



Australian Government

**Department of Industry,
Innovation and Science**

Supplementary Submission by the Department of Industry,
Innovation and Science to the Standing Committee on Education
and Employment

*Inquiry into the work health and safety of workers in the
offshore petroleum industry*

July 2018

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1. Introduction

The Department of Industry, Innovation and Science (the department) would like to thank the Senate Standing Committee on Education and Employment for the opportunity to present at the Melbourne hearing on the 11 July 2018 as part of the Inquiry into the work health and safety of workers in the offshore petroleum industry.

This supplementary submission has been prepared by the department in order to place on the record some additional factual information regarding provisions for health and safety representatives (HSR) and penalties under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act).

This supplementary submission is provided on behalf of the department only.

2. Health and Safety Representatives roles, elections and lists

The department recognises that HSRs play a very important role in representing the workforce on matters relating to health and safety and providing their views and concerns to the employer. HSRs can make a real difference in having health and safety issues addressed and help achieve better health and safety outcomes.

The OPGGS Act facilitates the operation of HSRs with comparable roles, functions and duties to the work health and safety (WHS) regime. There are a few differences between the details of the OPGGS Act's HSR framework and that of the WHS regime. For example, while the OPGGS regime is less prescriptive than the WHS regime in regards to training of HSRs this does not mean that the outcomes are inferior. Training of HSRs is mandated under the OPGGS regime, and may include refresher training. Additionally, while the OPGGS Act does not confer onto a court the power to disqualify an HSR directly, a decision by the National Offshore Petroleum Safety Environmental Management Authority (NOPSEMA) to disqualify a HSR is an administrative decision subject to review by a court under the *Administrative Decisions (Judicial review) Act 1977*.

Further, while the OPGGS regime does not require the operator to provide updated lists of HSRs to the regulator, the department notes that the model WHS laws were amended on 21 March 2016, with a focus on reducing regulatory burden and streamlining or simplifying without compromising safety outcomes. As part of this, the Council of Australian Governments (COAG) WHS Ministers agreed to remove the requirement for persons conducting the business or undertaking to provide a list of HSRs to the regulator. The OPGGS Act is thus now consistent with the WHS model laws in this respect.

The department would like to correct an assertion made by the Australian Council of Trade Unions (ACTU) and the Victorian Government in their submissions and presentations at the Melbourne public hearing, where they stated that the OPGGS Act does not allow for workers to autonomously determine the manner in which they elect an HSR. This claim is incorrect. The OPGGS regime does not preclude workers from autonomously determining the manner in which they elect their HSR. Instead, the Act allows for the workforce to control the process for selecting an HSR for a designated work group as described below.

In Schedule 3 of the OPGGS Act, Part 3, Division 3, Subdivision A outlines the provisions for selection of an HSR. An HSR is selected by one of two ways: if all members of the workforce unanimously agree, or if the person is selected by an election. The Act does not specify the process by which the workforce may choose an HSR under the first method, except that the decision be unanimous, and thus the workforce has broad autonomy under this method. If an HSR has not been autonomously 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. Clause 26(4) 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 designated work group, or a majority of the members of the workforce normally in the designated work group. 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.

3. Compliance and enforcement provisions under the OPGGS Act

In 2013, the Parliament passed amendments to the OPGGS Act to strengthen the compliance, monitoring, investigation and enforcement powers of the regulator and ensure that enforcement measures for contraventions of the Act are appropriate in the context of a high-hazard industry. Specifically:

- A civil penalty regime was introduced;
- Criminal penalty levels under the Act were increased, consistent with major hazard industry legislation;
- Penalties, including custodial penalties, were harmonised, or made greater, for occupational health and safety (OHS) offences under the Act with the WHS 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* (EPBC Act), and were

designed to ensure that the penalty applied is appropriate to reflect the potentially severe consequences of non-compliance.

Under the OPGGS regime, a graduated range of enforcement tools are available to the regulator, to encourage and support improved compliance with the regime. Prosecution is not the only enforcement mechanism at the top of the enforcement pyramid. There is also provision for NOPSEMA to withdraw acceptance of a permissioning document (which means that the titleholder/operator cannot legally continue to undertake operations), or for the Joint Authority to decide not to renew or to cancel a title.

The department is aware of claims made by the Victorian Government through their submission and WorkSafe Victoria's presentation at the Melbourne 11 July 2018 hearing that the penalty provisions under the OPGGS regime are significantly lower than under the model WHS and Victorian OHS regimes.

The OPGGS penalties are framed in accordance with the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The OPGGS regime's penalty units for a breach of primary WHS duties, with a fault element of recklessness or negligence, are higher than both the model WHS laws and the Victorian OHS Act. Furthermore, the penalty for recklessness under the OPGGS regime is more than double the amount imposed by the model WHS and Victorian OHS laws, with the exception of the penalty for a body corporate under the model WHS Act (compared to which the penalty in the OPGGS regime is still higher).

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. 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.

According to the Victorian Government submission, under the Victorian OHS Act, the maximum penalty is 1800 penalty units (\$285,426) for an individual and 9000 penalty units (\$1,427,130) for a body corporate.

The department may consider a future review of the penalty regime under the OPGGS Act on advice from the Attorney-General's Department or other relevant stakeholders.