



Australian Government

Department of Jobs and Small Business

**SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

**INQUIRY INTO THE WORK HEALTH AND SAFETY OF WORKERS IN THE
OFFSHORE PETROLEUM INDUSTRY**

**SUBMISSION OF THE
DEPARTMENT OF JOBS AND SMALL BUSINESS**

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Introduction

1. The Department of Jobs and Small Business (the Department) welcomes the opportunity to make a submission to the Senate Standing Committee on Education and Employment inquiry into the work health and safety (WHS) of workers in the offshore petroleum industry.
2. The Department has responsibility for administering the *Work Health and Safety Act 2011* (Cth) (the WHS Act), which is the principal Commonwealth Act for health and safety. The Department is also responsible for administering the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (the OHS(MI) Act), which is an industry-specific health and safety Act.
3. The Department also has policy responsibility for WHS, including harmonisation of WHS laws which is underpinned by the 2008 *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (Inter-Governmental Agreement).

Purpose of this Submission

4. In view of the Department's responsibilities, this submission covers the terms of reference relating to the scope and necessity for amending and updating any legislative inconsistencies in the relevant WHS scheme, including providing for appropriate consistency between the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGGS Act) and the WHS Act.

Framework of Australian work health and safety laws

General WHS laws

5. Australia's WHS laws have historically been based on the United Kingdom's health and safety laws which are often referred to as Robens-style legislation.¹ 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.² The principal Act is supported by regulations which set out detailed requirements to support the general duties in the Act and other procedural or administrative requirements.
6. The Robens principles also include a 'more effectively self-regulating system' which requires the participation and representation of employees in health and safety matters.
7. The WHS Act is Robens-style and is the principal WHS Act in the Commonwealth covering all industries and hazards within its jurisdiction unless specifically excluded.
8. Like the Commonwealth, each Australian state and territory also has a principal WHS Act.

Industry-specific WHS law

9. Alongside the principal WHS Acts in the Commonwealth and each state and territory, there are a number of separate and specific health and safety Acts that have been developed to deal with particular industries or hazards including the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act) and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGGS Act).

¹ For a detailed discussion of the 1972 Robens Report (*Report of the Committee on Safety and Health at Work*) and its influence on Australian WHS laws refer to Richard Johnstone and Michael Tooma's *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, 2012).

² Ibid.

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10. In general, industry-specific health or safety laws usually apply to higher-risk industries, where the hazards present may require a more prescriptive or tailored form of regulation. Examples of industry-specific health and safety Acts are shown below.

Industry Sector	Examples
Aviation	<ul style="list-style-type: none"> • <i>Civil Aviation Act 1988</i> (Cth)
Electrical	<ul style="list-style-type: none"> • State and territory electrical safety laws
Mining	<ul style="list-style-type: none"> • State and territory mines safety laws • <i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (Cth)
Heavy Transport (Road)	<ul style="list-style-type: none"> • <i>Heavy Vehicle National Law Act 2012</i> (Qld)* and complementary state/territory laws
Rail	<ul style="list-style-type: none"> • <i>Rail Safety National Law (South Australia) Act 2012</i> (SA)* and complementary state/territory laws
Maritime	<ul style="list-style-type: none"> • <i>Occupational Health and Safety Act (Maritime Industry) 1993</i> (Cth) • <i>Marine Safety (Domestic Commercial Vessels) National Law Act 2012</i> (Cth) and complementary state/territory laws • <i>Navigation Act 2012</i> (Cth)
Agriculture	<ul style="list-style-type: none"> • <i>Agricultural and Veterinary Chemicals Act 1994</i> (Cth) • <i>Agricultural and Veterinary Chemicals Code Act 1994</i> (Cth)
Radiation and nuclear	<ul style="list-style-type: none"> • <i>Australian Radiation Protection and Nuclear Safety Act 1998</i> (Cth) • <i>Industrial Chemicals (Notification and Assessment) Act 1989</i> (Cth)

* 'Home' state, also where national regulatory body is headquartered

11. These industry-specific health and safety Acts may operate concurrently, or to the exclusion of the principal WHS Act.

Harmonisation of WHS laws

12. In July 2008, the Commonwealth, state and territory governments of Australia committed through an Inter-Governmental Agreement to harmonise their WHS regulation through the adoption and implementation of model WHS laws by 1 January 2012.
13. The *National Review into Model Occupational Health and Safety Laws* (the OHS Review) was conducted in 2009 to make recommendations on the optimal structure and content of a model principal WHS Act that was capable of being adopted in all jurisdictions.
14. Safe Work Australia developed a single set of model WHS laws to be implemented across Australia. The model WHS laws are comprised of a model principal act, supported by model regulations and model codes of practice, and complemented by a nationally consistent approach to compliance and enforcement.
15. For the model WHS laws to become legally binding, the Commonwealth, states and territories must separately implement them as their own laws. All Australian jurisdictions except Victoria and Western Australia have implemented the model WHS laws. Victoria has similar laws in

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place and Western Australia is consulting stakeholders with a view to aligning its laws with the model WHS laws.

16. The WHS Act reflects the Commonwealth's implementation of the model WHS Act.
17. The second report of the OHS Review 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.³
18. The OHS Review found that the majority of industry-specific health and safety Acts contained similar Robens-style principles to that of the principal WHS Acts, in that they place duties on certain parties to eliminate or minimise hazards and risks. Stakeholders 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.
19. The responsible ministers agreed with the recommendation 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.⁴

Harmonisation of health and safety laws in the maritime industry: OHS (MI) Act

20. The OHS (MI) Act provides specific health and safety regulation for a small defined 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* (Cth) (the Commonwealth's previous principal WHS Act).
21. Maritime industry employers 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. The Seacare Authority's 2016-17 Annual Report noted there were 4,596 seafarers covered by the Seacare scheme, working on 188 vessels, of which 115 vessels were from the offshore industry.
22. In 2012, the Australian Government commissioned an independent *Review of the Seacare Scheme* and the laws supporting that scheme (the Seacare Review).⁵ 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.

³ *National Review into Model Occupational Health and Safety Laws*, Second Report to the Workplace Relations Ministers' Council, Commonwealth of Australia, January 2009. Chapter 20 of the National Review provides extensive detail on the scope of the proposed model work health and safety laws.

⁴ Recommendation 76. A copy of the 2009 report is available on the Department's website

<https://www.jobs.gov.au/occupational-health-and-safety-harmonisation>

This recommendation was agreed to by the former Workplace Relations Ministers' Council, along with the majority of the other recommendations of the review. The government's response to the review is available at <https://www.safeworkaustralia.gov.au/doc/wrmc-response-recommendations-national-review-model-ohs-laws>

⁵ *Review of the Seacare Scheme*, <https://www.jobs.gov.au/seafarers-rehabilitation-and-compensation-act-review>, March 2013.

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23. Following further analysis and consultation by the Department with industry and employee representatives, the Government determined that retaining industry specific health and safety laws for the small section of the maritime industry was unnecessary.
24. The Seafarers and Other Legislation Amendment Bill 2016 (the Bill) currently before the Parliament would repeal the OHS(MI) Act and extend the 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, and to develop codes of practice outside of the process agreed to by Australian governments under the IGA.
25. Codes of practice and further regulation will be developed in direct consultation with industry and employee representatives. AMSA will retain its current responsibility for enforcing WHS laws for vessels within the Seacare scheme. Specific arrangements for workers' compensation will also be retained.
26. Along with ensuring the laws do not once again become out of date, the benefits of alignment include:
 - AMSA will benefit from being able to draw on the resources, expertise and experience of other WHS regulators who apply similar laws and have equivalent practices
 - resources can be used more efficiently (for example, in relation to information and education activities)
 - accountability and performance measurements would be improved by enabling valid comparisons between safety outcomes, and
 - more consistent jurisprudence would develop.
27. The Bill also seeks to clarify the coverage of the WHS Act, removing uncertainty about the application of the OHS(MI) Act to this section of the maritime industry and the jurisdiction of AMSA and the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).
28. The committee considered the Bill in its report of 7 February 2017 and recommended the Bill be passed along with the rest of the legislative reform package for the Seacare scheme.

Interaction of the OHS (MI) and OPGGS Acts

29. The following information provides a brief explanation of the interaction between the OHS(MI) and OPGGS Acts to assist the Committee.
30. If the vessel is a 'facility' under the OPGGS Act, then the vessel will be exclusively subject to the WHS regime prescribed by that Act. The OHS(MI) Act does not apply to a structure or vessel to which the OPGGS Act applies. Also, principal Commonwealth, state and territory WHS Acts will not apply. 'Facilities' include vessels undertaking certain offshore petroleum operations while they stationary and are not in 'navigable form'. When these vessels move (which they may intermittently do to avoid bad weather or for repairs) the OHS(MI) Act will apply.
31. This position is maintained by the Seafarers Amendment Bill, but the Bill will remove the ongoing need to reference the repealed Navigation Act 1912, resolving longstanding jurisdictional uncertainty whether section 2 of the Navigation Act must be considered in determining whether a ship is a 'prescribed ship' for the purpose of the OHS(MI) Act. The Department notes that conflicting interpretations of the OHS(MI) Act have resulted in uncertainty as to whether AMSA's jurisdiction extends to certain vessels under the Act that the

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Department considers are within the Act's coverage. This issue is dealt with in some detail at 2.44 -2.45 of the Seacare Review Report.

32. Within this jurisdictional environment, the Department works with NOPSEMA, AMSA and their portfolio departments, to ensure that appropriate health and safety standards are in place.

The OPGGS Act framework

33. While the Department encourages harmonisation of health and safety laws, it acknowledges that there can be an objective need for tailored arrangements in specialised, high-risk industries, such as the offshore petroleum industry. It supports the decision made by the relevant minister that separate and specific health and safety laws for particular high risk industries should continue where they have been objectively justified.
34. The offshore petroleum and gas industry presents particular challenges for ensuring the health and safety of its workforce. Safety reports from incidents in the offshore industry, such as the 1988 *Piper Alpha* disaster in the United Kingdom, have pointed to the unique risks in the industry, both to the environment and to its workforce. Those reports have led to the establishment of dedicated regulators, such as NOPSEMA, which assess operator-led safety cases and enforce industry specific, performance-based legislation.
35. NOPSEMA's establishment and performance have been the subject of numerous reviews. The 2008 *Review of the National Offshore Petroleum Safety Authority Operational Activities* found that the 'regulation of health and safety in the offshore petroleum industry has successfully been made less complicated by the establishment of the single regulator to ensure appropriate, effective and cost efficient regulation of the offshore petroleum industry'.
36. The 2009 *Better Practice and the Effectiveness of the National Offshore Petroleum Safety Authority* report confirmed that NOPSEMA and its legislative framework 'should apply to safety and integrity for all offshore facilities and pipelines to minimise the type of unnecessary interfaces that can lead to safety issues falling between stools'.
37. The latest review, the 2015 *Operational Review*, found that NOPSEMA 'has been effective in bringing improvements to occupational health and safety'. NOPSEMA and the OPGGS Act legislative framework have also been widely supported by industry and experts since they were established.
38. In many respects, Schedule 3 of the OPGGS Act is consistent with the model WHS laws. It follows the same risk management approach to ensuring health and safety in the workplace and imposes a duty of care on a range of workplace parties. There are also clear consultation provisions to ensure a cooperative approach to managing the industry's specific risks and hazards, with worker representation key to achieving better safety outcomes. Within these broad areas of consistency, there may be scope for further harmonisation, which would require further in-depth analysis and stakeholder engagement.

Conclusion

39. The Department is of the view that harmonising WHS laws and the health and safety laws that cover the offshore sector, to which the OPGGS Act applies, should only occur after a careful analysis of any differences and with regard to the historical and established safety principles currently operating effectively in the offshore industry. Where these principles are not

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disturbed, we would support harmonisation with the goal of streamlining, avoiding duplication, and effective application of health and safety laws.

40. The Department continues to monitor for opportunities to further harmonise Australia's health and safety laws where there is a clear case that harmonisation will better protect the health and safety of workers, improve safety outcomes in the workplace, reduce compliance costs for business, and improve efficiency for regulatory agencies.