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Mr Peter Holden
General Counsel
ActewAGL
40 Bunda Street
Canberra ACT 2600



Norton Rose Fulbright Australia
ABN 32 720 868 049
Level 18, Grosvenor Place
225 George Street
SYDNEY NSW 2000
AUSTRALIA

Tel +61 2 9330 8000
Fax +61 2 9330 8111
GPO Box 3872, Sydney NSW 2001
DX 368 Sydney
nortonrosefulbright.com

Direct line
+61 2 9330 8108

Email
michael.tooma@nortonrosefulbright.com

Your reference: **Our reference:**
2822018

Dear Peter

Liability of the AER in relation to Draft Determination on the ACT electricity distribution revenue proposal.

- 1 You have sought our advice in relation to the duties of the Australian Energy Regulator (**AER**) under the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) arising from its draft determination of the ACT electricity distribution revenue proposal for the 2014-2019 period (**Draft Determination**).

BACKGROUND AND SCOPE

- 2 The AER is currently considering revenue proposals put to it by ActewAGL for the 2014-19 period. In submitting revenue proposals to the AER for determination, ActewAGL is required to include the proposed operating expenditure that they consider is required to achieve a number of objectives, which includes amongst others, maintaining the safety of the distribution system (**Operating Expenditure Objectives**).
- 3 The AER must accept these forecasts, provided certain criteria are met, which includes, for example, that it reasonably reflects the costs that a prudent operator would require to achieve the Operating Expenditure Objectives. As you are aware, the AER's role is to determine the maximum allowable revenue for ActewAGL and the operating expenditure comprises one component of that calculation.
- 4 The AER's Draft Determination does not accept ActewAGL's proposed total forecast operating expenditure and instead allows for a forecast operating expenditure that is 41.9% less than ActewAGL's proposal.
- 5 We are instructed that if the operating expenditure allowed for in the Draft Determination is reflected in the AER's Final Determination, this will affect ActewAGL's ability to operate safely and maintain the electricity
- 6 You have sought our advice whether the AER has any obligation under the WHS Act which would preclude it from making a determination which would impeded ActewAGL's ability to operate safety.

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DUTIES OF THE AER UNDER THE WHS ACT

- 7 The WHS Act applies to public authorities, if the public authority is conducting a business or undertaking.¹ Significantly, public authorities are defined under the Cth WHS Act to include a body corporate established for a public purpose by or under a law of the Commonwealth.²
- 8 The AER is a body corporate established for a public purpose (specifically, to regulate energy markets and networks under national energy market legislation and rules) under the *Competition and Consumer Act 2010* (Cth).³ The AER is also conducting an undertaking⁴ and, as such, the AER falls within the definition of a 'public authority'.
- 9 As a public authority, the AER will be subject to the duties imposed on PCBU's under the Cth WHS Act, including the primary duty of care. The AER will be required to ensure, so far as is reasonably practicable that the health and safety of **other persons** is not put at risk from work carried out as part of the conduct of the AER's undertaking.⁵
- 10 The consideration and determination of revenue proposals is work carried out as part of the AER's undertaking. As such, the AER is required to ensure, so far as is reasonably practicable, that persons are not put at risk to their health and safety as a result of those decisions. This requires the AER to adopt a risk management approach in its decision making.
- 11 The AER's Determination neither requires ActewAGL to only spend the operating expenditure applied by it in its calculations nor specifies how ActewAGL allocates its operating expenditure between safety and other expenditure.
- 12 However, if the AER is on notice of the safety impacts of the operating expenditure provided for in the Draft Determination (for example, by the Revised Regulatory Proposals) and its final determination still allows for the same significantly reduced operating expenditure irrespective of these safety impacts, **it will be** in breach of the primary duty of care under the WHS Act (section 19(2)). The enforcement of the duties is entrusted to the relevant regulator (in this case Comcare). It is within the discretion of the regulator as to whether a breach will be prosecuted, a decision which is not reviewable.
- 13 While the application of the second limb of the primary duty of care in this (or an analogous policy) context has not yet been considered by the courts, the recent Report of Royal Commission into the Home Insulation Program (HIP) (**Royal Commission**) provides some useful guidance.
- 14 In particular, the Royal Commission considered whether the Australian Government **should** have considered the risks to health and safety in relation to the HIP (or whether those risks 'belonged' only to the HIP installers, contractors and the State and Territory OHS regulators)⁶ and found:

¹ See section 12 of the WHS Act.

² See section 4 of the WHS Act.

³ See section 44AE of the *Competition and Consumer Act 2010* (Cth).

⁴ The term 'undertaking' is not defined under the Cth WHS Act. However, guidance issued by Safe Work Australia in its Interpretive Guideline on the meaning of 'Person Conducting a Business or Undertaking' provides that an undertaking "may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature."

⁵ See section 19(2) of the WHS Act

⁶ In this regard, it is worth noting that there were a number of prosecutions commenced against employers under State and Territory occupational health and safety legislation in relation to the four fatalities arising from the HIP. However, as you know, the Cth WHS Act commenced on 1 January 2012. That is, well after the four fatalities arising from the HIP. At that time, the Commonwealth was subject to the now repealed *Occupational Health and Safety Act 1991* (Cth), which did not contain an equivalent duty to section 19(2) of the Cth WHS Act. Rather, the Commonwealth's duty to 'other person' was limited to "persons at or near a workplace under the employer's control". This is not the case with the 'primary duty to other persons' under the Cth WHS Act.

- 15 *There was much debate about whether workplace health and safety issues were a matter that was of any concern to the Australian Government, or whether it was more properly the concern of the States and Territories. It was said, by a number of federal public servants, that the Australian Government had no regulatory power in the field of workplace safety, and therefore it was not a risk that the Australian Government could control. In my view, this attitude is deplorable.*⁷
- 16 Significantly, the Royal Commission made a number of recommendations designed to avoid the systemic failures that arose during the HIP (and that the Royal Commission found were capable of repetition in different circumstances). On the issue of 'risk', the Royal Commission recommended:
- 17 ***"Risk cannot be abrogated – Government must recognise that as much as it might seek to do so, risk cannot be abrogated. The responsibility of Government is to care for its citizens and to exercise care and diligence to do everything reasonable to ensure citizens are not placed in danger by its actions, particularly risk of death and serious injury."***⁸
- 18 While these recommendations would not be binding precedent on a court considering a breach of the WHS Act, it does provide useful guidance (and some support) for the interpretation that the WHS Act imposes duties on the AER in making revenue determinations.⁹ In fact, it is difficult to see how a different conclusion can be reached from a plain reading of the provisions, particularly having regard to the objects of the WHS Act. Indeed, the NER itself requires the AER to set the operating expenditure required to achieve, amongst other things, the safety of the distribution system.
- 19 Crucial to this conclusion is for the AER to be put on notice of the specific health and safety impacts of its decision **AND** making the decision irrespective of these impacts. This cannot be set out in general terms rather through specific assessments being made of the impacts. That is, what safety impacts such a determination will have on, for example, pole inspection frequency, auditing budgets, preventative maintenance and training budgets etc.

DUTIES OF THE AER'S OFFICER UNDER THE WHS ACT

- 20 The WHS Act provides that it applies to persons that are 'officers' of public authorities.¹⁰ As the AER is a public authority for the purposes of the WHS Act, 'officers'¹¹ of the AER will therefore be subject to the officer's duty to exercise *due diligence* to ensure that the **AER complies with its obligations** under the WHS Act.
- 21 *Due diligence* is defined in the WHS Act – relevantly, officers of the AER must be able to demonstrate that they have taken reasonable steps to, amongst other things ensure that the AER has, and implements processes for complying with its duties and obligations under the WHS Act.

⁷ Ian Hanger QC AM, *Report of the Royal Commission into the Home Insulation Program* (Commonwealth of Australia, 2014) [1.1.17].

<<http://www.homeinsulationroyalcommission.gov.au/Documentation/Documents/ReportoftheRoyalCommissionintotheHomeInsulationProgram.pdf>>

⁸ Ian Hanger QC AM, *Report of the Royal Commission into the Home Insulation Program* (Commonwealth of Australia, 2014) [14.7.3.2]

<<http://www.homeinsulationroyalcommission.gov.au/Documentation/Documents/ReportoftheRoyalCommissionintotheHomeInsulationProgram.pdf>>

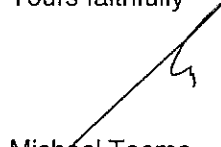
⁹ The concept of considering the safety impacts of revenue decisions is not novel. In the trucking industry, a seminal report was prepared linking the rates of pay of truck drivers to safety and the Hon Lance Wright QC and Professor Michael Quinlan concluded that the "*overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices.*"

¹⁰ See section 12 of the Cth WHS Act.

¹¹ An officer of a public authority is defined as "a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority..." This is likely to capture persons such as the AER Chief Executive Officer.

- 22 In our view, if the AER makes distribution determinations that allow for significantly less operating expenditure than it has been reasonably advised is necessary to safely maintain the distribution system **AND** its officers have not taken reasonable steps to ensure processes for legal compliance (under Element 5), then its officers will be in breach of their personal duty under the WHS Act. This will particularly be the case if the officers are on notice of the potential breach by the AER.

Yours faithfully



Michael Tooma
Partner - Head of Occupational Health Safety and Security
Norton Rose Fulbright Australia