AMMA
AUSTRALIAN RESOURCES & ENERGY GROUP

Submission to the Senate Education and Employment References Committee

Inquiry into the Work Health and Safety of Workers in the Offshore Petroleum Industry

March 2018

Submission to the Senate Select Committee:
Future of Work and Workers

About AMMA

AMMA is Australia's resources and energy group and has provided a unified voice for employers on workforce and other industry matters for 100 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

The resources industry is, and will remain, a major pillar of the national economy. Its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resources industry directly generates more than 8% of Australia's GDP, with around 50% of the value of all Australian exports coming from the resources industry. In 2015-16, the value of Australian resource exports was $157.1 billion. This is projected to increase to $232 billion in 2020-21[1].

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for 4% of total employment in Australia. Considering the significant flow-on benefits of the sector, an estimated 10% of our national workforce, or 1.1 million Australians, are employed as a result of the resources industry.

First published in 2018 by

AMMA, Australian Mines and Metals Association

Email: policy@amma.org.au

Phone: (03) 9614 4777

Website: www.amma.org.au

ABN: 32 004 078 237

© AMMA 2018

This publication is copyright. Apart from any use permitted under the Copyright Act 1968 (Cth), no part may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of the Chief Executive, AMMA, GPO Box 2933, BRISBANE QLD 4001

[1] Office of the Chief Economist – Resources and Energy quarterly publication.

Introduction

1. AMMA, Australia's resources and energy group, welcomes the opportunity to make this submission to the Senate Education and Employment Committee's inquiry into the Work Health and Safety of Workers in the Offshore Petroleum Industry.

2. AMMA notes the inquiry seeks to address a number of terms of reference. AMMA seeks to provide comment on behalf of member companies operating in the offshore petroleum industry.

3. This submission is limited to the intersection between the Terms of Reference and AMMA's expertise in employee relations.

4. AMMA has reviewed and supports the submission of the Australian Petroleum Production and Exploration Association (APPEA) as a peak body representing Australia's oil and gas exploration and production industry, which AMMA share many members with.

5. AMMA notes that the Committee is considering the scope and necessity for amending and updating any legislative inconsistencies in the relevant work health and safety scheme.

6. In particular, AMMA notes that the Committee is considering providing for appropriate consistency between the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) and the *Work Health and Safety Act 2011* (WHS Act), and any legislative change required to ensure consistency with the model work health and safety laws.

7. The terms of reference refer to the "model work health and safety laws (as revised in June 2011)". AMMA observes that the model work health and safety laws were amended on 21 March 2016 although as at 30 November 2016, no jurisdiction had implemented these amendments.

8. The 21 March 2016 amendments contain important corrections. For example, one of the changes included that before entering a workplace to inquire into a suspected contravention, a WHS entry permit holder must give at least 24 hours' notice. Another change involved increased penalties for contravening WHS entry permit conditions.

9. Under the model work health and safety laws, a WHS entry permit holder appointed under the WHS Act may enter a workplace to:

    - inquire into a suspected contravention of the WHS Act that relates to or affects a relevant worker
    - inspect employee records or other documents relating to the suspected contravention held by another person, and
    - consult or advise relevant workers on work health and safety matters.

10. The model work health and safety laws, as at June 2011, do not include a requirement for a WHS entry permit holder to provide notice of entry.[2]

[2] This is in contrast to the model health and safety laws amended on 21 March 2016, which require at least 24 hours' notice be given.

11. While at the workplace to inquire into a suspected contravention, the WHS entry permit holder may do all or any of the following:

    a) inspect work systems, plant, substance, structure or other thing relevant to the suspected contravention

    b) consult with the relevant workers in relation to the suspected contravention

    c) consult with the relevant person conducting a business or undertaking about the suspected contravention

    d) require the relevant person conducting a business or undertaking to allow the WHS entry permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention and that is kept at the workplace or is accessible from a computer kept at the workplace (unless contrary to the law)

    e) warn any person the WHS entry permit holder reasonably believes to be exposed to a serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard, of that risk.

12. AMMA and its members hold concerns that if extended to offshore, the WHS Act and model work health and safety laws risk being manipulated and used for industrial purposes.

Potential for union officials to misuse increased power

13. AMMA notes that the OPGGS Act clearly deals with the appropriate parties to enter offshore petroleum and greenhouse gas storage facilities for OHS inspections, being only inspectors from the relevant government authority NOPSEMA. AMMA further notes that the Act clearly deals with and limits what role there is for workplace representatives under the Act in relation to work undertaken at these facilities.

14. AMMA submits that the OPGGS Act should not be amended to include union right of entry provisions as contained in the model WHS Act and that third party entry to the workplace should be limited to those independent government regulators and inspectors as is currently clearly defined in the OPGGS Act.

15. AMMA is concerned that the frequent misuse of safety as an industrial weapon by both the Construction, Forestry, Mining and Energy Union (CFMEU) and Maritime Union of Australia (MUA) would infect the offshore petroleum industry both through areas of direct union coverage and through indirect disruption.

16. The merger of the CFMEU and MUA on 27 March 2018 is expected by AMMA to increase the risk of illegal conduct such as that outlined below.

17. Employees can continue to exercise their right to be represented by their union. A union representative that reasonably suspects a contravention of the model Act can notify the employer and/or the regulator without entering the site, in order to seek resolution of the safety issue. This poses no increased safety risk to workers.

18. Employees are entitled to cease work where there is an imminent danger to health and safety. However, appropriate measures are required to limit frivolous, vexatious or manufactured health and safety concerns, and action that halts an entire operation where the danger is to be confined to a particular area. This right should not be used by unions to support or advance industrial agendas.

19. Too often, rights under WHS laws have been abused and used as a means to achieve industrial relations objectives, undermining industrial relations legislation and genuine safety issues at the workplace. Union officials abusing their entry rights under WHS laws for industrial purposes, for example, is an ongoing concern for resources and energy employers.

20. The resources sector is committed to improving health and safety and employers in the offshore petroleum industry continue to improve their record in this important area. This commitment and focus on improving health and safety must not be undermined and side-tracked by significantly blurring the lines between safety and industrial issues.

21. AMMA has been advised by its members of numerous examples of unions abusing entry under WHS law. Indeed there are numerous case examples of the CFMEU and MUA in particular as the worst culprits, using illegitimate safety claims to pursue industrial outcomes, including the following:

    a) **Chevron Australia v MUA**

    Chevron Australia Pty Ltd v The Maritime Union of Australia (No 2) concerned the MUA utilising safety as a pretext for unlawful industrial action on the project over Chevron's use of non-Australian national crew.

    In a Federal Court judgement handed down on 30 June 2016,[3] Justice Gilmour found that the MUA breached s 417 of the *Fair Work Act 2009* (FW Act) by engaging in unprotected industrial action during the term of an enterprise agreement with Patrick Projects.

    The industrial action, including delays and refusal to work, took place over two days in June 2012 and involved stevedores employed by Patrick to load cargo onto the specialist *RollDock Sun* vessel – a Dutch flagged ship hired to transport construction supplies from the Australian Marine Complex in Henderson, Western Australia to the Gorgon Project site at Barrow Island.

    In his judgement, Justice Gilmour reproduced emails between senior union officials detailing their strategy to use alleged safety concerns to try to thwart Chevron's use of a non-Australian national crew. This included tactics such as requesting an Asbestos Free Certificate, requiring the inspection of cranes and equipment and checks of crane load charts to see they met work safe regulations.

    Justice Gilmour found that "the conduct of the MUA was deliberate and that the safety issues, said at the material time by the MUA to justify the industrial action on each day, were just a pretext."

    His Honour found that the real reason for the unprotected industrial action was to promote the MUA's campaign against Chevron's use of non-Australian crew on vessels.

    Justice Gilmour said the refusal or failure to perform allocated work constituted "industrial action" and "the asserted authority to stop work was not based on a genuine safety issue".

[3] Chevron Australia Pty Ltd v The Maritime Union of Australia (No 2) [2016] FCA 768.

b) **ABCC v CFMEU (The Kane Constructions Case)**

Following a Federal Court judgement handed down on 1 March 2017 concerning liability[4] and a judgement on 11 April 2017 concerning penalties,[5] the CFMEU and 10 officials were penalised $590,900 for coordinated unlawful industrial action across multiple construction projects worth nearly half a billion dollars in Victoria.

The CFMEU's coordinated unlawful action saw nine Victorian projects shut down after workers walked off numerous construction sites in April and May 2014.

Justice Jessup found in relation to the various stoppages that "in no instance was there any suggestion of an issue or grievance, specific to the site or the workers on it, that justified, or even explained, the organisation of industrial action... The inference is irresistible that the industrial action which was organised by the respondents had the explicit object of inflicting commercial harm on Kane."

Justice Jessup stated the "transparently groundless invocation of occupational health and safety as a pretext for entering the site reflected badly" on the CFMEU organiser, and the CFMEU.

His Honour commented that this type of action could be of detriment to the workers, by undermining the legitimacy of genuine WHS concerns:

> *Were it to become commonplace, conduct of this kind could only tend to undermine the legitimacy of such genuine health and safety concerns as might be expressed by the CFMEU from time to time, to the long-term detriment of workers in the industry. Regrettably, in his submission counsel for the respondents noted the allegation (which had been admitted) that Murphy had told Rankin that the purpose of his visit was occupational health and safety, and neither expressed any reservation about that statement nor dissociated his clients from Murphy's conduct in making it.*

c) **Laing O'Rourke Australia Pty Ltd v CFMEU**

Laing O'Rourke Australia Pty Ltd v CFMEU[6] concerned alleged unlawful withdrawal of labour by site workers for 48 hours following three unions baselessly asserting safety issues.

Laing O'Rourke Australia sought and obtained urgent ex parte interim injunctions against the CFMEU, the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and six union officials.

Workers withdrew labour from the site for 48 hours following the identification of a number of alleged safety issues.

In a Federal Court decision, Justice Collier noted "there is a serious question to be tried as to whether, on the facts of this case and particularly taking into account the recent history of industrial dispute between the parties, there is an element of abuse in the exercise of rights of entry by officials of the three respondent unions on 15 February 2013 purportedly pursuant to the WHS Act."

[4] *ABCC v CFMEU (The Kane Constructions Case)* [2017] FCA 168.
[5] *ABCC v CFMEU (The Kane Constructions Case) (No 2)* [2017] FCA 368.
[6] [2013] FCA 133.

Her Honour found the allegations by the CFMEU, CEPU and BLF of serious WHS issues were contradicted by an independent inspection conducted by Work Health and Safety Queensland. She stated "allegations of serious workplace health and safety issues at the site are contradicted by the safety review conducted by LORAC. More particularly those allegations are not supported by the independent inspection conducted by WHS Qld and the ESO on 19 February 2013."

Justice Collier went on to find "the contrary views upon which the union officials appeared to insist during the inspection, in the face of the views adopted at the site by WHS Qld, suggest an agenda by the relevant union officials other than a pure interest in workplace health and safety issues."

Her Honour found that it was open to the Court to find that "the CFMEU and the BLF have employed a strategy of using alleged workplace health and safety problems at the site as a pretext for interfering with the construction schedule of the M&A Project, in a bid to pressure the applicants to resolve the outstanding industrial issues on terms favourable to those unions".

The interlocutory orders were granted.

d) **ABCC v AMWU, AWU, CFMEU & Ors**

In *Australian Building and Construction Commissioner v AMWU & Ors*,[7] the Federal Court imposed penalties totalling $101,500 against the AMWU, CFMEU and AWU and three of their officials for their involvement in unlawful industrial action at a construction project at the Australian Paper Mill in Victoria's Latrobe Valley.

The unlawful action stopped work at the Mill's de-inking project for three days in March 2014, continuing on the third day in defiance of orders from the Fair Work Commission that industrial action stop.

On 27 March 2014, the union officials had attended a meeting of workers in the site car park. Following the meeting, the workers sat in the sheds, whilst the union officials and other representatives made various requests of Australian Paper and the building contractors in relation to safety issues and the payment of strike pay for a work stoppage that occurred on the previous Saturday.

While the officials contended the stoppages related to safety and therefore did not constitute unlawful industrial action, the Court found "[t]hat view was a mistaken one".

The Court found instead that by involving themselves in the action, the officials "took advantage of the employees' unlawful conduct to strengthen their hands in their negotiations with the companies".

22. In addition to the above selection of decisions, the inappropriate use of safety as a pretext for industrial purposes has been identified in both the Cole Royal Commission into the Building and Construction Industry,[8] and the Heydon Royal Commission into Trade Union Governance and Corruption.[9]

23. The Report of the Cole Royal Commission identified various categories of inappropriate conduct which existed at that time in the building and construction industry, including "the raising of alleged OH&S issues by a union in pursuit of industrial ends".

[7] Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors (The Australian Paper Case) (No 2) [2017] FCA 367 (11 April 2017).
[8] Established in August 2001; Final report tabled in March 2003.
[9] Established in March 2014; Final report tabled on 30 December 2015.

24. Commissioner Cole stated in the final report "Occupational health and safety is often misused by unions as an industrial tool. This trivialises safety, and deflects attention away from real problems."[10]

25. The same issue was identified by the Heydon Royal Commission. In the final report, Commission Heydon said:

> 79. Safety on work sites is paramount. No rational person would dissent from that view. It does not follow from that view, and it is not presently the law, that union officials should be permitted untrammelled access to work sites to ensure that they are safe. To say that safety is paramount merely begs the question of how it should be regulated.
>
> …
>
> 86. It is this element of surprise [exercising a right of entry without notice], combined with the ease with which rights may be exercised, at that very time they are likely to be most disruptive, that make them extremely fertile ground for abuse. The present legislative regime might be acceptable if union officials could be trusted not to abuse it.
>
> …
>
> 87. The ACT CFMEU and CEPU case studies strongly suggest that the trust that underpins the rights conferred on permit holders has been abused. The scheme has fallen into disrepute in the sense that participants in the industry in the ACT believe that the CFMEU exercises its rights of entry to apply industrial pressure, and in particular pressure to seek to ensure that all industry participants are signed up to CFMEU EBAs. For example, a scaffolder, in the course of explaining why he agreed to sign a CFMEU EBA, said that he felt that if he didn't the CFMEU would 'maybe go around the builders saying, recommending to use someone else or finding safety issues for an excuse to get on to sites'. There was other evidence to similar effect.
>
> 88. The threat made by the Secretary of the ACT Branch of the CFMEU to the principal of a building company in 2014 spells out the approach adopted:
>
> > 'If you don't sign up [to a CFMEU EBA], you will find you can't get access to a cement pour, there will be trades you can't access – you won't be able to build … there will be all sorts of authorities and officials visiting to check you over and close you down'.
>
> 89. Statements such as this indicate that a perception that the CFMEU uses safety as an industrial tool is well justified.
>
> 90. There were examples of these apprehensions in other case studies. Part of the strategy implemented by the Thiess John Holland Joint Venture on the Eastlink Project (one of the AWU case studies) was to avoid non-working delegates because of their tendency to 'create often bogus safety issues'. In the Maritime Employees Training Fund case study, an employer was prepared to make large payments to a union controlled training fund because of a fear that fictitious industrial issues ('fabricating issues that are maybe not really there'), some of which were related to safety, would be raised.

[10] Royal Commission into the Building and Construction Industry, February 2003, Final Report, Volume 6, page 108.

91. Concerns from industry participants of this kind are rationally based. The conduct of officials in the case studies referred to above reveals a lack of motivation by genuine safety concerns and defeats the purpose for which rights of this kind are conferred.

26. It is clear that there is great potential for unions to utilise any new provisions for purposes related to their political and industrial agendas that are unrelated to improving safety outcomes.

27. This type of behaviour does not just impact employers, but as outlined above, employees are also affected, through undermining the legitimacy of genuine WHS concerns. Lawless union behaviour and industrial disputation may also discourage investment and employment opportunities, thereby impacting the Australian community, economy, and living standards.

28. The oil and gas industry is a significant part of the national economy. The Australian Government Department of Industry, Innovation and Science Office of the Chief Economist Bureau of Resources and Energy Economics (2013) Resources and Energy Major Projects reports almost $200 billion was recently invested in oil and gas projects in Australia, including seven major liquefied natural gas (LNG) export projects.

29. By 2020, the sector's economic contribution to the national economy is set to more than double to $65 billion. Taxation paid is projected to rise from $8.8 billion (an estimated $4.9 billion in corporate taxes and $3.8 billion in production taxes) to reach almost $13 billion.

30. It is vital that an issue as fundamentally important as WHS does not become at risk of being inappropriately used or leveraged by third parties such as unions to mischievously pursue their industrial interests. This will not only create safety and productivity issues, but more broadly could adversely impact growth and investment opportunities for offshore resources projects.

31. AMMA does not consider there is evidentiary support for any alignment between the OPGGS Act and the WHS Act.

32. AMMA believes the OPGGS Act is robust and suitable to the offshore industry and NOPSEMA applies it in an effective and accountable manner.

33. This submission has outlined the importance of ensuring that inappropriate misuse of safety as a pretext for pursuing industrial agendas does not infiltrate to the safety critical and complex offshore resources activities.

34. AMMA strongly recommends that the WHS Act and model work health and safety laws are not extended to offshore.