and why do you think they are needed?

Are there any other operator duties and obligations to HSRs that should be provided for? If so, what are they and why do you think they are needed?

What are your views on aligning the HSR training provisions under the OPGGS Act with the WHS Act?

What would be the benefits or risks of increased alignment of HSR training provisions with the WHS Act?

What are your views on whether additional types of learning opportunities should be considered as ‘appropriate training’ for HSRs under the OPGGS regime?

Is there a need to specify in the legislation that a HSR is guaranteed a place on the HSC if they consent? Why/why not?

Do you think the current legislative provisions for engagement between HSRs and NOPSEMA are effective?

Do you think proposed amendments to the provisions regarding HSR lists, and mandating that HSRs accompany and meet with NOPSEMA inspectors (as outlined above), would improve engagement?

Can you suggest further strategies (legislative or non-legislative) to improve engagement between NOPSEMA and HSRs?

What are your views on the current consultation provisions provided under the OPGGS regime?

Which consultation provisions are working well?

Which consultation provisions could be further improved?

Would you support the introduction of a right of entry provision for the offshore petroleum industry, similar to that of the WHS Act? Would this provision lead to improved safety outcomes for the workforce?

What are your views on the current provisions for information sharing?

Do you think there is a need for increased transparency in relation to the regulation of health and safety? If so, what specific changes do you think should be made?

What are your views on the current provisions for workforce participation in governance arrangements?

Do you think the OPGGS Act should be amended to require representation of the workforce on the NOPSEMA Board?

What are your views on the effectiveness of the provisions relating to the protection of workers who are involved in or raise workplace health and safety issues, or who take on a representative role and raise health and safety issues? Do you have any suggestions for improvements?

Do you think the current provisions for issue resolution of health and safety issues, such as the use of HSRs, HSCs and other consultative mechanisms, are effective? If not, what changes do you suggest?

Part 6: Compliance and enforcement

What are your views on the provisions for inspector powers and inspection process under the OPGGS regime?

Do you think that unannounced inspections are necessary on offshore facilities, and if so, why?

What are your views on how compliance is monitored at vessel facilities?

Should the regime provide for any additional or different requirements for compliance monitoring?

Can you suggest ways (both regulatory and non-regulatory) in which monitoring compliance at vessel facilities could be enhanced?

What are your views on the current enforcement provisions under the OPGGS regime?

Do you think they provide sufficient and effective mechanisms and options to be utilised by the regulator? If not, how could they be improved?

What are your views on the penalty provisions under the current OPGGS regime?

Do the provisions provide effective incentive to comply with the regime? What evidence can you provide to support your comments?

Do you consider the current notification and reporting requirements for both duty holders and other entities under the OPGGS regime to be effective? If not, how could they be improved?

Part 7: Jurisdictional coverage

Do you think the current definitions of key terminology such as facility, offshore associated place, offshore petroleum operations, offshore greenhouse gas storage operations and other definitions are fit for purpose? Are any amendments or clarifications needed?

Does the disapplication of the Navigation Act under the OPGGS Act, and the international conventions it implements, affect offshore safety outcomes? Please provide evidence to support your views.

Are there any issues relating to the jurisdictional coverage and interaction of the OPGGS Act, Navigation Act and OHS(MI) Act that require clarification?

If so, is the issue one of legislative coverage or could it be addressed through communication and engagement between stakeholders?

Would increased collaboration between NOPSEMA and other OHS regulators, including Safe Work Australia, improve safety outcomes?

What evidence can you provide to support this?

How should this collaboration be undertaken and what mechanisms are required to facilitate and support it?

Can you suggest any mechanisms (regulatory or non-regulatory) to further enhance collaboration between AMSA and NOPSEMA?

Appendix A: Terms of reference

Review of the Occupational Health and Safety Regime for Workers involved in Offshore Petroleum Operations in Commonwealth Waters

Terms of Reference

Purpose:

To review the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* and the associated parts of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to ensure that they:

- i. provide an effective framework for securing the occupational health and safety of persons engaged in offshore petroleum or greenhouse gas storage operations in Commonwealth waters of Australia, and
- ii. represent leading practice that promotes and delivers safe offshore petroleum and greenhouse gas storage activities.

The review will be evidence-based and propose policy changes and legislative amendments, where necessary, to improve the OHS regime. Some areas may be identified that require further analysis following the review.

Background:

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) provides the legal framework for the exploration and recovery of petroleum and for the injection and storage of greenhouse gas substances in Commonwealth waters. This Act is administered by the Commonwealth Government, with some decisions made jointly with the state and Northern Territory governments. The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is responsible for the administration of occupational health and safety, environmental management and well integrity provisions.

Section 781 of the OPGGS Act provides that the Governor-General may make regulations prescribing matters that are required or permitted by the OPGGS Act, or necessary or convenient to be prescribed for carrying out or giving effect to the OPGGS Act. Clause 17 of Schedule 3 to the OPGGS Act provides that regulations may make provision relating to any matter affecting, or likely to affect, the occupational health and safety of persons at a facility.

Regulations have been in place for the safety of persons in connection with petroleum operations in Commonwealth waters since 1993, when they were created under the *Petroleum (Submerged Lands) Act 1967* (PSLA). The regulations were administered by the Designated Authorities in each state and the Northern Territory until 2005, when regulatory responsibility was transferred to the National Offshore Petroleum Safety Authority (now NOPSEMA). Continuing changes to implement various reforms have resulted in the current

Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 (the Safety Regulations).

The current Safety Regulations have been in operation since 1 January 2010 and are due to sunset on 1 April 2020. Given they will need to be remade before this date, it is an opportune time to undertake a holistic review of their efficiency and effectiveness, ensure consistency with leading practice, check the justifications for the current Safety Regulations, and, where necessary, propose changes to improve their operation. While some minor and technical amendments have been made to clarify and improve the Safety Regulations, a comprehensive review has not been undertaken since its commencement.

Objectives: The review will be conducted in line with requirements of Australian Government policy and guidance on regulation, including the Australian Government Guide to Regulation 2014 and other relevant references.

The review of the operation of the Safety Regulations and Schedule 3 to the OPGGS Act will specifically consider:

1. The extent to which the offshore OHS regime is securing the health and safety of persons engaged in offshore petroleum operations and driving continuous improvement in safety performance.
2. The effectiveness of the Safety Case provisions as a mechanism for achieving health and safety performance at offshore facilities.
3. The effectiveness of the Diving Safety Management Systems and Diving Project Plans for achieving safety performance in diving operations.
4. The appropriateness of definitions of facilities, vessels and structures, and associated offshore places for the purpose of ensuring occupational health and safety for persons working in the offshore resources industry.
5. The effectiveness of the framework of duties in protecting the health and safety of workers in the offshore oil and gas industry.
6. The appropriateness and effectiveness of provisions for workplace arrangements.
7. The transparency of current arrangements, including provision of information to the workforce.
8. The effectiveness of routine and non-routine notification and reporting arrangements.
9. The effectiveness of compliance and enforcement mechanisms for improving OHS performance.
10. Alignment of terminology throughout the offshore regulatory regime for safety and related legislation.
11. Any other changes that may be necessary to ensure the OHS regime reflects current Australian Government policy and guidance on best practice regulation.
12. Any other matter raised during the process considered relevant.

Scope:

The review will consider regulation of OHS within the scope of:

- The Safety Regulations

- Schedule 3 (Occupational Health and Safety) to the OPGGS Act.
- Any other matters under the OPGGS Act which are incidental to the above items, but necessary for a comprehensive review of the safety regime.

Since 2013, a number of OHS-related amendments have been proposed and consulted on with stakeholders, which are yet to be presented as bills to Parliament or amended regulations to the Executive Council. While those items will be included within the review, it is anticipated that previous consultation on these matters should assist their timely finalisation as part of this review.

The review will, in general, not address:

- other regulations under the OPGGS Act including environment, well integrity or resource management and administration
- policy regarding cost recovery through levies
- changes to other legislation or regulations beyond the scope of the OPGGS Act
- decisions by states or the Northern Territory on the conferral of functions to NOPSEMA.

Relevant matters arising from other inquiries and reviews will be considered as appropriate.

Timing and Process:

The policy review is expected to be completed in 2019. Any proposed amendments will be subject to parliamentary and Federal Executive Council processes applying to legislative and regulatory change. The Safety Regulations are currently due to sunset in 2020 and must be reviewed before they can be remade to ensure they are fit-for-purpose, up-to-date and leading practice. This review will inform the remaking of the Safety Regulations.

The following arrangements will be adopted to progress the formulation of proposed amendments:

Organisation: The review will be managed by the Commonwealth Department of Industry, Innovation and Science (DIIS), with technical input from NOPSEMA. Inputs from other relevant government departments will be sought where appropriate.

Consultation: A Safety Stakeholder Group (SSG) will be established to ensure a broad range of perspectives and views are considered and taken into account when considering issues and policy options. This will allow a robust examination to take place with consideration for all parties affected by any changes. The SSG will serve as a consultation group, not a decision-making body, to allow ideas and issues to be tested and discussed prior to a final policy position being reached.

The SSG will meet at key points during the review project, and the group's input will inform the development of consultation papers. Targeted meetings with specific stakeholder groups will also be held to complement the SSG. People from the same stakeholder representative type will be able to meet with the project team to discuss issues directly relevant to their group and the project, and in greater detail.

Publication: Information relating to the review will be published on the DIIS website. Any amendments to the OPGGS Act and Safety Regulations will be approved and published in accordance with the Australian Government parliamentary process on the Federal Register of Legislation at www.legislation.gov.au.