Australian Government Solicitor
50 Blackall Street Barton ACT 2600
Locked Bag 7246 Canberra Mail Centre ACT 2610
T 02 6253 7000 DX 5678 Canberra
www.ags.gov.au

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ADVICE

DEFENCE FUEL FARM AUDIT OUTCOME MANAGEMENT

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To:
Mr Mark Turner
Director Estate Engineering Policy
Department of Defence
PO Box 7925
CANBERRA BC 2610

Leah Edwards
Senior General Counsel
T 02 6253 7090 F 02 6253 7304
M 0409 271 351
leah.edwards@ags.gov.au

Bianca Wellington
Counsel
T 02 6253 7429 F 02 6253 7304
bianca.wellington@ags.gov.au

Grace Ng
Counsel
T 02 6253 7291 F 02 6253 7304
grace.ng@ags.gov.au

File reference: 13013305

Office of General Counsel

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ADVICE

DEFENCE FUEL FARM AUDIT OUTCOME MANAGEMENT

1. ADVICE

1.1. The following advice discusses the application to the Commonwealth, its officials and contractors of State and Territory laws that regulate the provision of electricity, the performance of electrical work, and the use of electrical equipment and installations (State and Territory electrical safety laws). The advice also discusses the interaction between the obligations imposed on the Commonwealth and its officials under State and Territory electrical safety laws and the duties of the Commonwealth and its officials under the *Work Health and Safety Act 2011* (Cth) (the WHS Act).

1.2. Appendix 1 contains our detailed advice on the WHS Act issues relating to electrical safety at Defence bases. Appendix 2 contains our detailed advice on the application of NSW electrical safety laws to the Commonwealth. Appendix 3 contains our detailed advice on the application of the electrical safety laws of the other jurisdictions to the Commonwealth.

Summary of advice

1.3. For the reasons set out below, our recommendation is that Defence comply with the electrical safety laws of all States and Territories.

1.4. We consider that the Commonwealth is bound to comply with the electrical safety laws of New South Wales, Victoria, Queensland, South Australia, Tasmania and the Northern Territory. We confirm that, in our view, there is no inconsistent Commonwealth law that would operate generally to prevent these State and Territory electrical safety laws applying to the Commonwealth.

1.5. The Commonwealth does not appear to be bound to comply with the electrical safety laws of Western Australia and the Australian Capital Territory. However, we consider there are a number of sound practical reasons why the Commonwealth would seek to comply with these laws in any case.

1.6. In our view, the Commonwealth is unlikely to be able to assert that the provisions of the various electrical safety laws we have identified as applying to the Commonwealth infringe its implied constitutional immunity. There may be a contrary argument in relation to the disconnection provisions, but it is not clear a court would accept this argument.

The Commonwealth does not have an absolute right to be supplied with electricity - non-compliance with State and Territory electrical safety laws may give an electricity provider cause to refuse to connect, or to disconnect, electricity supply

1.7. State and Territory electrical safety laws impose obligations on electricity providers. If an electricity provider is not satisfied that an installation at a Defence Base is safe or compliant (eg because it does not comply with the Wiring Rules), the provider has powers, and in some cases, the provider has a duty, to refuse to connect, or to disconnect, electricity supply to the installation. If Defence decides not to comply with the electrical safety laws in a particular jurisdiction, it is possible that non-compliance could lead a provider to decide that the provider is not satisfied with the installation.

1.8. The powers and duties of a provider to refuse to connect, or to disconnect, supply are not affected by who is the consumer of the electricity. So, an electricity provider in Western Australia or the Australian Capital Territory could refuse to connect, or disconnect, power to a Commonwealth installation if the provider is not satisfied with the installation, regardless of the fact that the Commonwealth may not be bound by the electrical safety laws of those jurisdictions.

1.9. A refusal to connect, or a disconnection, by a provider may also occur as a result of a failed inspection by the relevant State or Territory regulator. You have advised that the experience in the Australian Capital Territory is that the Regulator has repeatedly exercised its power not to connect Commonwealth installations until it is satisfied that the installations comply with the requirements of relevant Australian Capital Territory laws.

1.10. Generally speaking, the legislative provisions we have considered do not set out the specific steps Defence must take in relation to its electrical installations and electrical work[1]. What is required or desirable will depend on the particular circumstances. At a general level, we consider that Defence would need to make sure that :

- there is a system in place for ensuring the continuing safe operation of installations e.g. regular checks, reviews and audits
- factors that may compromise safe operation, including installations which do not comply with applicable standards, are identified and remedied at an early stage e.g. through maintenance by appropriately competent persons, replacement of parts as needed
- installations and dangerous areas are clearly marked and visible to those who are in or near them

[1] However, there are some specific requirements - for example, the obligation to ensure that an electrical installation remains connected to the electricity supply only if it is maintained in accordance with the regulations (see s 32 of the *Consumer Safety Act* (NSW) and reg 36 of the *Consumer Safety Regulations* (NSW).

- appropriate training and supervision is provided to those who work with and near electrical installations or perform electrical work, and
- installations are prevented from becoming sources posing fire or electric shock risk.

Voluntary compliance in those jurisdictions where the Commonwealth is not bound may not involve much further work for Defence

1.11. What Defence would need to do in order to comply with the electrical safety laws of each jurisdiction is substantially similar. Defence needs to take steps to ensure that it complies with electrical safety laws in the majority of jurisdictions. Little more may be required in order to also comply with the laws in Western Australia and the Australian Capital Territory. It is our experience that, even if the Commonwealth is not legally bound, as a matter of policy, the Commonwealth often seeks to comply with State and Territory laws where appropriate and practicable.

State and Territory laws are likely to be taken to reflect minimum standards in terms of managing relevant electrical risks for work health and safety purposes

1.12. From a work health and safety perspective, State and Territory laws are likely to be taken to reflect minimum standards in terms of managing relevant electrical risks. If Defence decides not to comply with the electrical safety laws of Western Australia and the Australian Capital Territory, for the purpose of the Commonwealth's health and safety duties, Defence would need to be able establish that it has taken other steps to manage the relevant risks and that Defence considers the other steps it has taken are a better or at least equivalent means by which to manage the relevant risks.

1.13. It seems likely that the knowledge and expertise that Defence would defer to in seeking to establish mechanisms to manage the relevant risks would largely include the same standards that are required by State and Territory electrical safety laws, eg the Wiring Rules. In those circumstances, investing additional time and resources in developing and assessing alternative mechanisms for managing risks may be of limited practical benefit.

Because Defence engages contractors to perform electrical work, the question of compliance with State and Territory laws largely depends on the conduct of those contractors

1.14. You have advised that Defence engages contractors to perform electrical work at its bases. Accordingly, the issue of whether or not 'Commonwealth' electrical work complies with State and Territory laws will largely depend on whether or not contractors, in performing the work, complied with those laws.

1.15. All State and Territory electrical safety laws, in effect, require that electrical work, equipment and installations comply with the AS/NZS 3000 Wiring Rules (the Wiring Rules). The mechanisms for achieving compliance with the Wiring Rules vary

across jurisdictions, but broadly speaking, compliance is usually achieved by requiring those persons performing electrical work to comply with the Wiring Rules.

1.16. We think it is generally reasonable for Defence to rely on its contractors to comply with the Wiring Rules, and so to assume that work performed by contractors complies with the Wiring Rules, unless or until Defence suspects or becomes aware of possible issues or discrepancies. You have advised that Defence's contracts with electrical contractors contain clauses requiring contractors to comply with all relevant laws (which would include State and Territory electrical safety laws) and that Defence requires contractors to certify that their work complies with relevant laws and standards.

1.17. We note that the fact that 'Commonwealth' electrical work was performed by contractors rather than Defence employees or ADF personnel will not affect the question of whether or not that work is compliant with State or Territory laws. However, we think it would probably be a relevant factor if a regulator is considering whether or not to take action in respect of suspected non-compliance.

1.18. We assume that regulators would be more concerned to pursue the persons who actually performed the non-compliant work, ie the contractors. In this context, we note that you are considering whether it might be beneficial to Defence's interests proactively reporting to regulators if you identify non-compliant works, as a show of good faith and to demonstrate Defence's willingness to work with the regulators to manage these issues. We agree that there may be benefits to establishing an early dialogue with regulators, particularly if Defence identifies a pattern of serious non-compliance by a contractor and the contractor fails or refuses to rectify that non-compliance. Early reporting may also be beneficial if Defence has concerns about the potential implications for the Commonwealth if an instance of non-compliance were to be identified by the regulator, eg after it has caused an incident. However, we note that proactive reporting to State and Territory regulators does not appear to be a legal requirement.[2]

Legal implications of non-compliance potentially broad-ranging

1.19. It is difficult to advise specifically on the legal implications that may flow from non-compliance with State and Territory electrical laws in the abstract. However we recommend that Defence, its officers and employees be mindful of the following possible outcomes:

- criminal and civil liabilities under work health and safety laws and regulations and under the Queensland Electricity Act in the case of Queensland
- disconnection of, or refusal of connection to, electrical supply under the laws of the States and Territories

[2] We assume that Defence would simply seek to have the contractor rectify isolated or minor non-conformances rather than reporting those matters to the regulator.

— tortious liability (e.g. negligence claims) should an accident or incident eventuate as a result of the non-compliance that causes loss or damage.

1.20. Generally speaking, even if the Commonwealth is not liable to be prosecuted for breaches of State and Territory electrical safety laws, individual APS employees, Defence members or contractors may be liable to prosecution for breaches of these laws. However, the provisions of these laws which permit executives of corporations to be prosecuted for breaches by the body corporate are generally not applicable to the Commonwealth and its employees.

Additional obligations: accidents and interaction with officials/regulators[3] or distributors

1.21. In the event of an accident, Defence and Defence employees have various obligations in each of the jurisdictions, including obligations to report an accident to an official/regulator[4] or distributor and to avoid interference with the site of an accident under both the work health and safety laws and electricity laws.[5]

1.22. With respect to interactions with officials and regulators, there are provisions in each jurisdiction's electricity laws making it an offence to obstruct or hinder an official/regulator in the exercise of his or her functions under the electricity legislation. [6] Some jurisdictions also make it an offence to use 'intimidatory language to, or engage in offensive or intimidatory behaviour towards' an enforcement officer or inspector.[7]

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3 Note various jurisdictions use different terms for the individuals or entities performing regulatory functions under electricity legislation, including 'enforcement officer', 'authorised officer', 'official entity' and 'inspector'. For the purposes of this section, we will refer to these individuals and entities as 'officials/regulators'.

4 *Electricity Safety Act 1971* (ACT) *s 32; Electricity (Consumer Safety) Act 2004* (NSW) s 33; *Electricity Reform Act 2000* (NT) s 71; *Electrical Safety Regulations 2002* (Qld) s 196; Electricity Act 1996 (SA) s 63; *Electricity Industry Safety and Administration Act 1997* (Tas) s 72; *Electrical Safety (Installations) Regulations* 2009 (Vic) Reg 256; *Electricity (Licensing) Regulations 1991* (WA) s 63.

5 *Electricity Safety Act 1971*(ACT) *s 35; Electricity (Consumer Safety) Act 2004* (NSW) s 36; *Electricity Reform Act 2000* (NT) s 71(1)(b); *Electrical Safety Regulations 2002* (Qld) s 201; *Electricity Act 1996* (SA) s63(1)(b); *Electricity Industry Safety and Administration Act 1997* (Tas) s 73. Note we have been unable to identify a provision in Victorian law creating such an offence.

6 *Electricity (Consumer Safety) Act 2004* (NSW) ss 40(1)(c); *Electricity Supply Act 1995* (NSW) s 63N(1)(c)*; Electricity Reform Act* (NT) s 101(1); *Electricity Safety Act 2002* (QLD) s 196; *Electricity Act 1994* (QLD) s 236; *Electricity Act 1996* (SA) s 89(1); *Electricity Supply Industry Act 1995* (Tas) s 114(1); *Electricity Safety Act 1998* (Vic) s 138; *Energy Coordination Act 1994* (WA) s 20(1); *Electricity Regulations* 1947 (WA) reg 336(2). Note we have been unable to identify a specific provision in ACT legislation relating to obstructing an official, however, this may result in a contravention of s 48 of the *Electricity Safety Act 1971* (ACT).

7 *Electricity Supply Industry Act 1995* (Tas) s 114(2); *Electricity Act 1996* (SA) s 89(1); *Electricity Reform Act (N*T) s 101(1)

1.23. The electricity laws of each jurisdiction also make it an offence to fail to comply with certain requests for information[8] or to provide false and misleading information to an official/regulator in certain circumstances including:

- in purported compliance with a requirement under the Act[9]
- in answering a question asked by the official/regulator[10]
- in 'furnishing information under' the Act in a material particular[11]
- in stating 'anything' to an official/ regulator in a material particular,[12] or
- in giving information to an official/regulator.[13]

2. WORK HEALTH AND SAFETY - QUESTIONS AND ANSWERS

Work Health and Safety obligations to manage electrical risks on Defence bases, particularly near fuel installations

Q1. *What obligations are imposed on Defence under the* Work Health and Safety Act 2011 *(WHS Act) in relation to electrical risks at Defence bases, particularly where the risks are near to bulk fuel installations (BFIs)*?

A1. There are a range of statutory duties imposed on the Commonwealth under the *Work Health and Safety Act 2011* (WHS Act) which require the Commonwealth to ensure, so far as is reasonably practicable, the health and safety of its workers and any other persons who might be affected by the Commonwealth's activities. These duties are enforceable as criminal offences.

The Commonwealth will owe work health and safety duties to certain 'workers' under s 19(1) of the WHS Act, to all persons who may be at risk from the activities of Defence under s 19(2) of the WHS Act, and to all

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8 *Electricity Safety Act 1971* (ACT) ss 40, 48 (relating to obligation for person to give inspector reasonable help in exercising powers), *Electricity (Consumer Safety) Act 2004* (NSW) ss 40(1)(a); *Electricity Supply Act 1995* (NSW) s 63N(1)(a)*; Electricity Reform Act* (NT) s 81(3); *Electricity Act 1996* (SA) s 73(3); *Electricity Supply Industry Act 1995* (Tas) ss 15, 94; *Electricity Safety Act 1998* (Vic) s 134(4); *Energy Coordination Act 1994* (WA) s 22(1). Note we have been unable to identify a general provision making it an offence to fail to comply with an official/regulator's request for information in Queensland legislation. However, non-compliance with such a request may result in a contravention of s 144(5) of the *Electricity Safety Act 2002* (QLD). Note that s 158 of the *Electricity Safety Act 2002* (QLD) makes it an offence to fail to comply with a request to produce documents.

9 *Electricity (Consumer Safety) Act 2004* (NSW) ss 40(1)(b); Electricity Supply Act 1995 (NSW) s 63N(1)(b); *Energy Coordination Act 1994* (WA) s 22;

10 *Electricity (Consumer Safety) Act 2004* (NSW) ss 40(1)(b); Electricity Supply Act 1995 (NSW) s 63N(1)(b)*;*

11 *Electricity Safety Act 1998* (Vic) s 135; *Electricity Reform Act* (NT) s 102.

12 *Electricity Safety Act 2002* (QLD) s 194; *Electricity Act 1994* (QLD) s 238.

13 *Electricity Supply Industry Act 1995* (Tas) s 112. Note that there is no specific provision in the ACT electricity law relating to providing false and misleading information, however, doing so may result in a contravention of s 48 of the *Electricity Safety Act 1971* (ACT).

persons at workplaces controlled by Defence under ss 20 and 21 of the WHS Act. We think that the Commonwealth may also owe an 'upstream' duty under s 26 of the WHS Act to the extent that the Commonwealth, as represented by Defence, 'commissions' any plant or structure that has been installed or constructed by, for example, a contractor.

In practice, it is likely that the 'reasonably practicable' steps required to be taken by the Commonwealth under ss 20, 21 and 26 would be the same or similar to the 'reasonably practicable' steps that the Commonwealth would be required to take under the primary health and safety duties set out in s 19 of the Act. Therefore, in practice, there may be little difference between what is required of the Commonwealth in order to comply with s 19 and what is required in order to comply with the Commonwealth's other duties under the WHS Act.

There are also further and more specific obligations under the *Work Health and Safety Regulations 2011* (WHS Regulations) that the Commonwealth must comply with. For example, the Commonwealth has specific obligations under the WHS Regulations in relation to electrical risks and potential ignition sources at Defence workplaces, including:

– to disconnect unsafe electrical equipment (reg 149)

– to manage electrical risks (reg 147)

– to manage risks associated with an ignition source in a hazardous atmosphere (reg 52).

In practical terms, complying with these duties will require Defence to take into account the risks identified through your audits and related risk assessments and to determine how best to eliminate or minimise the identified risks.

There is a Code Of Practice For 'Managing Electrical Risks In The Workplace'. This Code of Practice sets out how a person conducting a business or undertaking (PCBU) can comply with their duties under the WHS Act and WHS Regulations to manage electrical risks. Compliance with this Code of Practice is not mandated under the WHS Act or the WHS Regulations, but the Code of Practice would be highly relevant and highly persuasive on the issue of what steps could be considered reasonably practicable to manage electrical risks in the event of any prosecution for an alleged contravention of the WHS Act, or in the course of any inspection or investigation of an alleged contravention of the WHS Act by Comcare.

The Commonwealth also has obligations under the WHS Act to consult, co-operate and co-ordinate on work health and safety matters with workers and other duty holders. For example, if Defence engages a contractor to perform electrical work at a base, s 12B of the WHS Act would require Defence, on behalf of the Commonwealth, to consult, co-operate and co-ordinate about risk management with the contractor and the regulator.

Q2. What obligations are imposed on persons who are 'officers' under the WHS Act and what would such persons need to do to discharge their obligations in relation to the operation of BFIs?

A2. Some senior officials in Defence will have a personal duty as 'officers' to exercise due diligence to ensure that the Commonwealth meets its duties and obligations under the WHS Act and WHS Regulations. This duty is imposed personally on individual officers and can be enforced personally against each officer as a criminal offence. An officer faces a possible penalty of up to $600,000 and/or 5 years imprisonment. Section 27(5) sets out what 'due diligence' requires of officers (see the discussion at paragraphs 1.97 to 1.112 below) and for example, requires that officers gain an understanding of the nature of the operations of the undertaking and generally of hazards and risks associated with those operations. This would include the hazards and risks associated with the operation of BFIs.

3. BACKGROUND

3.1. Following 2 separate audits, Defence has identified a number of risks to health and safety arising from concerns about the safety and compliance of some electrical equipment/work/installations at Defence bases, particularly because of the proximity of some of the non-compliant and potentially unsafe equipment/work/installations to BFIs on the relevant bases, eg RAAF Base Williamtown. The Commonwealth must manage the risks that you have identified.

3.2. In relation to the management of these risks, you have request our advice about:

- Defence's work health and safety duties and obligations under the WHS Act
- the duty of 'officers' in Defence under the WHS Act, and
- what is required of the Commonwealth, and of 'officers' in Defence, to discharge those duties.

3.3. We note that Defence has commissioned 2 audits in relation to health and safety risks at particular BFIs. Those audits covered the variety of health and safety risks that might arise at and around those installations. This advice relates only to electrical risks.

1. APPENDIX ONE

WHS Act

1.1. The WHS Act imposes health and safety duties on the following persons:

- persons conducting a business or undertaking (as defined)
- officers (as defined)
- workers (as defined)
- other persons at a workplace.

Duties of PCBUs

1.2. The persons capable of being a PCBU under the WHS Act are:

- the Commonwealth (as defined)
- public authorities (as defined)
- non-Commonwealth licensees (as defined).

1.3. 'Commonwealth' is defined for the purposes of the WHS Act as including:

> any person or body, other than a public authority, that is an agency within the meaning of the *Financial Management and Accountability Act 1997*.

1.4. The Department of Defence is an agency within the meaning of the FMA Act, and as such would form part of the 'Commonwealth' for the purposes of the WHS Act (see definition of 'agency' in s 5 of the FMA Act).

1.5. The ADF is not an FMA Act agency, but s 7(2A)(c) of the WHS Act deems members of the ADF to be carrying out work for a business or undertaking conducted by the Commonwealth when performing their functions as ADF members.

1.6. We think it more likely that activities of Defence would be an undertaking, rather than a business. However, we do not think anything turns on the difference, so we have not considered this issue in depth.

Duties of the Commonwealth as a PCBU

1.7. As a PCBU, the Commonwealth has a range of duties and obligations under the WHS Act.

1.8. Under the WHS Act, a PCBU owes primary health and safety duties to 'workers' and 'other persons' (ss 19(1) and (2)). A PCBU may also owe a number of further duties or 'upstream' duties under ss 20-26 of the WHS Act.

1.9. In the current context, we consider that the Commonwealth clearly owes the following duties under the WHS Act:

a) primary health and safety duties to 'workers' and 'other persons' (ss 19(1) and (2)); and

b) further duties as the person with management or control over Defence bases and over fixtures, fittings or plant at those bases (ss 20 and 21).

1.10. We think that the Commonwealth may also owe an 'upstream' duty under s 26 of the WHS Act to the extent that the Commonwealth, as represented by Defence, 'commissions' any plant or structure that has been installed or constructed by, eg, a contractor.

Primary duties

1.11. The primary work health and safety duties for PCBUs are set out in ss 19(1) and 19(2) of the WHS Act.

Primary duty to workers

1.12. Section 19(1) of the WHS Act outlines the primary duty to 'workers'. It provides as follows:

> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
>
> (a) workers engaged, or caused to be engaged by the person; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the person;
>
> while the workers are at work in the business or undertaking.

1.13. We note that, unlike the former *Occupational Health and Safety Act 1991*, the duty owed by a PCBU to workers is based on the concept of 'work' and not 'employment'.

1.14. The WHS Act introduces a broad concept of a 'worker', which is defined in s 7 in the following terms:

> (1) A person is a ***worker*** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
>
> (a) an employee; or
>
> (b) a contractor or subcontractor; or
>
> (c) an employee of a contractor or subcontractor; or
>
> (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
>
> (e) an outworker; or
>
> (f) an apprentice or trainee; or

(g) a student gaining work experience; or

(h) a volunteer; or

(i) a person of a prescribed class.

1.15. However, the fact that a person is a 'worker' is not determinative of whether the Commonwealth would owe that person a duty under s 19(1) of the WHS Act. This is because the duty to workers under s 19(1) only applies to those classes of workers expressly listed in ss 19(1)(a) and 19(1)(b), ie if the worker is:

- engaged, or 'caused to be engaged' by the Commonwealth; or
- influenced or directed by the Commonwealth in relation to their activities carrying out work.

1.16. In the context of the undertaking of Defence, there are a range of persons who may be workers of the Commonwealth and to whom the Commonwealth will owe a duty under s 19(1) of the WHS Act. That is, there are a range of persons who may, at a point in time, meet the 4 criteria listed above.

1.17. It is clear that the APS employees who are engaged by the Commonwealth to perform work in Defence are owed a duty by the Commonwealth as 'workers' for the purposes of s 19(1) of the WHS Act. Similarly, we think it is clear that members of the ADF are owed a duty by the Commonwealth under s 19(1) of the WHS Act (and this is made abundantly clear by s 7(2A)(a) of the WHS Act).

1.18. Any other person who is performing work for Defence (eg contractors, employees of contractors, subcontractors, employees of subcontractors, labour-hire workers) may also be owed a duty by the Commonwealth under s 19(1) of the WHS Act if the person is 'engaged', or 'caused to be engaged' by Defence, or is 'influenced' or 'directed' by Defence in relation to their activities carrying out work. We would be happy to advise further about the issues relevant to determining whether a worker is relevantly engaged, caused to be engaged, influenced or directed, by the Commonwealth, if you would like.

1.19. In any case, even if a particular worker is not owed a duty under s 19(1) of the WHS Act, they would at least be owed a duty as 'other persons' under s 19(2). Section 19(2) of the WHS Act provides that a PCBU must 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 business or undertaking. Further, because the Commonwealth is in control of the relevant workplaces and the fixtures, fittings and plant at those workplaces, any worker would also be owed duties under ss 20 and 21 of the WHS Act.

Primary duty to other persons

1.20. In addition to the duty to relevant classes of workers under s 19(1) of the WHS Act, s 19(2) also requires the Commonwealth, as a PCBU, 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 its business or undertaking. The expression 'other persons' will include any individual who may be put at risk.

Specific obligations under s 19(3)

1.21. Section 19(3) of the WHS Act also sets out specific obligations that must be satisfied in order to meet the primary duties of care to workers and other persons as set out in ss 19(1) and 19(2), without limitation of the general obligations. A PCBU who owes duties under ss 19(1) and 19(2) must ensure, as far as is reasonably practicable:

a) the provision and maintenance of a work environment without risks to health and safety;

b) the provision and maintenance of safe plant and structures;

c) the provision and maintenance of safe systems of work;

d) the safe use, handling and storage of plant, structures and substances

e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;

f) the provision of 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; and

g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

1.22. We note that most of these examples seem to be more directed toward the duty to workers under s 19(1) than directed toward the duty to other persons.

Further duties

1.23. In our view, in relation to Defence premises, the Commonwealth will also owe duties under ss 20 and 21 of the WHS Act as the Commonwealth is the PCBU with management or control of those workplaces, and with management or control of the fixtures, fittings or plant at those workplaces.

1.24. Workplace is defined in s 8 of the WHS Act as a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. Relevantly, s 8(2)(a) makes clear that 'place' includes a vehicle, vessel, aircraft or other mobile structure.

1.25. Section 20(2) of the WHS Act imposes a duty on a person with management or control of a workplace to ensure, so far as is reasonably practicable, that the

workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.

1.26. Section 21(2) of the WHS Act imposes a duty on a person with management or control of fixtures, fittings or plant at a workplace to ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.

1.27. For the purposes of these duties, 'person with management or control' does not include (see ss 20(1) and 21(1)):

a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or

b) a prescribed person.

Neither of these exceptions are relevant in this context. We note that no PCBUs have been prescribed for the purposes of ss 20(1) and 21(1).

1.28. In practice, it is likely that the 'reasonably practicable' steps required to be taken by the Commonwealth under ss 20 and 21 would be the same or similar to the 'reasonably practicable' steps that the Commonwealth would be required to take under the primary health and safety duties set out in s 19 of the Act. Therefore, in practice, there may be little difference between what is required of the Commonwealth in order to comply with s 19 and what is required in order to comply with the Commonwealth's other duties under the WHS Act.

'Upstream' duties

1.29. In addition to the primary health and safety duties set out in s 19 of the WHS Act, the Act contains further specific duties for PCBUs whose business or undertaking involves specific activities. Relevantly, these specific activities include:

– designing plant, substances or structures (s 22)

– manufacturing plant, substances or structures (s 23)

– importing plant, substances or structures (s 24)

– supplying plant, substances or structures (s 25)

– installing, constructing or commissioning plant or structures (s 26).

1.30. As we understand it, the activities that we are considering in this advice do not involve Defence designing, manufacturing, importing or supplying plant, substances or structures, nor do the activities involve Defence installing or constructing plant or structures. We note that you have specifically advised that all electrical installation work is performed by contractors. However, it is not clear to us whether the activities of Defence may involve 'commissioning' plant or structure that is installed or constructed by, eg, a contractor.

1.31. ‘Plant’ is defined in s 4 of the Act as:

> (a) any machinery, equipment, appliance, container, implement and tool; and
>
> (b) any component of any of those things; and
>
> (c) anything fitted or connected to any of those things.

1.32. ‘Structure’ is defined in s 4 of the Act as anything that is constructed, whether fixed or moveable, temporary or permanent, and includes:

> (a) buildings, masts, towers, framework, pipelines, transport infrastructure and underground works (shafts or tunnels); and
>
> (b) any component of a structure; and
>
> (c) part of a structure.

1.33. 'Commission’ is not defined in the WHS Act. The *Macquarie Dictionary* (online edition) provides a number of definitions of this term. In our view, the meaning appropriate to this context is 'to put in commission' (item 18). Similarly, the noun 'commission' is relevantly defined as 'the condition of anything in active service or use: to be in commission; to be out of commission' (item 7). Therefore, we think that commissioning plant or structure for the purposes of s 26 of the WHS Act means to put plant or structure into active service or use, ie the opposite of 'decommissioning'.

1.34. If the activities of Defence do, in fact, involve 'commissioning' plant or structure that is installed or constructed by, eg, a contractor, s 26 of the WHS Act will require that the Commonwealth, as the PCBU, to ensure, so far as is reasonably practicable, that the way in which the plant or structure is commissioned ensures that the plant or structure is without risks to the health and safety of persons:

> (a) …
>
> (b) who use the plant or structure at a workplace for a purpose for which it was…commissioned; or
>
> (c) who carry out any reasonably foreseeable activity at a workplace in relation to the proper use, decommissioning or dismantling of the plant or demolition or disposal of the structure; or
>
> (d) who are at or in the vicinity of a workplace and whose health or safety may be affected by a use or activity referred to in paragraph (a), (b) or (c).

1.35. Again, in practice, it is likely that the 'reasonably practicable' steps required to be taken by the Commonwealth under s 26 would be the same or similar to the 'reasonably practicable' steps that the Commonwealth would be required to take under the primary health and safety duties set out in s 19 of the Act, and the further health and safety duties set out in ss 20 and 21 of the Act. Therefore, even if the activities of Defence (on behalf of the Commonwealth) do include 'commissioning' plant or structures for the purposes of the duty under s 26 of the WHS Act, in

practice, there may be little difference between what is required of the Commonwealth in order to comply with that duty and what is required in order to comply with its other duties under the WHS Act.

WHS Regulations

1.36. The WHS Act is accompanied by the WHS Regulations. The WHS Regulations total over 600 pages and set out additional and more prescriptive requirements for dealing with health and safety matters in high-risk circumstances and high-risk industries. PCBUs, as well as officers or workers in those PCBUs, that engage in these activities must comply with the WHS Regulations as well as, and as part of, their broader health and safety duties under the WHS Act.

1.37. We have identified a number of regulations which we consider to be particularly relevant in this context.

Regulations 149 - Unsafe electrical equipment

1.38. Regulation 149 of the WHS Regulations provides as follows:

> (1) A person conducting a business or undertaking at a workplace must ensure that any unsafe electrical equipment at the workplace:
>
> (a) is disconnected (or isolated) from its electricity supply; and
>
> (b) once disconnected (or isolated):
>
> (i) is not reconnected until it is repaired or tested and found to be safe; or
>
> (ii) is replaced or permanently removed from use.
>
> Penalty:
>
> (a) In the case of an individual — $3 600.
>
> (b) In the case of a body corporate — $18 000.
>
> *Note* Section 12F of the Act provides that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. The reference in section 12F of the Act includes these Regulations.
>
> (2) For this regulation, electrical equipment or a component of electrical equipment is ***unsafe*** if there are reasonable grounds for believing it to be unsafe.

1.39. 'Electrical equipment' is defined broadly in reg 144 as follows:

> any apparatus, appliance, cable, conductor, fitting, insulator, material, meter or wire that:
>
> (a) is used for controlling, generating, supplying, transforming or transmitting electricity at a voltage greater than extra-low voltage; or
>
> (b) is operated by electricity at a voltage greater than extra-low voltage; or

(c) is part of an electrical installation located in an area in which the atmosphere presents a risk to health and safety from fire or explosion; or

(d) is, or is part of, an active impressed current cathodic protection system within the meaning of AS 2832.1:2004 (Cathodic protection of metals—Pipes and cables).

but does not include any apparatus, appliance, cable, conductor, fitting, insulator, material, meter or wire that is part of a vehicle that is a motor car or motorcycle if:

(a) the equipment is part of a unit of the vehicle that provides propulsion for the vehicle; or

(b) the electricity source for the equipment is a unit of the vehicle that provides propulsion for the vehicle.

1.40. In reg 149, a reference to 'electrical equipment' means electrical equipment that is under a PCBU's management or control (see reg 148). In our view, electrical equipment on Defence bases will generally be considered to be under the management or control of Defence.

1.41. Accordingly we think that reg 149 will generally require Defence to ensure that any unsafe electrical equipment at Defence bases:

(a) is disconnected (or isolated) from its electricity supply; and

(b) once disconnected (or isolated):

(i) is not reconnected until it is repaired or tested and found to be safe; or

(ii) is replaced or permanently removed from use.

1.42. It is not clear from reg 149 when a person might be expected to have reasonable grounds for believing that electrical equipment or a component of electrical equipment is 'unsafe', or what is meant by 'unsafe' in this context. The reference to the possibility of 'repairing' unsafe equipment might be considered an indication that this regulation is essentially concerned with the physical state of electrical equipment, and whether it is unsafe to use the equipment while it is in that state. However, there is a possible broader interpretation that equipment might be considered to be 'unsafe' because of the circumstances and context in which it is used. For example, if equipment is used in a hazardous area when it is not certified for use in a hazardous area, it is possible that may be grounds for considering that the equipment is unsafe even if the equipment is in good physical state and works as intended.

1.43. In our view, the terms of the definition of 'electrical equipment' in reg 144, in particular paragraph (c) of that definition which refers to equipment that 'is part of an electrical installation located in an area in which the atmosphere presents a risk to health and safety from fire or explosion', suggests that the context in which equipment is intended to operate will be a relevant consideration for reg 149 (and

the rest of Part 4.7 of the WHS Regulations). Accordingly, we think the broader interpretation that equipment might be considered 'unsafe' because it is used in a context or for a purpose that it should not be used in or for, even if the equipment itself is in good physical state and works as intended.

1.44. We also think that a court would prefer a broad interpretation of when equipment might be considered to be 'unsafe', to give the Act and Regulations the broadest possible application, taking into account the object and purpose of the WHS Act, to protect health and safety. The effect of the broad interpretation in this context would be to, as much as possible, require that any PCBU who has management or control of electrical equipment, and so may be in a position to influence health and safety risks arising from the use of such equipment, is obliged to do so.

1.45. The penalty if the Commonwealth was found to have contravened this obligation could be $18,000.

1.46. As discussed in detail below, s 12D(1) of the WHS Act makes clear that Defence would not be obliged to perform an act or refrain from performing an act that would, or could reasonably be expected to, be prejudicial to Australia's defence. However, we doubt whether disconnecting unsafe electrical equipment would satisfy this threshold, at least not in all circumstances. In our view, it would depend on what consequences would flow from the disconnection and its potential to impact on Australia's defence.

Regulation 355 - Specific control — fire and explosion

1.47. Regulation 355 of the WHS Regulations provides as follows:

> A person conducting a business or undertaking at a workplace must, if there is a possibility of fire or explosion in a hazardous area being caused by an ignition source being introduced into the area, ensure that the ignition source is not introduced into the area (from outside or within the space).
>
> Penalty:
>
> (a) In the case of an individual — $6 000.
>
> (b) In the case of a body corporate — $30 000.
>
> *Note* Section 12F of the Act provides that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. The reference in section 12F of the Act includes these Regulations.

1.48. 'Ignition source' is defined in reg 5 as a source of energy capable of igniting flammable or combustible substances.

1.49. 'Hazardous area' is defined in reg 5 as having the same meaning as under:

(a) AS/NZS 60079.10 (Electrical apparatus for explosive gas atmospheres — Classification of hazardous areas); or

(b) AS/NZS 61241.10 (Electrical apparatus for use in the presence of combustible dusts — Classification of areas where combustible dusts may be present).

1.50. You have advised that there are some affected areas on Defence bases that would be considered 'hazardous areas'. Further, as we understand it, some of the electrical risks that have been identified in those areas could probably be considered an 'ignition source'.

1.51. However, reg 355 is expressed to apply in circumstances where an ignition source might be introduced into a hazardous area. As we understand it, even if the electrical risks that have been identified in a hazardous area could be considered an ignition source, those risks already exist in those areas, and would not be being *introduced* to those areas. We do not think that reg 355 would apply in these circumstances. (We note that reg 355 is in slightly different terms to the equivalent regulation that applied under the former *Occupation Health and Safety (Safety Standards) Regulations 1994*. The equivalent regulation, former reg 8.28, simply required an employer to ensure that, as far as practicable, there were no ignition sources in a hazardous area at the workplace, or if that was not practicable, any risk resulting from the ignition source needed to be controlled. There was no reference in former reg 8.28 to an ignition source being *introduced*. In our view, reg 8.28 clearly covered the management of ignition sources that already existed in the hazardous area).

1.52. It is important, however, to make clear that even if reg 355 would not specifically apply to the management of ignition sources that already exist in the hazardous area, the Commonwealth would still not need to take steps to address the risks presented by those ignition sources. The management of such risks would certainly be required in order for the Commonwealth to comply with its health and safety duties under ss 19-21 of the WHS Act.

Regulation 147 - Risk management

1.53. Regulation 147 of the WHS Regulations provides as follows:

> A person conducting a business or undertaking at a workplace must manage risks to health and safety associated with electrical risks at the workplace, in accordance with Part 3.1.
>
> *Example*
>
> Electrical risks associated with the design, construction, installation, protection, maintenance and testing of electrical equipment and electrical installations at a workplace.
>
> *Note* WHS Act — section 19 (see regulation 9).

1.54. 'Electrical risk' is defined in reg 5 of the WHS Regulations as a risk to a person of death, shock or other injury caused directly or indirectly by electricity.

1.55. Regulation 9 of the WHS Regulations provides that, where a note under one of the regulations states ‘WHS Act’, followed by a reference to a section number, the regulation sets out the way in which a person’s duty or obligation under that section of the Act is to be performed in relation to the matters and to the extent set out in the regulation.

1.56. A note under reg 147 makes clear that, in relation to electrical risks, a PCBU's obligation under s 19 is to be performed in accordance with Part 3.1. Part 3.1 sets out a framework for managing risks to health and safety in relevant circumstances as prescribed by the regulations. Relevantly, Part 3.1 requires that any specific requirements under the WHS Regulations for the management of risk be complied with (reg 33), and requires a duty holder, in managing risks to health and safety, to (reg 35):

> (a) eliminate risks to health and safety so far as is reasonably practicable; and
>
> (b) if it is not reasonably practicable to eliminate risks to health and safety — minimise those risks so far as is reasonably practicable.

1.57. As discussed above, what is 'reasonably practicable' is to be determined taking into account and weighing up the relevant factors set out in s 18 of the WHS Act.

Regulation 52 - Ignition sources

1.58. Regulation 52 of the WHS Regulations provides as follows:

> (1) A person conducting a business or undertaking at a workplace must manage risks to health and safety associated with an ignition source in a hazardous atmosphere at the workplace, in accordance with Part 3.1.
>
> *Note* WHS Act — section 19 (see regulation 9).
>
> (2) This regulation does not apply if the ignition source is part of a deliberate process or activity at the workplace.

1.59. Again, 'ignition source' is defined in reg 5 as a source of energy capable of igniting flammable or combustible substances. A 'hazardous atmosphere' is defined in reg 51(2) as follows:

> (2) An atmosphere is a ***hazardous atmosphere*** if:
>
> (a) the atmosphere does not have a safe oxygen level; or
>
> (b) the concentration of oxygen in the atmosphere increases the fire risk; or
>
> (c) the concentration of flammable gas, vapour, mist or fumes exceeds 5% of the LEL for the gas, vapour, mist or fumes; or
>
> (d) combustible dust is present in a quantity and form that would result in a hazardous area.

1.60. This regulation will be relevant if there are electrical risks that could constitute an ignition source in an area that could be considered to be a 'hazardous atmosphere'.

1.61. Again, a note under reg 52 makes clear that, in relation to risks associated with an ignition source in a hazardous atmosphere, a PCBU's obligation under s 19 is to be performed in accordance with Part 3.1.

Code of Practice on Electrical Risks

1.62. We note that the Minister has approved a Code of Practice on ‚Managing Electrical Risks in the Workplace' (see Appendix 4 to the Work Health and Safety Codes of Practice 2012, available at *www.comlaw.gov.au*). This Code of Practice sets out how a PCBU can comply with their duties under the WHS Act and WHS Regulations to manage electrical risks.

1.63. Compliance with this Code of Practice is not mandated under the WHS Act or the WHS Regulations, but the Code of Practice would be highly relevant and highly persuasive on the issue of what steps could be considered reasonably practicable to manage electrical risks in the event of any prosecution for an alleged contravention of the WHS Act, or in the course of any inspection or investigation of an alleged contravention of the WHS Act by Comcare.

1.64. An approved Code of Practice is admissible in court proceedings as evidence of whether or not a duty or obligation under this Act has been complied with. A court may have regard to the Code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the Code relates and rely on the Code in determining what is reasonably practicable in the circumstances to which the Code relates (ss 275(2) and 275(3) of the WHS Act). Approved Codes of Practice may also be referred to by Comcare in provisional improvement notices to PCBUs from Health and Safety Representatives in the workplace, or in improvement or prohibition notices from Comcare inspectors.

1.65. However, this is not to say that the Commonwealth would not be able to demonstrate compliance with its health and safety duties, to the extent that they involve the management of electrical risks, in a manner that is different from a Code of Practice. Section 275(4) of the WHS Act makes clear that it is possible for a PCBU to demonstrate compliance in a manner that is different from a Code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the Code.

Discharging the Commonwealth's health and safety duties

1.66. We must next consider what will be required of the Commonwealth in order to discharge its duties under the WHS Act.

What does it mean to 'ensure health and safety'?

1.67. Section 17 of the WHS Act provides that a duty to ensure health and safety involves:

- eliminating the risks to health and safety, so far as is reasonably practicable; and
- if it is not reasonably practicable to eliminate risks to health and safety, minimising those risks so far as is reasonably practicable.

What is 'reasonably practicable'?

1.68. The duties outlined above apply only so far as is 'reasonable practicable'. What is reasonably practicable will vary depending on the circumstances. Section 18 of the WHS Act sets out what is meant by ‘reasonably practicable’ in relation to a duty to ensure health and safety, for the purposes of the health and safety duties in the Act. Section 18 provides as follows:

> ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:
>
> (a) the likelihood of the hazard or the risk concerned occurring; and
>
> (b) the degree of harm that might result from the hazard or the risk; and
>
> (c) what the person concerned knows, or ought reasonably to know, about:
>
> (i) the hazard or the risk; and
>
> (ii) ways of eliminating or minimising the risk; and
>
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
>
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

There will be other duty holders

1.69. It is important to note that the Commonwealth will not necessarily be the sole PCBU who owes a duty to ensure the health and safety of workers and other persons, so far as is reasonably practicable, at Defence bases. Relevantly, in this context, you have advised that electrical work at Defence bases is performed by contractors. Contractors will also owe health and safety duties under the equivalent State or Territory Work Health and Safety Act, eg the *Work Health and Safety Act 2011* (NSW).

1.70. An electrical contractor in a jurisdiction that has enacted the Model Work Health and Safety Act and Regulations (which is all jurisdictions except Victoria and Western Australia) will have duties and obligations under an equivalent State or Territory Work Health and Safety Act or Regulations to their workers (eg the contractor's employees), and to any other persons that might be put at risk from the electrical work carried out as part of the contractor's business. An electrical contractor may also owe further 'upstream' duties, eg if the contractor installs plant. The fact that a contractor may owe the same or similar duties to the same kinds of persons will not affect the fact that the Commonwealth separately owes health and safety duties to those persons under the WHS Act and Regulations (as outlined above), but it may be relevant to how the Commonwealth can discharge its duties.

1.71. For example, if Defence engages an electrical contractor with sufficient expertise, and takes steps to ensure that the contractor has taken reasonably practicable steps to ensure the health and safety of workers and other persons who may be at risk from their electrical work, there may be nothing else that Defence could reasonably do over and above what the contractor has done. If there is nothing else that Defence could reasonably do, then taking steps to ensure that the contractor managed the risks might be sufficient to discharge the Commonwealth's duties.

1.72. We note that this is not the same as the Commonwealth purporting to 'contract out of' its health and safety duties, which the Commonwealth cannot do. Rather, the reasonably practicable steps that the Commonwealth, through Defence, is taking to manage electrical risks would simply include ensuring that the contractor is managing the relevant risks.

1.73. We think the Commonwealth would actually need to take steps to satisfy itself that the contractor is doing what is reasonably practicable to manage risks. It may not be sufficient to merely include a clause in the contract to that effect. The Commonwealth is already obliged under the WHS Act to consult, co-ordinate and co-operate with the contractor about the management of relevant risks when they owe duties in respect of the same matters (s 12B). So, the Commonwealth is obliged under the WHS Act to inform itself about the performance of its contractors in managing electrical safety risks. In the event that the contractor's performance was found to be inadequate, the Commonwealth could take action under the contract or directions could be given to the contractor or its personnel who are at the workplace to remedy identified problems. Other statutory remedies may be available (for example, notification of dispute with the contractor under s 48C of the *Home Building Act 1989* (NSW)).

1.74. We note that a contractor may already be required by WHS laws or applicable State or Territory electricity laws to certify that particular kinds of electrical work are safe etc. Defence should require a contractor to comply with these obligations and to provide all relevant certification. You have advised that Defence already does require these things.

1.75. We think it is generally reasonable for Defence to rely on a contractor's expertise in performing electrical work and managing risks associated with that work. However, if Defence were to become aware that the contractor was not adequately managing risks, eg as a result of consultation with or oversight of the contractor's performance, or as a result of a safety audit of a particular facility, Defence would need to take steps to address these failures, which ultimately may require replacing the contractor.

Exclusion for acts (or omissions) that may prejudice Australia's defence

1.76. Section 12D of the WHS Act makes clear that nothing in the WHS Act is intended to prejudice Australia's defence. Section 12D provides as follows:

> **12D Act not to prejudice Australia's defence**
>
> (1) Nothing in this Act requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to Australia's defence.
>
> (2) Without limiting the generality of subsection (1), the Chief of the Defence Force may, by instrument in writing, declare that specified provisions of this Act do not apply, or apply subject to such modifications as are set out in the declaration, in relation to:
>
> (a) a specified activity; or
>
> (b) a specified member of the Defence Force; or
>
> (c) members of the Defence Force included in a specified class of such members.
>
> (3) A declaration under subsection (2) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.
>
> (4) In the exercise of the power under subsection (2), the Chief of the Defence Force must take into account the need to promote the objects of this Act to the greatest extent consistent with the maintenance of Australia's defence.

Meaning of 'prejudicial'

1.77. The *Macquarie Dictionary* (online edition) defines 'prejudicial' as 'causing prejudice or disadvantage; detrimental'. 'Prejudice' is similarly defined as 'disadvantage resulting from some judgment or action of another; resulting injury or detriment; or to affect disadvantageously or detrimentally'.

1.78. Based on these definitions, any action (or inaction) would be, or could reasonably be expected to be 'prejudicial' to Australia's defence if it would, or could reasonably be expected to, cause disadvantage, injury or detriment to Australia's defence.

1.79. We note that, in our view, disadvantage, injury or detriment of any kind (eg financial disadvantage) would not be sufficient. The disadvantage must relate to the quality of Australia's defence.

Meaning of 'Australia's defence'

1.80. 'Australia's defence' is not defined in the WHS Act. We have not identified any cases where this expression has been judicially considered, but we note that there is a line of case law considering the similar expression 'the defence of Australia', in the context of determining if a matter could be considered 'prejudicial to the defence of Australia' (see, for example, *Australian Communist Party v Commonwealth* ('Communist Party case) (1951) 83 CLR 1). We think a court would take the same approach to the expression ‘Australia’s defence’ in s 12D(1) of the WHS Act.

1.81. The approach that the courts have taken on this issue in the past can be summarised as follows:

- whether or not a matter could be considered a risk to Australia's defence is not intended to be a question of fact or law. These considerations are a matter for the discretion of the decision maker
- it is a question of degree and the answer may vary depending on the circumstances (eg whether or not a particular matter could be considered a risk to Australia's defence might vary between peacetime and wartime)
- courts will generally have regard to what the Executive Government thinks might be a risk to Australia's defence
- what might be considered a risk to 'Australia's defence' is often associated with what might be considered a risk to 'Australia's security'

1.82. This approach suggests that, if this issue came before a court, the court would generally accept, for the purposes of s 12D(1) of the WHS Act, the opinion of a decision-maker who decided that an act or omission would, or could reasonably be expected to, prejudice Australia's defence. However, we think there would need to be sound evidence that the decision-maker made a decision on that ground. We think it could be difficult to persuade a court that a person did not take a particular action, or took a particular action, because doing otherwise would, or could reasonably be expected to, prejudice Australia's defence, if there is no evidence that the potential for prejudice to Australia's defence was even considered at the time.

Effect of s 12D(1)

1.83. In our view, the effect of s 12D(1) is that, if disadvantage, injury or detriment to Australia's defence, or a reasonable expectation of such disadvantage, injury or detriment could be established, the effect of s 12D(1) would be that a particular act or omission would not be required by the WHS Act, even if it was reasonably practicable to do so.

1.84. However, the effect of s 12D(1) is not to qualify or absolve the Commonwealth from its duties under the WHS Act in the relevant circumstances. Rather, s 12D(1) affects what actions the Commonwealth must take (or not) in those circumstances. That is, s 12D(1) ensures that the Commonwealth would not be considered to have contravened its duties under the WHS Act if the Commonwealth does not take a particular action that would be, or could reasonably be expected to be, prejudicial to Australia's defence (or takes a particular action if not doing so would be, or could reasonably be expected to be, prejudicial to Australia's defence).

1.85. The Commonwealth would still need to comply with its duties under the WHS Act in all circumstances, including defence operations, by taking all reasonably practicable steps that would not be, or could not reasonably be expected to be, prejudicial to Australia's defence.

1.86. We note that ss 12D(2)-(3) permit the Chief of the Defence Force to exclude, but only with the approval of the Minister, provisions of the WHS from applying to specified activities, specified members of the ADF, or a specified class of ADF members. Unlike a declaration made under these provisions, s 12D(1) does not operate as a complete exclusion.

Possible application if work might otherwise be considered unsafe

1.87. You have asked whether s 12D of the WHS Act could permit the continuation of work in circumstances that might otherwise be considered unsafe.

1.88. The effect of this provision is not to 'authorise' unsafe work. However, this provision may excuse unsafe work if not doing the work, or not doing the work in a particular way, would be, or could reasonably be expected to be, prejudicial to Australia's defence. That is, continuing to perform work in circumstances that might otherwise be considered unsafe would not mean that the Commonwealth failed in its duties to ensure the health and safety of workers or other persons if not doing the work would be, or could reasonably be expected to be, prejudicial to Australia's defence.

Consultation with workers

1.89. The Commonwealth has an obligation under s 47 of the WHS Act to consult about certain work health and safety matters with workers who carry out work for the Commonwealth, and who are, or are likely to be, directly affected by the work health and safety matter. Penalties may apply if the Commonwealth fails to comply with this consultation obligation.

1.90. Section 49 of the Act provides that the circumstances in which Defence, on behalf of the Commonwealth, will be required to consult with workers are as follows:

> a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;

b) when making decisions about ways to eliminate or minimise those risks;

c) when making decisions about the adequacy of facilities for the welfare of workers;

d) when proposing changes that may affect the health or safety of workers;

e) when making decisions about the procedures for:

i) consulting with workers; or

ii) resolving work health or safety issues at the workplace; or

iii) monitoring the health of workers; or

iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or

v) providing information and training for workers;

f) when carrying out any other activity prescribed by the regulations for the purposes of this section.

1.91. It will, of course, be open to Defence to consult with workers in a broader range of circumstances, eg, following an incident at the workplace. However, these are the only circumstances in which consultation with workers is required under the WHS Act.

1.92. Section 48 of the WHS Act provides that consultation with workers requires the following:

— that relevant information about the matter is shared with workers; and

— that workers be given a reasonable opportunity to express their views and to raise work health or safety issues in relation to the matter, and to contribute to the decision-making process relating to the matter; and

— that the views of workers are taken into account by the person conducting the business or undertaking; and

— that the workers consulted are advised of the outcome of the consultation in a timely manner; and

— if the workers are represented by a health and safety representative (HSR), the consultation must involve the HSR.

1.93. If alternative consultation procedures are agreed with workers, consultation must also be in accordance with those procedures (s 47(2)).

1.94. A Code of Practice for 'Work Health and Safety Consultation, Co-Operation and Co-Ordination' has also been approved (see Work Health and Safety Codes of Practice 2011 - available at www.comlaw.gov.au). This Code of Practice sets out

how duty holders can comply with their consultation, co-operation and co-ordination obligations under the WHS Act.

1.95. The Code of Practice includes some detailed examples of how to consult, co-operate and co-ordinate in different scenarios (see Appendices A and C). It also includes a 'checklist' for effective consultation (see Appendix B).

Consultation with other duty holders

1.96. As noted above, there is also a consultation obligation under s 12B of the WHS Act which requires the Commonwealth to consult, co-operate and co-ordinate activities where the Commonwealth shares a health and safety duty in relation to the same matter with another person under the equivalent State or Territory Work Health and Safety Act, eg the *Work Health and Safety Act 2011* (NSW). As discussed, this will be the case where, eg, Defence engages a contractor to perform electrical work at a base. Section 12B would require Defence, on behalf of the Commonwealth, to consult, co-operate and co-ordinate about risk management with the contractor.

Duty of officers

1.97. Section 27(1) of the WHS Act provides that, if a PCBU has a duty or obligation under the Act, an officer of that PCBU must exercise due diligence to ensure the PCBU complies with that duty or obligation.

1.98. While the duty of due diligence is linked to the performance of the PCBU's duty, an officer can be investigated or prosecuted for an alleged contravention of the officer's duty even if the PCBU is not prosecuted. Whether or not this occurs in practice will be a matter for Comcare and/or the Commonwealth Director of Public Prosecutions.

1.99. The definition of ‘officer’ of a PCBU in the WHS Act includes a person who is an 'officer of the Commonwealth' within the meaning of s 247 of the WHS Act' (see definition in s 4).

1.100. Section 247 of the WHS Act defines 'officer of the Commonwealth' as follows:

> (1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Commonwealth is taken to be an officer of the Commonwealth for the purposes of this Act.
>
> (2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

1.101. On the basis that Defence is a business or undertaking of the Commonwealth, it follows that a person who makes, or participates in making, decisions that affect the whole or a substantial part of Defence would be an 'officer of the Commonwealth' for the purposes of the WHS Act.

1.102. We note that the issue of who could be considered a person who 'participates in making decisions that affect the whole or a substantial part of a business or undertaking' is complex. We would be happy to advise further on this issue if you would like.

1.103. In the context of Defence, we do not think there is any significant doubt that the Secretary of Defence or the service chiefs would be considered officers of the Commonwealth for the purposes of the WHS Act. It is also possible that other very senior officials of Defence or the ADF, could be considered 'officers of the Commonwealth', if those officials make, or participate in making, the requisite class of decisions.

What is required for an officer to discharge their duty?

1.104. As discussed, the duty of an officer is to exercise due diligence to ensure that the person conducting the business of undertaking complies with that duty or obligation.

1.105. 'Due diligence' is defined in s 27(5) of the WHS Act as including, but not limited to, taking reasonable steps:

> a) to acquire and keep up-to-date knowledge of work health and safety matters; and
>
> b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
>
> c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
>
> d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
>
> e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under [the WHS Act]; and
>
> f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

1.106. The Explanatory Memorandum to the Work Health and Safety Bill 2011 provides the following elaboration on the nature of the officers' health and safety duty and what it requires:

The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Bill. (see paragraph 66)

…

An officer must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the officer within the PCBU. (paragraph 69)

What is required of an officer should be directly related to the influential nature of their position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable. (paragraph 70)

1.107. The extent of the steps that each 'officer' is required to take to discharge their duty will vary depending on the circumstances. Generally:

— What is required is that the duty holder has done all they could reasonably be expected to do. (See *Inspector Hayes v Santos and Lorenzo* [2009] NSWIRComm 163 at [178] and [189] – in relation to what standard of conduct is required to demonstrate that a director of a corporation has exercised 'due diligence' for the purposes of s 26(1)(b) of the *Occupational Health and Safety Act 2000* (NSW)).

— The word 'due', in the context of 'due diligence', means 'right; proper; adequate'. The presence of the word 'due' means that absolute or perfect diligence is not required. The use of that word also means that consideration must be given to the circumstances of the person concerned in the management of the corporation etc, including the particular functions performed by that person (see *Inspector Ken Kumar v David Aylmer Ritchie* (*Ritchie*) [2006] NSWIRComm 323 at [134]).

This is reflected in the text of s 27(5) of the Act, which makes clear that officers are only required to take reasonable steps toward each of the matters listed in that provision. Failure to 'absolutely' or 'perfectly' perform all of those matters will not necessarily mean that an officer has contravened their duty, provided the officer took reasonable steps.

— This duty must operate in a realistic and practical way, taking into account factors such as the variety of workplaces, the multitude of industries and the range of corporate structures covered by the Act (see *Ritchie* at [135]).

An officer will have complied with their duty if he or she, realistically and practically, took all proper and adequate steps to prevent the contravention by the PCBU (see *Ritchie* at [136]).

1.108. These principles are consistent with the statement in paragraph 69 of the Explanatory Memorandum to the WHS Bill that standards of due diligence must be high *yet attainable.*

1.109. Factors such as an officer's seniority or their role within Defence will likely be relevant to the assessment of the level of diligence that is 'due' of them if they are officers. The officer's duty of due diligence probably doesn't require an officer to take steps in relation to matters that are genuinely outside their control. However, even if a matter is outside an officer's control, the duty of due diligence may require the officer to take steps to verify that the matter is being addressed by the person who has control of that matter, eg, a contractor (see s 27(5)(f)).

1.110. The issue turns on whether an officer has discharged their duty, not whether a person has been injured at work. An officer will have discharged their duty if the officer has done all they could reasonably be expected to do to ensure the PCBU complies with its duties or obligations, including by taking those steps outlined in s 27(5). The WHS Act does not require an officer to prevent all workplace injury or illness.

Multiple officers

1.111. There may be more than one person who is an officer for a PCBU in relation to a matter. Section 16(3) of the WHS Act deals with what happens if more than 1 person has a duty for the same matter, eg if more than one person has a duty as an officer for the same or multiple PCBUs. Each officer must comply with their duty to the required standard, ie due diligence, even if another officer has the same duty. However, the required standard will be limited to those matters the officer can control or influence.

1.112. Section 46 of the WHS Act requires persons who have duties for the same matter to, so far as is reasonably practicable, consult, co-operate and co-ordinate activities in relation to that matter. Therefore, where more than one person has a duty as an officer of a PCBU, those officers must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities in relation to the performance of that duty.

Duty of workers

1.113. Under s 28 of the WHS Act, a 'worker', that is, a person who carries out work in any capacity for a PCBU must:

a) take reasonable care for his or her own health and safety;

b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons;

c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the [PCBU] to allow the person to comply with the WHS Act; and

d) co-operate with any reasonable policy or procedure of the [PCBU] relating to health or safety at the workplace that has been notified to workers.

1.114. This duty will apply to APS employees in Defence and all ADF members while they are performing their duties. The duty will also apply to all individuals who are carrying out work under a contract with Defence.

Penalties under the WHS Act

1.115. The WHS Act establishes a criminal penalty regime for breaches of health and safety duties, with differing maximum penalties depending on the severity of the of the contravention. An officer may be liable for the following maximum penalties under that regime:

- Category 1 offence: where the officer exposes an individual to whom the duty is owed to a risk of death or serious injury or illness, is reckless as to the risk of death or serious injury or illness - $600,000 or 5 years imprisonment or both (s 31).
- Category 2 offence: where the officer fails to comply with their duty and exposes an individual to a risk of death or serious injury or illness - $300,000 (s 32).
- Category 3 offence: Where the officer fails to comply with their duty - $100,000 (s 33).

1.116. Different penalties would apply if the Commonwealth was found to have contravened its duties under the WHS Act:

- Category 1 offence - where the Commonwealth exposes an individual to whom the duty is owed to a risk of death or serious injury or illness, is reckless as to the risk of death or serious injury or illness - $3,000,000
- Category 2 offence - where the Commonwealth fails to comply with their duty and exposes an individual to a risk of death or serious injury or illness - $1,500,000
- Category 3 offence - where the Commonwealth fails to comply with their duty - $500,000.

2. APPENDIX TWO

Obligations under State and Territory electrical safety laws

Concerns for Defence and our approach to this part of the advice

2.1. We understand Defence's first and primary concern is the safety of its installations. More generally, Defence would like to ensure that it acts to minimise the legal risks flowing from the concerns identified by the audit in the context of electrical safety laws. This part of the advice concerns the obligations and responsibilities of Defence, its staff and contractors, under State and Territory electrical safety laws.

2.2. For NSW, we were asked to consider the legislative obligations most relevant to the concerns identified by the audit of the Williamtown RAAF base. These include:

- contracted electricians who are providing services to Defence and are not meeting the requirements for the competency of persons working with electrical equipment in hazardous areas as required by the Australian Standards (AS/NZS 60079.17)
- use of electrical parts which do not meet minimum standards
- failure to appropriately maintain electrical equipment
- poor or deficient record-keeping, and
- non-compliance generally with legislated standards and Defence standards related to electrical installations and maintenance safety in fuel installations.

2.3. With these objectives in mind, we have structured our advice on NSW in the following way:

a. First, we discuss various legislative provisions relevant to the concerns identified by the audit, and the consequences where those provisions are not complied with including the available enforcement options. We will also consider in this section the circumstances in which a power to disconnect electricity supply may be exercised.

b. Second, we consider if those provisions apply to the Commonwealth and contractors providing services to the Commonwealth, and Commonwealth premises. This will involve considering whether:

   – the relevant provisions bind the Crown in right of the Commonwealth and its contractors

   – the relevant provisions are inconsistent with any law of the Commonwealth, and invalid to the extent of that inconsistency, and

   – the Commonwealth benefits from implied constitutional immunity.

2.4. As Defence has identified its RAAF base in Williamtown, NSW as presenting a significant source of risk our advice on NSW is accordingly significantly more detailed than our advice on the other jurisdictions.

2.5. In relation to the other jurisdictions, we have kept our advice at a relatively high level of generality. We would be happy to provide more specific advice if future compliance audits identify particular areas of concern.

New South Wales

Legislation considered

2.6. In relation to New South Wales, we have analysed the following legislation in this advice:

- *Electricity (Consumer Safety) Act 2004* (NSW) (Consumer Safety Act) and *Electricity (Consumer Safety) Regulations 2006* (NSW) (Consumer Safety Regulations), and
- *Electricity Supply Act 1995* (NSW) (Supply Act) and *Electricity Supply (Safety and Network Management) Regulations 2008* (NSW) (Supply Regulations).

2.7. In our research, we identified a number of other laws which are also potentially relevant:

- *Electricity Supply (Corrosion Protection) Regulation 2008* (NSW): It is not clear on the information provided if Defence operates a 'corrosion protection system' which falls within the scope of those regulations.
- *Home Building Act 1989* (NSW) which contains some provisions on licensing requirements for electrical wiring work and other specialist work, and
- *Explosives Act 2003* (NSW) and *Explosives Regulations 2005* (NSW) which regulate the handling of explosives.

Please let us know if you require advice on any of the above.

Consumer Safety Act

2.8. The Consumer Safety Act has four main aspects:

- regulation of 'electrical articles' (Part 2)
- regulation of 'electrical installations' (Part 3)
- accident reporting and investigations (Part 4), and
- enforcement provisions (Part 5).

Part 2, generally speaking, is directed to ensuring that electrical articles sold and manufactured comply with certain standards. As we do not understand Defence to engage in either of these activities, (subject to what we say in paragraph 3.73) Part

2 does not appear presently relevant. We also have not been asked to consider Defence's obligations (if any) in the event of an accident[14]. We therefore focus our attention on Parts 3 and 5.

Regulation of 'electrical installations'

2.9. There is a preliminary question of what 'electrical installations' are, and whether they are involved in Defence's activities. An 'electrical installation' is defined in s 3 to mean:

> any fixed appliances, wires, fittings, apparatus or other electrical equipment used for (or for purposes incidental to) the conveyance, control and use of electricity in a particular place

Based on the information provided, at least some of the equipment at Williamtown is used to connect Defence infrastructure to the general electricity supply. The Williamtown base would clearly be a place. On that basis, we think that at least some of Defence's activities involve electrical installations, within the meaning of the Consumer Safety Act.

2.10. The definition of 'electrical installation' in s 3 is subject to a number of exceptions. Most of these, on the information available to us, are not relevant.[15] We do, however, point out two of the more relevant exceptions, being:

- electrical articles connected to, and extending or situated beyond, any electrical outlet socket. An 'electrical article' means 'any appliance, wire, fitting, cable, conduit, meter, insulator, apparatus, material or other electrical equipment intended or designed for use in, or for the purposes of, or for connection to, any electrical installation' (s 3), and
- any electrical equipment operating at not more than 50 volts alternating current or 120 volts ripple-free direct current.

2.11. The Consumer Safety Act contains two main types of controls on electrical installations:

- section 31 requires a person carrying out 'electrical installations work' to comply with standards or requirements prescribed by the regulations.

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14 For example. Defence as the occupier of the premises is required to report a 'serious electrical accident' to the Director-General within 7 days after the accident (see s 33 of the *Consumer Safety Act*).

15 Specifically:

- Defence does not appear to be an 'electricity supply authority' (because it does not distribute electricity to the public, or generate electricity for supply to the public (see paragraph (a) of definition)
- we are not concerned with equipment in or about a mine (see paragraph (b) of definition), and
- the electrical equipment prescribed in the *Electricity (Consumer Safety) Regulations 2006* (see reg 39) refers only to 'metering installations' within the meaning of the *National Electricity Rules* (see paragraph (e) of definition).

— section 32 imposes obligations on 'responsible persons' in relation to 'electrical installations'. Section 32(3) defines responsible person, in relation to an electrical installation in a place as the occupier of the place, or if there is no occupier, any owner of the place. We think the Commonwealth is capable of being a 'responsible person' in this context. The content of these obligations is discussed further in paragraphs 2.14 to 2.16 below.

Carrying out electrical installations work

2.12. Under s 31, a person carrying out electrical installation work must comply with standards or requirements prescribed in the regulations. Contraventions may attract fines and/or imprisonment. 'Electrical installation work' is broadly defined in s 31(2) to mean 'the work of installing, adding to, altering, disconnecting, reconnecting or replacing an electrical installation'. The relevant standards and requirements can be found in reg 32 of the Consumer Safety Regulations. To give a broad overview, reg 32 requires:

— the authorisation of the relevant distribution network service provider[16] before a electrical installations, or parts thereof, are energised (reg 32(2))

— a safety and compliance test before an electrical installation, or part thereof, is energised (reg 32(4)). We will say a bit more about this requirement below.

— electrical installation work to be carried out in accordance with the Australian/New Zealand Wiring Rules (Wiring Rules), as in force from time to time (reg 32(3) and definition of 'Australian/New Zealand Wiring Rules'). (We have not for present purposes examined the requirements of the Wiring Rules in detail.)

— a free-standing electrical installation not to be energised unless the stand-alone power system to which it is to be connected complies with the relevant Australian Standard (reg 32(5)).

'Energise', in relation to an electrical installation, means the connection of the installation (or part of the installation) to the distribution system of a distribution network service provider or to a stand-alone power system (reg 3).

2.13. As noted above, reg 32(4) requires a safety and compliance test before an electrical installation is energised. A safety and compliance test must be carried out by a 'qualified person'[17] (reg 34). The results must then be notified to the owner of the installation and (depending on the type of electrical installation involved) either the distribution network service provider or the Director-General (reg 34). A person who

16 A map from 2011 produced by NSW Department of Resources & Energy indicates that distribution network service providers in NSW include ACTEWAGL, Ausgrid, Endeavour Energy and Essential Energy.

17 This term is defined in reg 3 to mean a person authorised under the *Home Building Act 1989* to do electrical wiring work without supervision, and (in relation to the testing of a consumer's aerial wiring system) includes a person who is authorised to test a distribution network service provider's overhead lines.

is not a qualified person must not carry out a safety and compliance test (reg 36(1)). Importantly for Defence, a responsible person for an electrical installation must not cause or permit an employee, agent or contractor of the responsible person to carry out a safety and compliance test on the electrical installation concerned unless the employee, agent or contractor is a qualified person (reg 36(2)).

Obligations on 'responsible persons'

2.14. Section 32 of the Consumer Safety Act imposes additional obligations on a 'responsible person' in relation to electrical installations. It relevantly provides:

> (1) A responsible person for an electrical installation in a place must, to the best of the person's ability and knowledge, ensure that such parts of the electrical installation as may be prescribed by the regulations are maintained in accordance with the regulations while the electrical installation remains connected to the source of the supply of electricity.
>
> Maximum penalty: 500 penalty units (in the case of a corporation) and 150 penalty units (in any other case).

2.15. Regulation 36 sets out the relevant requirements for s 32. It provides that all parts of an electrical installation are prescribed for the purposes of s 32(1), then goes on to list the following as requirements applying to the maintenance i.e. responsible persons must maintain electrical installations to ensure:

> (i) the safe and satisfactory operation of the installation is not impaired by interference, damage, ageing or wear,
>
> (ii) the live parts of the installation remain properly insulated, or protected, against inadvertent contact with any person,
>
> (iii) the earthing system for the installation operates effectively,
>
> (iv) the installation is not used in a manner that exceeds the operating limits imposed by its design or installation,
>
> (v) the installation does not become a significant potential cause of fire for the environment surrounding the installation.

2.16. Section 32 of the Consumer Safety Act and reg 36 of the Consumer Safety Regulations are silent on the specific steps a 'responsible person' is obliged to take, and the content of the obligation will depend on the circumstances. What is required is that the responsible person, to the best of their ability and knowledge, ensure that all parts of electrical installations are maintained to ensure the matters in (i) to (v).

2.17. Although a failure to comply with these requirements would not expose the Commonwealth to proceedings for the imposition of a pecuniary penalty, the Director-General could seek an undertaking regarding compliance (see the discussion at paragraphs 2.22 to 2.24 below). If the non-compliance gave rise to concerns about the safety of an electrical installation, the statutory powers relating to disconnection could be exercised.

Enforcement

Powers of authorised officers

2.18. The Consumer Safety Act provides 'authorised officers' with a range of powers, though none of these includes the power to disconnect electricity supply (but see our discussion of the Supply Act below). 'Authorised officers' may be appointed under s 39; an investigator under the *Fair Trading Act 1987* (NSW) is also an authorised officer for these purposes (see definition in s 3(1)).

2.19. In relation to electrical installations, under s 30 of the Consumer Safety Act authorised officers may:

- enter any place at any reasonable time to inspect an electrical installation
- require any person claiming to be an authorised electrician to produce their licence or authority to do electrical wiring work
- require any person who appears to be doing electrical wiring work to show that they are not prohibited from doing so under the *Home Building Act 1989* (NSW), and
- enter a place and inspect documents (with the written authority of the Director-General) evidencing conduct in connection with a non-compliant electrical installation.

It is an offence to refuse or fail to comply with a requirement made, or to answer question asked, by an authorised officer without reasonable excuse (s 40(1)(a), Consumer Safety Act).

2.20. An authorised officer may also apply under s 42 for a search warrant to enter and search a place if there are reasonable grounds for believing:

- an unsafe electrical installation is in that place
- a serious electrical accident has occurred there, or
- a provision of the Consumer Safety Act or Consumer Safety Regulations has been or is being contravened there.

2.21. In respect of particular offences under the Consumer Safety Act or Consumer Safety Regulations, an authorised officer may also issue penalty notices. Of the provisions we have identified above, only those in reg 35 (which require safety and compliance tests for electrical installations to be carried out by qualified persons) appear to be 'penalty notice offences'. Penalty notices in effect allow an alleged offender to pay a penalty as an alternative to having the matter dealt with by a court (see s 47, Consumer Safety Act).

1.1. We mention also, for completeness, powers of authorised officers in relation to electrical articles which do not comply with the Consumer Safety Act or Consumer Safety Regulations. As we mentioned before, Consumer Safety Act regime primarily

regulates the sale and manufacture of electrical articles, and many powers of authorised officers are directed to persons involved in sale or manufacture. That said, under s 26(2) authorised officers can enter a place and inspect documents (with the written authority of the Director-General) evidencing conduct in connection with non-compliant electrical articles. This may potentially capture consumers or end-users of electrical articles, such as Defence.

Enforceable undertakings

2.22. In your request, you also asked that we consider the use of enforceable undertakings. An enforceable undertaking is a promise voluntarily given by the member of a regulated community to a regulator. Such undertakings are enforceable in court. Enforceable undertakings are often given where a regulator believes that a person or company has breached an obligation under the relevant legislation

2.23. The Consumer Safety Act contemplates the Director-General accepting undertakings in connection with a matter in relation to which the Director-General has a function under that Act (see s 43). It does so by 'picking up' s 218 of the *Australian Consumer Law (NSW)* which deals with enforceable undertakings.

2.24. What is included in an enforceable undertaking will depend on the particular circumstances of the case, and in fact one of its advantages is to allow a set of enforceable promises tailored to suit the circumstances at hand. By way of illustration, an enforceable undertaking may involve the person undertaking to:

- carry out or cease particular activities
- provide compensation to parties adversely affected by conduct
- formulate appropriate strategies for ensuring the conduct does not re-occur
- develop or improve internal compliance training programs.

2.25. We would be happy to provide further specific advice on this aspect of the enforcement regime as the matter develops.

Supply Act

2.26. The Supply Act is considerably longer than the Consumer Safety Act, and deals with many aspects of electricity supply, the electricity market and related infrastructure. Based on the information provided, the main aspects of the Supply Act which appears relevant to the concerns identified in the audit are those dealing with the right to connection, and electrical safety.

Right to connection

2.27. Generally speaking, s 15 provides for the right of any person who owns or occupies premises to apply to the relevant distribution network service provider for 'customer

connection services'. We think that the Commonwealth (as represented by Defence) is a person owning or occupying premises (the Williamtown base) for the purposes of s 15.

2.28. The 'right to connection' in s 15 is subject to the Supply Act and regulations made under that Act. Relevantly, under the Supply Regulations, reg 5 provides:

> (1) For the purposes of section 15(3) of the Act, a distribution network service provider may disconnect premises from, or refuse to connect premises to, its distribution system if the provider reasonably considers that the electrical installation on the premises is, or is likely to become unsafe if the premises are, or continue to be, connected to the distribution system.

2.29. This is followed by a number of provisions requiring the distribution network service provider to give notice before disconnecting the premises. However, reg 6 provides an exception to those obligations:

> Despite clause 5(3), a distribution network service provider may immediately disconnect premises from its distribution system if the provider reasonably considers that there is an immediate danger to life or property or an immediate risk of starting a fire if the premises continue to be connected to the distribution system.

2.30. In effect then, a distribution network service provider may, after providing the requisite notice, disconnect electricity supply to certain premises on the basis of safety concerns. However, where there is 'immediate danger' to life or property or 'immediate risk' of fire, then a distribution network service provider may disconnect the premises immediately.

Electrical safety

2.31. Part 5D of the Supply Act deals with electrical safety. There are a number of provisions which appear relevant to Defence's concerns at Williamtown.

2.32. First, Part 5D provides 'inspectors' with a range of powers. Inspectors are appointed by the Director-General under s 63M. Under s 63O, inspectors may:

- enter any place at any reasonable time to inspect any electrical installation, corrosion protection system or stray current source[18]
- require the relevant distribution network service provider for an electrical installation to disconnect the installation for safety reasons
- require any person claiming to be an authorised electrician to produce their licence or authority to do electrical wiring work
- require any person who appears to be doing electrical wiring work to show that they are not prohibited from doing so under the *Home Building Act 1989* (NSW), and

[18] Each of these terms are defined in the Dictionary to the Supply Act.

— enter a place and inspect documents (with the written authority of the Director-General) evidencing conduct in connection with a non-compliant electrical installation.

It is an offence to refuse or fail to comply with a requirement made, or to answer question asked, by an authorised officer without reasonable excuse (s 63N(1)(a), Supply Act).

2.33. Second, under s 63P(1) the Director-General may cause to be examined and tested 'electricity delivery equipment'[19] to determine if it can be used safely. An inspector may enter any place at any reasonable time in order to do so (s 63P(2)). If, on the Director-General's recommendation, the Minister is satisfied that electricity delivery equipment cannot be used safely, the Minister may, by order served on the network operator or retail supplier using the equipment, prohibit the use of the equipment (s 63Q). It is an offence to use equipment in contravention of such an order (s 63Q(4)). While Defence does not appear to be either a network operator or retail supplier, impediments to the use of 'electricity delivery equipment' on grounds of safety may have flow-on effects for its operations.

1.2. Finally, we note for completeness that the Local Court can order that premises be disconnected and/or that electricity supply be discontinued if a person is found guilty of particular offences (see s 73).

Do the NSW laws bind Defence and its contractors?

2.34. In relation to this issue, you asked that we consider:

— whether powers to disconnect could be exercised in relation to Defence facilities

— whether State/Territory electrical safety laws are binding on the Commonwealth, and if there would be any limits on enforcement in relation to Defence.

2.35. To determine whether a State law applies to the Commonwealth, we ask:

a. Does the NSW law apply to the Commonwealth, ADF members, Commonwealth employees and contractors, and Commonwealth-owned premises, as a matter of statutory construction?

b. If the NSW law does apply as a matter of construction, are the relevant provisions inconsistent with a law of the Commonwealth for the purposes of s 109 of the Constitution, and invalid to the extent of the inconsistency?

c. If the NSW law does apply as a matter of construction and is not inconsistent with a law of the Commonwealth, do the provisions infringe the Commonwealth's implied constitutional immunity from State law?

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19 Electricity delivery equipment is defined to mean any machinery, apparatus, appliances, material or other equipment used or intended to be used by any network operator or retail supplier for or in connection with the generation, transmission or distribution of electricity.

2.36. We assume that the Williamtown base is 'a place acquired by the Commonwealth for public purposes' within the meaning of s 52(1) of the Constitution.[20] Accordingly, the Commonwealth Parliament has exclusive legislative power with respect to the base. It follows that NSW laws do not apply in or in relation to the place where the base is situated. However, the *Commonwealth Place (Application of Laws) Act 1970* (Commonwealth Places Act) applies provisions of State law *as Commonwealth law* in and in relation to Commonwealth places in the States (s 4(1)). The Commonwealth Places Act does not pick up and apply State laws in or in relation to a Commonwealth place if that law would not apply in or in relation to that place if it were not a Commonwealth place (s 4(2)). This means that regardless of whether we are dealing with a Commonwealth place, the same legal questions as those identified above would arise.

2.37. For the reasons given, we think that generally speaking the powers to disconnect can be exercised in relation to Defence bases in NSW (such as Williamtown), and the provisions we have identified in the Consumer Safety Act and Supply Act will apply to the Commonwealth, its employees, ADF members[21] and Commonwealth contractors. We do, however, make a couple of caveats. First, none of the provisions will expose the Commonwealth (as distinct from ADF members and contractors) to criminal liability. Second, there may be an argument that Defence is entitled to assert constitutional immunity from the power to disconnect Williamtown, particularly without notice to the Commonwealth, but it is not clear a court would accept this argument.

First question: Does the NSW law apply to Defence. ADF members, employees and contractors?

2.38. Many of the provisions we have identified above would, on the face of things, be capable of applying to Defence and ADF members, employees and contractors at the Williamtown base. On this point, we note that references to 'person'[22] can capture individuals as well as bodies politic (such as the Commonwealth),[23] and references to 'place' or 'premises'[24] would encompass the Williamtown base. As a general proposition[25], we consider that individual employees, members and

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20 Section 52(i) of the Constitution relevantly provides that the Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to … all places acquired by the Commonwealth for public purposes'.

21 ADF members would have a limited immunity from licensing requirements imposed by NSW laws in respect of electrical work they may do in the course of their duties.

22 See e.g. ss 30-32, Consumer Safety Act; regs 36(1) and 36(2), Consumer Safety Regulations and s 63O, Supply Act.

23 'Person' includes an individual, a corporation and a body corporate or politic (s 21, *Interpretation Act 1987* (NSW)).

24 See e.g. ss 26(2), 30 and 42, Consumer Safety Act and s 63O, Supply Act.

25 A claim of 'derivative immunity' may be a possibility if applying a legislative provision to a contractor etc would 'divest the Crown of proprietary, contractual or other *legal* rights or

contractors should proceed on the basis that the requirements of the NSW electricity safety laws that apply to 'a person' will apply to them notwithstanding that their activities may be carried on in the course of their employment or service.

2.39. There is, however, a presumption of statutory interpretation that the Crown is not bound by the general words of a statute. The Crown, in this context, represents 'the members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents'.[26] This presumption extends beyond the Crown in right of the enacting legislature to include the Crown in right of the other polities forming part of the federation.[27] For example, a NSW Act is presumed not to bind the Crown in right of either NSW or the Commonwealth.

2.40. The High Court has formulated the questions relevant to this presumption in the following way:[28]

> Where the legislative provisions in question are concerned with the regulation of the conduct of persons or individuals, it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents of the executive government of the polity concerned, rather than whether they bind the Crown in one or other of its capacities. In other legislative contexts, slightly different questions may emerge. Thus, for example, where legislation regulates the use of land or other property, it will usually be more pertinent to ask whether the legislation was intended to apply to land or property owned by or on behalf of the polity in question.

2.41. In relation to the NSW laws considered, we are arguably concerned with both types of provisions mentioned in the excerpt above:

- Provisions concerning, for example, licensing and electrical installation maintenance requirements regulate the conduct of persons or individuals. Based on the formulation above, the question here is whether that regulation applies to the Commonwealth, ADF member, employees and contractors.
- Provisions concerning disconnection, on the other hand, arguably regulates the use of property (i.e. by regulating whether premises or electrical installations remain connected). The question here becomes whether that legislation was intended to apply to premises or installations owned by or on behalf of the Commonwealth.

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interests' (see *Baxter Healthcare Pty Ltd* (2007) 232 CLR 1). Whether such a claim would be possible would depend on the particular provision and the nature of the effect that this is claimed to have on the Commonwealth's rights or interests.

26 See *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 per Gleeson CJ and Gaudron J; see also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

27 See *Jacobsen v Rogers* (1995) 182 CLR 572 at 585.

28 *Bass v Permanent Trustee* (1999) 198 CLR 334 at [18].

2.42. Whether this presumption has been rebutted depends on the intention of the enacting legislature as disclosed by the terms, subject matter and context of the legislation in question.

2.43. We therefore first need to consider what the relevant legislation says about its application to the Crown, or the Commonwealth. Both the Consumer Safety Act and Supply Act contain a provision dealing with this issue, providing in s 4 and 5, respectively:

> This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

2.44. Neither the Consumer Safety Regulations nor the Supply Regulations contains any provision on the issue. In relation to the Consumer Safety Regulations, we think it is probably the case that they would be interpreted with reference to s 4 of the Consumer Safety Act. The Supply Regulations (which as we noted above contain provisions on disconnection), however, require closer analysis.

2.45. Sections 191(1) and (1A) of the Supply Act set out a range of regulation-making powers. Section 191(3C), which was inserted in 2004, provides:

> A regulation made for the purposes of subsection (1A) binds the Crown if expressed so to do.

The Supply Regulations were made in 2008 i.e. after s 191(3C) was inserted. They are not expressed to bind the Crown. Thus, if the regulations were made 'for the purposes of' s 191(1A), then the implication would appear to be that the Supply Regulations do not bind the Crown (here meaning that they would not apply to premises owned by the Commonwealth).

2.46. In relation to regs 5 and 6 of the Supply Regulations (which deal with disconnection), we think it is probably not the case that they were made 'for the purposes of' s 191(3C). Rather, we think they were probably made for the purposes of s 15(3) (which allows the regulations to authorise disconnection). Regulation 5(1) expressly states that it is 'for the purposes of' s 15(3) of the Supply Act. It follows that the fact regs 5 and 6 are not expressed to bind the Crown does not give rise to any implication that they do not apply to premises owned by the Commonwealth. In our view, they would be interpreted with reference to s 5 of the Supply Act. Therefore, Defence should proceed on the basis that regulations 5 and 6 of the Supply Regulations bind the Commonwealth and would allow the service provider to disconnect Defence premises from the distribution system.

2.47. Provisions such as that extracted in paragraph 2.43 are usually sufficient to indicate that legislation extends to the Crown in right of the Commonwealth and its agencies. However, such provisions are not necessarily conclusive.[29]

2.48. The matter is further complicated because some of the Consumer Safety Act provisions identified above are penal provisions, contraventions of which can attract fines and/or imprisonment. It is well-established that 'there is the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature'(*Cain v Doyle* (1946) 72 CLR 409 per Dixon J at 424). In *Cain v Doyle*,[30] Dixon J referred (at 424) to counsel's argument that criminal liability could lie against the Crown, as relying:

> …upon the absurdity of supposing that the Executive Government of the country, for that is the practical meaning of the expression Crown in such a connection, is to be brought before magistrates to receive punishment, a punishment which the Executive Government may enforce.

2.49. In our view, the terms of the provision extracted in paragraph 3.73 would not be sufficient to indicate that the Commonwealth itself was intended to be criminally liable for contraventions under the Consumer Safety Act (or Supply Act).

2.50. That does not, however, necessarily mean that the Commonwealth would not have an obligation to comply with the requirements set out in those Acts. A penal provision may be interpreted as being intended to bind the Crown, although without subjecting it to a penalty.[31] In relation to the Consumer Safety Act, for example, a court may find that the Commonwealth, as a 'responsible person' within the meaning of s 32, is legally obliged to comply with the requirements found in that provision even though the Commonwealth could not be held criminally liable for non-compliance.

2.51. Further, even if criminal liability would not attach to the Commonwealth, the same probably could not be said for individuals. In *Pirrie v McFarlane* (1925) 36 CLR 170, a person acting in the course of his duties as a member of the Royal Australian Air Force was held to be bound by the provisions of a Victorian Act requiring him to hold a driver's licence when driving a vehicle on a public highway in the course of those duties. Thus, it has been held that Commonwealth officers are subject to State criminal laws, even when acting in the course of their duties. The Commonwealth executive cannot authorise an officer to do something that contravenes

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29 In *Telstra Corporation Limited v Worthing* (1999) 197 CLR 61 (*Telstra v Worthing*) the High Court held that a particular NSW Act did not bind the Commonwealth, despite a specific provision in the NSW Act stating that it bound the Crown in all of its capacities.

30 (1946) 72 CLR 409.

31 See *Cain v Doyle* (1946) 72 CLR 409 at 419.

Commonwealth or State law.[32] The decision in *Pirrie v McFarlane* was approved by the High Court in *Henderson*.

2.52. Drawing these principles together, it is therefore possible that, while criminal liability would not be imposed upon the Commonwealth (in this instance, Defence), it could still be imposed on individuals working for Defence.

2.53. However, that is not necessarily the end of the query in relation to Defence contractors. If applying the penal provisions to Defence contractors would prejudice the Commonwealth or detract from the Commonwealth's own immunity from criminal liability, the contractors may enjoy a degree of 'derivative immunity'. Unfortunately there is relatively little case law on the issue of whether the Commonwealth (or a State) would be prejudiced by making Commonwealth (or State) employees criminally liable, in circumstances where the Commonwealth (or State) cannot itself be liable. We also note that in *ACCC v Baxter Healthcare Pty Ltd*[33] - concerning the derivative immunity of contractors - the majority of the High Court considered that 'general references to unspecified forms of prejudice to interests of the Crown … are unhelpful', and that it was necessary to concentrate on the 'legal consequences' for the Crown that would result if the law applied to the person concerned.[34] Thus the question appears to be one of statutory construction.

2.54. While it may be possible in some cases to argue that it would be unavoidably necessary for a Defence contractor to, for instance, do electrical installation work otherwise than in accordance with the Wiring Rules, in order to pursue an important Crown purpose, we doubt such an argument could be made as a matter of course for all electrical installations located, and work done, at the Williamtown base.

2.55. Generally speaking, it is difficult to see how the requirements in the NSW laws we have identified would adversely affect the Commonwealth's interests. Turning back to consider the legislation more closely, we note that the purpose of the provisions we have identified aim primarily to ensure safety e.g. by ensuring that electrical installation work (which is potentially dangerous) is done to a particular standard and safety and compliance tests are done by appropriately qualified persons. In our view, the purpose behind these provisions do not indicate that the NSW legislature did not intend for Commonwealth contractors to be subject to potential criminal liability. In fact, that purpose suggests that the provisions are intended to apply as broadly as possible, and irrespective of whether the electrical installation work is being done by or for the Commonwealth or not.

Conclusions on the first question

2.56. In relation to the first question then, we think that:

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32 See *A v Hayden* (1984) 156 CLR 532, *Coco v The Queen* (1994) 179 CLR 427.

33 [2007] 232 CLR 1 at 32.

34 At 35, paras [60]-[62].

- While none of the provisions will expose the Commonwealth to criminal liability, the Commonwealth would be found to have a legal obligation to comply with their terms.
- Individuals (e.g. ADF members, APS staff, Defence contractors) on the other hand, are bound by the NSW laws, including being potentially subject to criminal proceedings and liability in the event of non-compliance.
- The ability to disconnect premises or electrical installations for safety concerns is applicable to Commonwealth premises.

Second question: Inconsistency with a Commonwealth law

2.57. Section 109 of the Constitution provides that Commonwealth laws prevail over inconsistent State laws.[35] We are not aware of any Commonwealth law that would be inconsistent with the relevant controls and prohibitions imposed on the Commonwealth, employees or contractors by the Consumer Safety Act and Supply Act (and associated regulations).

2.58. In relation to ADF members, we think the effect of s 123 of the *Defence Act 1903* would be to exempt them from needing to be licensed under NSW law in respect of electrical work done in the course of their duties as ADF members. The provision would not, however, provide a general immunity for ADF members from the operation of NSW laws. However, although s 123 exempts the member from a requirement to be licensed, this does not affect Defence's obligations under the WHS Act to ensure the health and safety of workers and other persons. In the absence of a licence, Defence would need to put in place an equivalent process to ensure that an ADF member directed to perform electrical work had the necessary skills and experience to do so safely

Third question: Is the Commonwealth impliedly constitutionally immune from the State provisions?

2.59. The final question for analysis is whether the application of the relevant provisions of the Consumer Safety Act or Supply Act (or associated regulations) would infringe the Commonwealth's immunity from State laws as set out in *Henderson*. The Commonwealth benefits from a degree of immunity from the application of State legislation, even if as a matter of statutory construction it appears that a State law was intended to apply so as to regulate the conduct or rights of the executive government of the Commonwealth. This immunity derives from implications arising from the nature of the system of government established by the Constitution.

2.60. In *Henderson*, a majority of the High Court drew a distinction between a State law which purports to modify the nature of the Crown's executive power or 'capacities' and a State law of general application which merely seeks to regulate activities

[35] Section 109 provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

undertaken in the exercise of that power or those capacities. While the Commonwealth enjoys immunity from the operation of a law of the former kind, it is not immune from a law of the latter kind. Capacities or functions in this context means the rights, powers, privileges and immunities which are collectively described as the 'executive power of the Commonwealth' in s61 of the Constitution.

2.61. The distinction between a law which modifies the nature of the Crown's executive power and one which merely seeks to regulate activities undertaken in the exercise of that power is difficult to apply in practice.

2.62. The likely success of arguing that Defence benefits from *Henderson* immunity in the context of NSW electrical safety laws will depend, to an extent, on the particular provisions we are concerned with. In relation to the disconnection provisions (particularly that allowing disconnection without notice), there may be an argument that they could infringe the Commonwealth's implied constitutional immunity. If the Williamtown base were disconnected, it would have the potential to prevent Defence from carrying on its functions there. The counter-argument is that this is simply a way for NSW to regulate the use of electricity. On this point it is significant that the statutory 'powers to disconnect' we have identified can only be exercised on the basis of safety concerns.

2.63. In relation to the other provisions we have identified, we think it is unlikely they infringe the Commonwealth's immunity from State laws as set out in *Henderson*. On this point, we note that the controls imposed by the NSW laws do not prevent Defence from carrying out essential Commonwealth functions on a defence base. The Consumer Safety Act and Supply Act are laws of general application concerned, in part, with electrical safety. The Commonwealth (relevantly, Defence) is being treated in the same manner as other persons, that is, it is not being singled out, and is being required to do something that any other person who wished use or energise electrical installations, or conduct electrical installation work, would be required to do. For these reasons, we consider there is a strong possibility that a court would characterise this as amounting merely to regulation, by the State, of activities undertaken by the Commonwealth in the exercise of its executive powers.

Conclusion on the third question

2.64. In our view, the Commonwealth is unlikely to be able to assert that the provisions we have identified infringe its implied constitutional immunity. There may be a contrary argument in relation to the disconnection provisions, but it is not clear a court would accept this argument.

Liability of individuals

2.65. Defence has also asked that we consider whether individuals within Defence (e.g. ADF members, staff) could be exposed to liability, where the Commonwealth is itself in contravention of the relevant laws. Defence is particularly concerned with the potential vulnerability of:

- an individual within Defence who knowingly does nothing about or directs actions (or frustrates appropriate actions by others) contrary to Defence's legal obligations under electricity laws, and
- individuals within Defence who have advised senior management of contraventions but who are themselves not in a position to effect change.

Consumer Safety Act

2.66. As we have said above, the Commonwealth is bound to comply with the Consumer Safety Act, though it could not be prosecuted for an offence. The question here is whether, in situations where the Commonwealth contravenes the Consumer Safety Act, that might expose persons within the Commonwealth to liability also.

2.67. The Consumer Safety Act contains provisions under which individuals within 'corporations' may be held liable for offences committed by the corporation.

2.68. Section 45 deals with 'executive liability offences' (which includes s 31(1), mentioned above). Under this provision individuals within 'corporations' may be held liable for offences committed by the corporation if, for example, they ought reasonably to know the offence is being committed and failed to take all reasonable steps to prevent or stop the commission of the offence. Section 45A applies more broadly to 'corporate offences' (being offences against the Act or the regulations that are capable of being committed by a corporation). Under this provision, individuals within a corporation may be liable if, for example, they aided and abetted the commission of the offence. The question here is whether either of these provisions could apply to expose persons within Defence to liability, where Defence (that is, the Commonwealth) is in contravention.

2.69. While there are differences between ss 45 and 45A, both of them impose liability on a person where the person is:

- a director of the corporation, or
- an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence (see ss 45(2)(b) and 45A(2)(b)).

2.70. A threshold question here is whether the Commonwealth is a 'corporation' within the meaning of the Consumer Safety Act. If it is not, then s 45 does not apply. 'Corporation' is not defined in the Consumer Safety Act, nor in the *Interpretation Act 1987 (NSW)* (NSW IA Act). We also have not located any case law which has considered this issue in the NSW context.

2.71. In order to determine whether the word 'corporation' includes a body politic (here, the Commonwealth), we would consider its ordinary meaning, taking into account its

context in the Consumer Safety Act and the purpose of that Act.[36] The *Macquarie Dictionary* relevantly defines the term 'corporation' to mean 'a type of organisation, created by law or under authority of law, having a continuous existence irrespective of that of its members, and powers and liabilities distinct from those of its members' and 'any group of persons united, or regarded as united, in one body'. Although the Commonwealth is not a corporation in the conventional sense, it could be argued that it falls within the ordinary meaning of the term. We consider that the purpose of the Consumer Safety Act is consistent with giving the term 'corporations' (and, it follows, the coverage of s 45) a broad scope.

2.72. However, there are arguments that this ordinary meaning of 'corporations' should not be adopted, particularly given the context in which the term appears. Turning first to s 45(2)(a), we consider it is relevant that 'director' is defined (for s 45) as having the same meaning as in the *Corporations Act 2001*. 'Director' of a company or other body is defined in the Corporations Act to mean a person who is appointed to the position of a director or is appointed to the position of an alternate director and is acting in that capacity. Even assuming the Commonwealth is a 'corporation' for present purposes, it is not clear who would be the 'director'. Ministers, conceivably, might be; it is very unlikely (where the Commonwealth is the relevant corporation), any individual person in Defence could be said to be a 'director'.

2.73. Section 45(2)(b) does not use the word 'director', but there would be similar difficulties in applying it to the Commonwealth. That provision is directed at individuals who are *both* involved in management of the corporation, and are in a position to influence the conduct of the corporation in relation to the commission of the offence. In the context of the Commonwealth, it is not clear who this could be. Again, Ministers might conceivably be said to be involved in the Commonwealth's 'management', but they are unlikely to wield the amount of influence required in s 45(2)(b)(i). Senior Executives in Defence might wield the requisite influence, but probably could not be said to be involved in the 'management' of the Commonwealth.

2.74. Our comments above about s 45(2) should not be taken to mean that the Commonwealth could never be a corporation in particular contexts, nor that could never be someone occupying a position akin to that of a director in a corporation in relation to the Commonwealth. However, the difficulties that are evident in applying s 45 to a body politic such as the Commonwealth are, in our view, fairly strong indications that the term 'corporation' was not intended to be interpreted to include the Commonwealth here.

2.75. In summary, we consider it unlikely any particular individual within the Commonwealth could be held liable under s 45 if the Commonwealth committed an executive liability offence under the Consumer Safety Act. This does not change the

[36] It is well-accepted in Australia that legislation should be interpreted in a purposive and contextual way. This principle of statutory construction has been replicated in s 34(2)(a) of the NSW IA Act.

fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others. Nor would it protect them from other provisions of the Consumer Safety Act which may apply to them directly as individuals.

Supply Act

2.76. Unlike the Consumer Safety Act, the Supply Act does not appear to impose any relevant obligations on the Commonwealth which it could contravene. It follows that it is not necessary to consider whether individuals could be held liable for the Commonwealth's contraventions.

2.77. However, we note that individuals could of course be liable if they fail to comply with provisions that apply to them, as individuals.

3. APPENDIX THREE

Queensland

3.1. In relation to Defence bases in Queensland, we have identified the following relevant laws:

- *Electrical Safety Act 2002* (Qld) (Qld Safety Act) and *Electrical Safety Regulation 2002* (Qld) (Safety Regulation), and
- *Electricity Act 1994* (Qld) (Qld Electricity Act).

3.2. As our discussion below shows, we consider that not only is the Commonwealth bound by the Qld Safety Act, it may also be prosecuted for an offence against the Act. This places the Qld Safety Act in a significantly different position to the other State and Territory laws considered. Therefore, in addition to the powers to disconnect and enforceable undertaking, we have also given a brief overview below of the obligations that are imposed by the Qld Safety Act on the Commonwealth. For this reason, we have also structured the discussion on Queensland laws slightly different to that of the other jurisdictions.

Qld Safety Act

3.3. The Safety Act deals with many aspects concerning electrical safety. These relevantly include:

- the imposition of 'electrical safety obligations' (Part 2)
- enforceable undertakings (Part 3)
- requirements for electrical licences (Part 4), and
- enforcement powers (Part 11).

We examine each of these more closely in turn below.

Electrical safety obligations

3.4. Under the Safety Act, certain persons (by reason of their capacity or activities) have electrical safety obligations. Defence would, in our view, most likely be in a capacity to attract some of these obligations e.g. as an employer and as a person in control of electrical equipment[37] (s 26). Defence contractors would also attract some of

[37] A person who is the occupier of a place where electrical equipment is located would ordinarily be the person in control of the equipment (s 24(2)). 'Electrical equipment' is any apparatus, appliance, cable, conductor, fitting, insulator, material, meter or wire—

(a) used for controlling, generating, supplying, transforming or transmitting electricity at a voltage greater than extra low voltage; or

(b) operated by electricity at a voltage greater than extra low voltage; or

(c) operated by electricity at an extra low voltage, if the equipment forms part of an electrical installation located in a hazardous area; or

(d) that is, or that forms part of, a cathodic protection system.

these obligations e.g. as an installer or repairer of electrical equipment and electrical installations. A person on whom an electrical safety obligation is imposed must discharge it, with breaches punishable by fines and/or imprisonment (s 27).

3.5. As an employer, Defence's obligations under s 30 is to ensure the undertaking is conducted in a way that is electrically safe,[38] including ensuring:

- that all electrical equipment used is electrically safe
- the electrical safety of all persons and property likely to be affected by electrical work, and
- persons performing work involving contact with or in proximity to exposed parts are electrically safe.

3.6. As a person in control of electrical equipment,[39] Defence's obligations under s 38 is to ensure the electrical equipment is electrically safe.

3.7. The Safety Act expresses these electrical safety obligations at a high level of generality. These are supplemented by regulations,[40] codes of practice[41] and ministerial notices (where the Minister considers urgent action is needed to deal with an electrical risk). Each of these can be used to prescribe a way of discharging a person's electrical safety obligations. They generally would not prescribe all that a person must or must not do, but if a person fails to comply with a regulation, ministerial notice or code of practice, the person would also have failed to discharge their electrical safety obligation (see Division 3 of Part 2, Safety Act).

Enforcement powers

3.8. The Qld Safety Act provides inspectors with a range of enforcement powers, including disconnection in certain circumstances. Inspectors are appointed by the chief executive under the Safety Act (s 122). Having entered a place under the Safety Act, inspectors may (among other things) seize electrical equipment[42] on the basis of safety concerns (see ss 146 and 147), and having seized electrical

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38 There is an extensive definition of 'electrically safe' in s 10 of the Safety Act.

39 Section 28 expressly provides that a person may be the subject of an electrical safety obligation in more than one capacity.

40 We have identified the following provisions in the Safety Regulation as potentially relevant to Defence's activities:

- Divisions 2 to 5 of Part 2 and Division 1 of Part 5 dealing with electrical work
- Part 4 dealing with work in contact with or near to electrical parts
- Subdivision 2 of Division 5 concerning cord extension sets and flexible cables, and
- Subdivision 5 of Division 5 concerning electrical equipment in 'service work' or 'office work'.

41 Codes of Practice can be accessed from http://www.justice.qld.gov.au/fair-and-safe-work/electrical-safety/law-and-penalties/codes-of-practice.

42 See s 14 for definition of 'electrical equipment'.

equipment, inspectors may disconnect it from its supply of electricity (s 147(1)(b)) or dismantle it (s 147(1)(c)).

3.9. There are a range of other enforcement options which do not appear to require an inspector to enter and seize electrical equipment, some of which can also result in disconnection. In particular, where an inspector reasonably believes that circumstances causing, or likely to cause, an immediate electrical risk[43] to persons or property have arisen at a place, under s 154 they may:

- direct the person in control[44] of any activity or electrical equipment that caused, or is likely to cause, the circumstances to stop the activity or stop use of the electrical equipment, and
- disconnect electrical equipment from its supply of electricity as necessary to eliminate the electrical risk.

Requirements for electrical licences

3.10. The Safety Act contains a scheme for electrical licences. A person must not perform or supervise electrical work unless they have an electrical work licence authorising that work (s 55(1)). The scheme also imposes obligations upon persons conducting a business or undertaking that includes the performance of electrical work. The Qld Safety Act also contains provisions for the rectification of defective electrical work (see Division 1A of Part 4).

Enforceable undertakings

3.11. Under the Qld Safety Act, certain persons (by reason of their capacity or activities) have electrical safety obligations. Defence would, in our view, most likely be in a capacity to attract some of these obligations e.g. as an employer and as a person in control of electrical equipment (s 26). Part 3 of the Qld Safety Act allows a person who is alleged to have failed to discharge their electrical safety obligation to give a written undertaking (called an 'electrical safety undertaking') which includes an assurance as to the person's future behaviour. When an electrical safety undertaking is operating, proceedings cannot be commenced in relation to the alleged contravention (s 51(2)). It is an offence to contravene an electrical safety undertaking (s 52), and the undertaking is enforceable in court (s 54).

Qld Electricity Act

3.12. The Qld Electricity Act also contains a number of provisions allowing for disconnection which may be relevant to Defence's operations. These are found primarily in Chapters 6 (which deals with 'electricity officers') and 7 (which deals with 'inspection officers').

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43 See s 10 for definition of 'electrical risk'.

44 See s 24 for meaning of 'person in control'. We note that under the *Acts Interpretation Act 1954* (Qld), 'person' includes corporations, which in turn includes bodies politic (see s 36).

3.13. Electricity officers[45] have disconnection powers exercisable specifically to deal with safety concerns. Under s 141, an electricity officer for an electrical entity may enter a place[46] where it has works or electrical installations, or where someone else has an electrical installation, to make them safe. 'Safe', in relation to works or an electrical installation, 'means that the works or electrical installation can not cause fire or electrical shock' (s 141(5)). The electricity officer may disconnect supply to a works or installation until it is made safe (s 141(3)). Electricity officers for an electrical entity may also be able to disconnect supply where they are refused entry to certain places e.g. to read a meter (see s 138).

3.14. In relation to disconnection, inspection officers under the Qld Electricity Act have similar powers as inspectors under the Qld Safety Act (see specifically ss 152H and 152I).

Application of Qld laws to Defence

3.15. Section 13 of the *Acts Interpretation Act 1954* (Qld) (Qld Interpretation Act) provides:

> **13 Future Acts when binding on the Crown**
>
> No Act passed after the commencement of this Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included in the Act for that purpose.

3.16. In our view, for the reasons below we think it is reasonably clear that the Queensland Parliament intended that the Qld Safety Act and Qld Electricity Act (both of which were passed after the commencement of the Qld Interpretation Act) would generally bind the Crown in right of the Commonwealth.

Qld Safety Act

3.17. Section 3 of the Qld Safety Act provides:

> This Act binds all persons, including the State, and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.

As we said in the NSW advice, this kind of formulation would usually be sufficient to indicate that legislation extends to the Crown in right of the Commonwealth and its agencies.

3.18. In the NSW advice, we also noted that this type of provision would generally not be sufficient to expose the Commonwealth to criminal liability. The position under the Qld Safety Act is, in our view, considerably different. Division 2A of Part 13 specifically deals with proceedings against government bodies. Section 192B(1)

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45 A person who is appointed under the Qld Electricity Act as an electricity officer (Dictionary in Sch 5 to the Qld Electricity Act).

46 Neither the definition of 'place' nor that of 'premises' excludes those owned or occupied by the Commonwealth (see Dictionary in Sch 5 to Qld Electricity Act).

provides that a 'government body' may be prosecuted for an offence against the Qld Safety Act. A 'government body' includes the Commonwealth (see s 192A). The penalty that may be imposed on a government body is that applicable to a body corporate, and a government body may be served an infringement notice in relation to an offence under the Qld Safety Act (see s 192D).

3.19. These provisions, taken together, indicate that the Qld Safety Act would apply to the Commonwealth. Importantly, it also potentially exposes the Commonwealth to criminal liability in respect of contraventions.

3.20. We are not aware of any Commonwealth law that would be inconsistent with the Qld Safety Act. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the Qld Safety Act generally (though it may be possible to make arguments to this effect in particular circumstances).

3.21. In summary, we think the Commonwealth should proceed on the basis that it is bound to comply with the Qld Safety Act, including being potentially exposed to criminal liability.

Qld Electricity Act

3.22. Section 18 of the Qld Electricity Act applies the Act to government entities (which includes the Commonwealth), but only:

(a) to the extent that the entity is, or has a financial interest in, an electricity entity; or

(b) to the extent that the entity is a customer; or

(c) in relation to electricity restriction and rationing

…

3.23. In other words, the Qld Electricity Act applies to the Commonwealth, though only to the extent set out in s 18. We do not think s 18 would be sufficient to expose the Commonwealth to criminal liability, though (as discussed in the NSW advice) the Commonwealth may still have a legal obligation to comply with the relevant provisions.

3.24. We are not aware of any Commonwealth law that would be inconsistent with the Qld Electricity Act. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the Qld Electricity Act generally (though it may be possible to make arguments to this effect in particular circumstances).

3.25. In summary, we think the Commonwealth should proceed on the basis that it is bound to comply with the Qld Electricity Act.

Liability of individuals

Qld Safety Act

3.26. As we said above, the Commonwealth is bound by the Qld Safety Act, including being potentially exposed to criminal liability. The question here is whether that liability could be 'devolved' onto persons within the Commonwealth. We have not located any provision in Division 2A of Part 13 which does this. There is, however, a more general 'executive officer offence provision', which we turn to below.

3.27. Section 199 of the Qld Safety Act relevantly provides:

> (1) The executive officers of a corporation must ensure that the corporation complies with this Act.
>
> (2) If a corporation commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision.

3.28. Before s 199(2) can apply (to expose executive officers to liability), the corporation must have committed an offence against the Qld Safety Act (though the Act is silent on whether the corporation needs to have been *convicted* of the offence). We mention that the provisions we have discussed above in relation to the Qld Safety Act are, for the most part, not offence provisions. At the same time, we were not asked to give a comprehensive of all of the obligations the Qld Safety Act imposes on the Commonwealth, the contravention of which might be an offence. For the purposes of this discussion, we have assumed that the Commonwealth has committed some sort of offence against the Qld Safety Act, and considered whether that might expose individuals in Defence to liability.

3.29. As with the NSW Consumer Safety Act, a key threshold issue is whether the Commonwealth is a 'corporation'. The Qld Safety Act does not define the term, but unlike NSW, s 36 of the *Acts Interpretation Act 1954* (Qld) (Qld AI Act) defines 'corporation' to include a body politic. There is accordingly a stronger case that s 199 of the Qld Safety Act is capable of applying to the Commonwealth, and to its 'executive officers'.

3.30. However, the application of definitions in Qld AI Act is subject to a contrary intention appearing in the Act being interpreted (see s 4, Qld AI Act). In our view, the Qld Safety Act arguably does have such a contrary intention. Section 199 applies to 'executive officers', which is defined as follows:

> ***executive officer***, of a corporation, means a person who—
>
> (a) is a member of the governing body of the corporation; or
>
> (b) is concerned with, or takes part in, the corporation's management, whatever the person's position is called and whether or not the person is a director of the corporation.

3.31. In our view, there would be difficulties with applying this definition to a body politic. It is not immediately obvious what the Commonwealth's 'governing body' would be (Cabinet perhaps). It also is not clear who would be a person concerned with, or taking part in, the Commonwealth's management. As we have said above, this could capture Ministers, but is unlikely to extend to Senior Executives within Defence (who, after all, only have managerial responsibilities in relation to a part of the Commonwealth). As we have said above in relation to NSW, these comments should not be taken to mean that the Commonwealth could never be a corporation in particular contexts, nor that there could never be someone occupying a position akin to that of an executive officer in a corporation in relation to the Commonwealth. However, the difficulties that are evident in applying s 199 to a body politic are fairly strong indications that the definition of 'corporations' in the Qld AI Act to include bodies politic was not intended to apply here.

3.32. In summary, we consider it unlikely any particular individual within the Commonwealth could be held liable under s 199 if the Commonwealth committed an offence under the Consumer Safety Act. This does not change the fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others. Nor would it protect them from other provisions of the Qld Safety Act which apply to them directly as individuals.

Qld Electricity Act

3.33. Section 240A of the Qld Electricity Act is, for present purposes, identical to s 199 of the Qld Safety Act, and our comments above are applicable.

3.34. For completeness, we mention that s 120ZA (where it applies) places liability for the conduct of individuals within an 'electrical entity' onto the entity itself. However, as it does not appear that Defence or the Commonwealth is an electrical entity, we have not considered s 120ZA further.

Victoria

3.35. In relation to Defence bases in Victoria, we have identified the *Electricity Safety Act 1998* (Vic) (Vic Safety Act) as the most relevant Act. We also briefly reviewed the *Electricity Industry Act 2000* (Vic) but it did not appear to contain any provisions dealing with disconnection for safety reasons or enforceable undertakings.

Powers to disconnect

3.36. There are two main provisions of note in the Vic Safety Act. The first concerns the powers of enforcement officers, the other deals with the powers of the Director of Energy Safety.

Powers of enforcement officers

3.37. Under s 125(1), enforcement officers,[47] on exercising a power of entry under Division 1 of Part 11, may (among other things):

> (e) examine, test and, if necessary, disconnect, seize and remove or otherwise make safe any electrical equipment, electrical installation or electrical installation work that the enforcement officer considers unsafe or does not comply with this Act or the regulations or was involved in a serious electrical incident.

3.38. Enforcement officers can exercise powers of entry in particular circumstances only. This includes where there is a threat to the safety of persons or property arising from a situation relating to electricity (see s 124(1)).

Powers of Director of Energy Safety

3.39. Part 12 allows the Director of Energy Safety to give directions on the basis of safety concerns. The power is drafted relatively broadly, and may encompass a direction involving disconnection of particular electrical equipment. Section 141(2) is relevant here, providing:

> (2) If the Director is satisfied that it is necessary to do so for safety reasons, the Director may, in writing, direct a person—
>
> (a) to cease to use particular electrical equipment or a class of electrical equipment until the Director considers that it is safe to use; or
>
> (b) to cease a particular electrical work practice or class of electrical work practice until the Director considers that it is safe; or
>
> (c) to make safe an electrical installation or particular electrical equipment; or
>
> (d) to do any other thing necessary to make an unsafe electrical situation safe; or
>
> (e) to do any other thing necessary to prevent an unsafe electrical situation from arising.

The *Interpretation of Legislation Act 1984* (Vic) defines 'person' to include a body politic (s 38), which would include the Commonwealth. Penalties attach to a failure to comply with a direction given under s 141 (s 141(4)), though as we say below we do not think the Vic Safety Act is intended to expose the Commonwealth to criminal liability.

Enforceable undertakings

3.40. We have not located any provision in the Vic Safety Act indicating that enforceable undertakings are available in respect of alleged contraventions. This appears

[47] A person appointed as an enforcement officer under Part 11 of the Vic Safety Act (s 3).

consistent with information on the Energy Safe Victoria website on enforcement options.[48] Please let us know if you would like us to advise on other enforcement options under the Vic Safety Act.

Application to Defence

3.41. Section 5 of the Vic Safety Act provides:

> This Act binds the Crown, not only in right of Victoria but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

3.42. As we said in the NSW advice, this kind of formulation would usually sufficient be to indicate that legislation extends to the Crown in right of the Commonwealth and its agencies. We do not think that s 5 would in itself be sufficient to expose the Commonwealth to criminal liability, though (as discussed in the NSW advice) the Commonwealth may still have a legal obligation to comply with the relevant provisions.

3.43. We are not aware of any Commonwealth law that would be inconsistent with the Vic Safety Act. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the Vic Safety Act generally (though it may be possible to make arguments to this effect in particular circumstances).

3.44. In summary, we think the Commonwealth should proceed on the basis that it is bound to comply with the Vic Safety Act.

Liability of individuals

3.45. As we have said above, we consider that the Commonwealth is bound to comply with the Vic Safety Act, though it could not be prosecuted for an offence against it. The question addressed in this question is whether non-compliance by the Commonwealth under the Vic Safety Act could expose individuals to liability.

3.46. The Vic Safety Act contains a provision under which 'officers' of 'bodies corporate' may be held liable for offences committed by the body corporate. The provision applies whether or not the body corporate has been proceeded against or convicted of the offence (s 146(2)).

3.47. Section 146 relevantly provides:

> (1) If a body corporate commits an offence against this Act or the regulations, any officer of the body corporate who was in any way, by act or omission, directly or indirectly knowingly concerned in or party to the commission of the offence is also guilty of that offence and liable to the penalty

[48] http://www.esv.vic.gov.au/Legislation-Regulations/Enforcement/Enforcement-policy-and-philosophy.

…

(5) In subsection (1), ***officer***, in relation to a body corporate, means—

(a) a director, secretary or executive officer of the body corporate; or

(b) any person in accordance with whose directions or instructions the directors of the body corporate are accustomed to act; or

(c) a person concerned in the management of the body corporate.

3.48. The first question here is whether the Commonwealth - a body politic - is a 'body corporate' for the purposes of s 146. The Vic Safety Act does not define 'body corporate'. The *Interpretation of Legislation Act 1984* (Vic) (Vic IL Act) defines 'person' to include 'a body politic or corporate' as well as an individual' (s 38). However, there is no statement that a body corporate includes a body politic, and we do not think that can be implied from the definition of 'person'.

3.49. In recent years, several Australian courts have held that the phrase 'body corporate' in certain pieces of legislation includes a body politic,[49] and these decisions may influence a court's interpretation of s 146. However, we consider that even assuming that the Commonwealth is a body corporate for the purposes of s 146, it is unlikely that any particular individual within Defence would fall within any of s 146(5)(a)-(c). Similar to the comments we made in relation to NSW and Qld, it is not immediately apparently who would be the equivalent of a director (or secretary or executive officer, for that matter) of the Commonwealth. The term 'director' is relevant to both ss 146(5)(a) and (b). The only provision that seems capable of applying to an entity like the Commonwealth would be s 146(5)(c). Individual Defence employees (even those at the Senior Executive level) are unlikely to meet the description of being persons 'concerned in the management' of the Commonwealth. (as they would likely only have managerial responsibilities for only a part of the Commonwealth).

1.3. On one view, only Ministers could be said to be the persons 'concerned in the management' of the Commonwealth (as a single legal entity). In our view, the difficulties of applying s 146 to an entity like the Commonwealth are fairly strong indications that the provision was not intended to apply so as to make individuals within the Commonwealth liable for actions of the Commonwealth. Even if s 146 had that effect, it is unlikely individuals within Defence would be caught by it. This does not change the fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others. Nor would it protect them from other provisions of the Vic Safety Act which apply to them directly as individuals.

South Australia

3.50. In relation to Defence bases in South Australia, we have identified the *Electricity Act 1996* (SA) (SA Electricity Act) as the most relevant Act.

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[49] See *Workcover NSW v Police Service of NSW* (2000) 50 NSWLR 333 and *Coochey v Commonwealth of Australia* [2005] FCA 1165.

Powers to disconnect

3.51. Generally speaking, there are a number of persons or entities who have been given some power of disconnection under the SA Electricity Act. These are electricity officers, electrical entities, the office of the Technical Regulator and authorised officers.

Powers of electricity officers and electrical entities

3.52. An electricity entity may appoint persons to be its electricity officers under s 41. Electricity officers have a range of powers under the SA Electricity Act. These powers include the power to enter places to inspect electrical installations in that place to ensure it is safe to connect or reconnect electricity supply, and if it appears unsafe, to disconnect electricity supply to the place where the electrical installation is situated until it is made safe (s 49). In certain circumstances where an electricity officer is refused entry to a place, they may disconnect electricity supply to that place (s 52). An electricity entity may also cut off electricity supply where it is necessary to avert danger to person or property (s 53).

3.53. Electricity officers of an electrical entity are also able to disconnect under s 59(2) electricity supply to an electrical installation that:

- is connected to the entity's transmission or distribution network in contravention of s 59, or
- otherwise does not comply with the SA Electricity Act.

(We have not, for present purposes, examined the requirements which electrical installations must meet in order to comply with the SA Electricity Act.)

Powers of the office of the Technical Regulator

3.54. If an electrical installation or electrical equipment is unsafe, or does not comply with the SA Electricity Act, the Technical Regulator may give a direction under s 62 to the person[50] in charge of the installation or equipment, or the occupier[51] of the place where the installation or equipment is situated, requiring (among other things) the temporary disconnection while rectification work is carried out or permanent disconnection and removal of the installation or equipment.[52] Failure to comply with the Technical Regulator's direction is punishable by a fine (s 62(4)). If a person does not comply with the direction, the Technical Regulator may take the action that is reasonable and necessary to have the direction carried out (s 62(5)).

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50 The word 'person' is not defined in the *Acts Interpretation Act 1915* (SA) to include or exclude bodies politic (see s 4(1)). Although no mention is made of bodies politic, in law the term 'person' includes the Crown (cf. *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667 to 685, 686 and 692).

51 'Occupier' of land or a place means a person who has or is entitled to possession or control of the land or place (s 4(1)).

52 There are provisions under s 62 allowing the giving of directions to electrical entities in relation to electrical infrastructure, but they do not appear relevant to Defence's activities.

Powers of authorised officers

3.55. The Minister may appoint persons as authorised officers (s 64(1)). Authorised officers have a range of powers under the SA Electricity Act. These include the power to disconnect electricity supply where an authorised officer finds that:

- electricity is being consumed or supplied contrary to the SA Electricity Act (s 70), or
- electricity infrastructure, an electrical installation or electrical equipment is unsafe (s 72).

Enforceable undertakings

3.56. If it appears to the Technical Regulator that a person is guilty of a contravention of Part 6 (which deals with safety issues), the Technical Regulator may issue a warning under s 63A(2) that they will be prosecuted unless the person:

- takes rectification action, and
- gives an assurance that the person will avoid a future such contravention.

3.57. Where the Technical Regulator has given a warning to a person, under s 63A(6) the Technical Regulator must not proceed against the person unless they:

- fail to take the rectification action, or
- fail to give the assurance, or contravene an assurance.

Application to Defence

3.58. Section 5 of the SA Electricity Act deals with its application. It is useful to set it out in full:

> (1) This Act binds the Crown.
>
> (2) Nothing in this Act renders the Crown in any of its capacities liable to be prosecuted for an offence.
>
> (3) For the purposes of this section, a reference to the Crown extends—
>
> (a) not only to the Crown in right of this State but also (so far as the legislative power of the State permits) to the Crown in any other capacity; and
>
> (b) to an instrumentality of the Crown, and to an officer or employee of the Crown and any contractor or other person who carries out functions on behalf of the Crown.

3.59. In our view, ss 5(1) and 5(3)(a) together indicate that the legislation extends to the Crown in right of the Commonwealth. Section 5(2) confirms the strong presumption that the Commonwealth would not be exposed to criminal liability in respect of contraventions under the SA Electricity Act.

3.60. We are not aware of any Commonwealth law that would be inconsistent with the SA Electricity Act. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the SA Electricity Act generally (though it may be possible to make arguments to this effect in particular circumstances).

3.61. In summary, we think the Commonwealth should proceed on the basis that it is bound to comply with the SA Electricity Act.

Liability of individuals

3.62. In our view, the effect of s 5(3) of the SA Electricity Act is that neither of the following could be prosecuted for an offence under the Act:

- officers or employees of the Commonwealth,
- contractors or other persons carrying out functions on behalf of the Commonwealth.

3.63. In other words, in the same way that the Commonwealth could not be prosecuted for an offence under the SA Electricity Act, neither could individual officers or employees in Defence, or contractors carrying our functions on behalf of Defence.

3.64. This does not, in our view, change the fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others.

Tasmania

3.65. In relation to Defence bases in Tasmania, we have identified the following relevant laws:

- *Electricity Supply Industry Act 1995* (Tas) (Tas Supply Act), and
- *Electricity Industry Safety and Administration Act 1997* (Tas) (Tas Safety and Administration Act).

Powers to disconnect

Tas Supply Act

3.66. Under the Tas Supply Act, both electricity officers and authorised officers have the power to disconnect electricity supply in certain circumstances.

3.67. Electricity officers are appointed by electrical entities for that entity (see s 58(1)). An electricity officer may exercise powers only in relation to the electricity entity's infrastructure and the supply of electricity by the electricity entity (s 58(3)(a)). The key provision for present purposes is s 62. It allows an electricity officer for an electricity entity to enter, at any reasonable time, a place to which electricity is supplied by the entity to (among other things) inspect electrical installations to

ensure safety and to prevent or minimise an electrical hazard. An electricity officer may also disconnect electricity supply to a place if, in their opinion, an electrical installation in that place is unsafe (s 62(5)). Electricity officers for an electrical entity may also be able to disconnect supply in particular circumstances where they are refused entry to a place (see s 65).

3.68. Authorised officers are appointed under s 84 of the Tas Supply Act. If an authorised officer finds that electricity is being supplied or consumed contrary to the Tas Supply Act (or an order under that Act), they may disconnect the electricity supply (s 90).

Tas Safety and Administration Act

3.69. There are also a number of disconnection powers given to authorised officers and to the Secretary by the Tas Safety and Administration Act. In this context, authorised officers are persons appointed under s 9(1) of the Tas Safety and Administration Act.

3.70. The most relevant provisions are found in Division 3 of Part 5, which confers powers to ensure safety. The Secretary may:

- direct an electricity entity to disconnect supply to a particular electrical installation for reasons of safety (s 66)
- direct the person in charge of electrical equipment to discontinue use of it for reasons of safety (s 67), and
- require a person to stop a practice creating a significant risk of a serious electrical accident (s 68).

Non-compliance with such directions attracts a penalty. 'Person' is not defined in either the Tas Supply Act or the Tas Safety and Administration Act. The *Acts Interpretation Act 1931* (Tas) (Tas Interpretation Act) defines 'person' to include 'any body of persons, corporate or unincorporate, other than the Crown' (s 41(1)). This definition of 'person' would, on its face, exclude the Commonwealth, but as we discuss from paragraph 3.73 the provisions we have identified probably indicate a contrary intention.[53]

3.71. Under the Tas Safety and Administration Act, authorised officers are able to:

- disconnect from a source of electricity electrical infrastructure or electrical installations which they find to be unsafe (s 69), and
- disconnect a source of electricity in an emergency where that is necessary to protect life or property (s 70).

[53] See s 4(1) of the Tas Interpretation Act.

Enforceable undertakings

3.72. We have not located any provision in the Tas Supply Act or the Tas Safety and Administration Act indicating that enforceable undertakings are available in respect of alleged contraventions. Please let us know if you would like us to advise on other enforcement options under either of these Acts.

Application to Defence

3.73. Both the Tas Supply Act and Tas Safety and Administration Act (see ss 4 and 5, respectively) provide:

> This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.

3.74. There has been some judicial consideration of the effect of such provisions, particularly in light of the definition of 'person' in the Tas Interpretation Act which (as we noted above) excludes the Crown. This is especially relevant to the provisions in the Tas Safety and Administration Act which allow the Secretary to give directions to 'persons' to ensure safety. The Tas Interpretation Act also contains the following more general provision in s 6(6):

> No Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose.

3.75. In *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*[54] (Anti-Discrimination Act case), the Full Federal Court considered whether the *Anti-Discrimination Act 1998* (Tas) (Tas AD Act) applied to the Commonwealth. Section 4 of the Tas AD Act is expressed in the same way as ss 4 and 5 of the Tas Supply Act and Tas Safety and Administration Act.

3.76. Goldberg J, in the minority, considered that s 4 of the Tas AD Act showed a clear intention to bind the Commonwealth, and that this overrode the presumption (expressed in the Tas Interpretation Act) that 'person' does not include the Crown. His Honour further held that s 4 contained 'express words' for the purposes of s 6(6) of the Tas Interpretation Act.

3.77. The majority (Weinberg and Kenny JJ) held that 'person' in the Tas Anti-Discrimination Act should be construed as not being intended to apply to the Commonwealth. An important aspect of the reasoning preferred by the majority appeared to be that if the Tas Anti-Discrimination Act applied to the Commonwealth, it would treat the Commonwealth less favourably than the State. This was because there were provisions in the Tas AD Act allowing discrimination on particular grounds in the administration of State laws and programs which (as a matter of statutory interpretation) would not have been available to the Commonwealth.

54 [2008] FCAFC 104.

3.78. In relation to the provisions we have identified as presently relevant in the Tas Supply Act and Tas Safety and Administration Act, they do not appear to involve any differential treatment as between the State and the Commonwealth. The provisions we have identified appear capable of applying to all persons, places, premises etc. For that reason, we think there is some doubt whether a court would reach the same view in relation to the Tas Supply Act and Tas Safety and Administration Act as that reached by the majority in the Anti-Discrimination Act case. We also note that applying the Tas Supply Act and Tas Safety and Administration Act, particularly the provisions relating to electrical safety, as broadly as possible (regardless of, for example, who owns or is in charge of an electrical installation), would appear to promote the objects of those Acts.[55]

3.79. It follows that we do not think it would be prudent for Defence to proceed on the basis that it is not bound by the Tas Supply Act or the Tas Safety and Administration Act. That said, even proceeding on the basis that those Acts do apply to the Commonwealth, we do not think the provision excerpted in paragraph 3.73 would be sufficient to expose the Commonwealth to criminal liability, though the Commonwealth may still have a legal obligation to comply with the relevant provisions.

3.80. We are not aware of any Commonwealth law that would be inconsistent with the Tas Supply Act or Tas Safety and Administration Act. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the Tas Supply Act or Tas Safety and Administration Act generally (though it may be possible to make arguments to this effect in particular circumstances).

3.81. In summary, we think it would be prudent for the Commonwealth to proceed on the basis that it is bound to comply with the Tas Supply Act and Tas Safety and Administration Act.

Liability of individuals

3.82. As we have said above, we consider that the Commonwealth is bound to comply with the Tas Supply Act and the Tas Safety and Administration Act, though it could not be prosecuted for an offence against it. The question addressed in this question is whether non-compliance by the Commonwealth under either Act could expose individuals to liability.

Tas Supply Act

3.83. The short answer under the Tas Supply Act is no. We have not identified any 'corporate liability' provisions in the Tas Supply Act that would have this effect. This does not change the fact that it would be prudent for all members in Defence to

[55] Section 8A(1) of the Tas Interpretation Act provide '[i]n the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object'.

comply with the applicable law. Nor would it protect them from other provisions of the Tas Supply Act which apply to them directly as individuals.

Tas Safety and Administration Act.

3.84. Unlike the Tas Supply Act, the Tas Safety and Administration Act. does contain 'corporate liability' provisions. Section 92 provides:

> **92 Liability of directors and managers**
>
> (1) If a body corporate commits an offence against this Act, each director or manager of the body corporate who knowingly authorised or permitted the offence is also guilty of an offence and liable to a penalty not exceeding the maximum prescribed for the body corporate's offence.
>
> (2) A director or manager may be convicted of an offence under this section whether or not proceedings have been brought against the body corporate.

3.85. The first question is then whether the Commonwealth is a 'body corporate'.

3.86. The Tas Supply and Administration Act does not define the term, nor is it defined in the Tas Interpretation Act. As we have discussed above, several courts have held several Australian courts have held that the phrase 'body corporate' includes a body politic in certain pieces of legislation which may influence how a court interprets s 92.

3.87. In our view, even if the Commonwealth is a 'body corporate' for the purposes of the Tas Safety and Administration Act, it is unlikely to expose individuals within Defence to liability for the Commonwealth's contraventions. For that to occur, they must first be a 'director' or 'manager' of the body corporate. Neither of these terms are defined in the Tas Supply and Administration Act.

3.88. Their ordinary meanings are respectively:

- director: someone or something that directs or one of a body of persons chosen to control or govern the affairs of a company or corporation
- manager: someone who manages, a person charged with the management or direction of an institution, a business or the like or someone who manages resources and expenditures, as of a household.

There are, in our view, difficulties with applying these concepts to the Commonwealth. It is not clear that any individual within Defence (even at the Senior Executive levels) could be said to be either a director or manager of the Commonwealth.

3.89. In our view, the difficulties of applying s 92 to an entity like the Commonwealth are fairly strong indications that the provision was not intended to apply so as to make individuals within the Commonwealth liable for actions of the Commonwealth. Even

if s 92 had that effect, it is unlikely individuals within Defence would be caught by it. This does not change the fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others. Nor would it protect them from other provisions of the Tas Supply and Administration Act which apply to them as individuals.

Western Australia

3.90. We have identified the following laws which we think could be relevant to Defence bases in Western Australia:

- *Energy Coordination Act 1994* (WA) (WA Energy Coordination Act)
- *Electricity Act 1945* (WA) (WA Electricity Act)
- *Electricity Regulations 1947* (WA) (WA Electricity Regulations)

3.91. We have outlined some keys aspects of these laws.

3.92. We note that it appears that the relevant WA Acts and Regulations do not apply to the Commonwealth as a consumer. Of course, this does not mean that there could be no adverse consequences for Defence if installations and equipment does not meet the standards required under WA law. The supply authority or network operator has powers and obligations to maintain the integrity of the supply, network and infrastructure etc. If the supply authority or network operator decided that, in order to meet its obligations under WA law, it needed to take action to, eg, cut the electricity supply to a Defence base, that could have direct consequences for Defence regardless of whether the Commonwealth itself is subject to WA electricity laws as a consumer. It is possible that such a scenario could arise if, for example, a licensed electrician is called to a Defence base to perform electrical work and in the course of performing that work the licensed electrician identifies safety concerns and later reports those concerns to the regulator.

3.93. Further, the WA Acts and Regulations will clearly apply to those contractors who perform electrical work for Defence, and the regulator's powers will extend to those contractors.

Powers to disconnect

WA Electricity Regulations

3.94. The supply authority may disconnect a consumer’s installation without notice if the consumer has an installation that is faulty or unsafe (reg 272(a)).

Enforceable undertakings

WA Energy Coordination Act

3.95. The Director of Energy Safety (WA) may appoint persons to be inspectors for the purposes of the WA Energy Coordination Act and the WA Electricity Act) (and associated regulations) (s 12). These inspectors have a range of powers including to conduct enter premises to conduct inspections and to compel the production of records (see s 14).

3.96. If an inspector is of the opinion that any thing that the inspector is authorised to inspect (ie any plant, works, installation, component or activity used or undertaken or intended to be used or undertaken for or in connection with the generation, transmission, distribution, supply or use of the form of energy - see s 14(c)) does not conform with a relevant Act or is unsafe, the inspector may:

- make an order prohibiting the use of that thing absolutely or except in accordance with any condition or restriction; and/or
- disconnect the supply of energy to that thing, or to the premises on which it is situated, until the inspector is satisfied that the thing conforms with the Act or is safe. (s 18).

3.97. If an inspector is of the opinion that any thing that they are authorised to inspect is dangerous or has been rendered dangerous by the circumstances of use or location, an inspector may require the person who has apparently caused the danger, or the person who is legally responsible for or who has apparent control of the thing to take immediate steps to remove or mitigate the danger. (ss 18A(1)-(2))

3.98. If the inspector is of the further opinion that any immediate steps taken or to be taken may not remove the danger, the inspector may require that the thing be modified, dismantled or removed, or may require that the circumstances which may render that thing dangerous be dealt with. (ss 18A(3)-(4))

3.99. Further, if an inspector considers that any work practice related to safety in the construction, repair, maintenance or operation of any thing that they are authorised to inspect may give rise to any danger from electricity, or does not conform with relevant laws, the inspector may make an order:

- requiring the person appearing to be responsible for the carrying out of the work practice to modify that work practice within a period of not less than 28 days specified in the order and to, in the meantime, carry out the work practice in accordance with any condition, restriction or limitation specified by the inspector; or
- prohibiting the carrying out of the work practice absolutely. (s 18B)

3.100. An individual who fails to comply with an order under ss 18, 18A and 18B is guilty of an offence and liable to a penalty of $50,000, and the body corporate is liable to a penalty of $250,000 (see s 20).

WA Electricity Act

3.101. If the Director of Energy Safety considers that an electrical appliance is, or is likely to become, unsafe or dangerous in use (s 33C), the Director may prohibit by notice the use of the electrical appliance. An individual who fails to comply with a notice is guilty of an offence and liable to a penalty of $50,000, and the body corporate is liable to a penalty of $250,000.

Application to Defence

3.102. Unlike all of the other State and Territory Acts identified in this advice, none of the Western Australian Acts specify how or whether they are intended to apply to the Crown in right of the Commonwealth.

3.103. Both the Energy Coordination Act and the Electricity Act contain occasional references to the 'Crown' but in all instances it appears that those references are intended to refer to the Crown in right of Western Australia and not to the Crown in any other capacity. Without any indication of a contrary intention, the expression 'the Crown', where it appears in a State Act, is usually interpreted to refer only to the Crown in right of the enacting State: see, eg, *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 26 (Dixon J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 432-3, [114] (Gummow J).

3.104. We note that we do not think that there is anything in the *Interpretation Act 1984* (WA), which applies to the interpretation of all WA laws, that would suggest a general intention that when the term 'Crown' is used in a WA law it is intended to include the Commonwealth (to the extent possible).

3.105. Accordingly, in our view, the WA Acts do not rebut the ordinary presumption that a State Act is not intended to apply to the Commonwealth, its servants or agents (see, eg, *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107; *Commonwealth v Western Australia* (1999) 196 CLR 392 (the Mining Act Case) at 410). It therefore appears that the relevant WA Acts and Regulations do not apply to the Commonwealth.

Liability of individuals

3.106. As the WA Acts do not apply to the Commonwealth, it is not necessary to consider whether non-compliance by the Commonwealth under the WA Acts could expose individual employees or members to liability.

Northern Territory

3.107. In relation to Defence bases in the Northern Territory, we have identified the *Electricity Reform Act* (NT) (NT Electricity Act) as the most relevant Act.

Powers to disconnect

3.108. The NT Electricity Act confers powers to disconnect on a number of persons and entities.

3.109. Electricity officers are appointed under Part 4 of the NT Electricity Act. An electricity officer for an electricity entity:

- may enter, at any reasonable time, a place to which electricity is supplied by the entity to (among other things) take action to prevent or minimise an electrical hazard (s 60(1))
- may disconnect electricity supply to a place if, in their opinion, an electrical installation in that place is unsafe (s 60(5))
- may be able to disconnect supply in particular circumstances where they are refused entry to a place (see s 63), and
- may disconnect electricity supply to an electrical installation that is connected to the entity's network in contravention of s 67 or otherwise does not comply with the NT Electricity Act (s 67).

3.110. An electricity entity may cut electricity supply if it is necessary to do so to avert danger to person or property (s 65).

3.111. If an electrical installation is unsafe, the electricity safety regulator[56] may give a direction to the person[57] in charge of the installation or the occupier of the place where it is situated requiring (among other things) temporary disconnection while rectification work is carried out or permanent disconnection of the installation (s 70). Non-compliance with the direction attracts a penalty.

3.112. Authorised officers also have powers in this regard. Under Division 2 of Part 6, they may:

- disconnect electricity supply if they find that electricity is being supplied or consumed contrary to the NT Electricity Act (s 78), and
- disconnect electricity supply if they find an electrical installation is unsafe or direct person in charge of the installation or the occupied of the place where it is situated to disconnect supply (s 80).

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56 This means the person holding the office of electricity safety regulator under Part 2 of the NT Electricity Act.

57 Section 24AA of the *Interpretation Act* (NT) provides that a reference to 'person' generally includes a reference to a body politic and body corporate as well as an individual.

A person who given a direction under s 80 must comply with it.

Enforceable undertakings

3.113. We have not located any provision in the NT Electricity Act indicating that enforceable undertakings are available in respect of alleged contraventions. Please let us know if you would like us to advise on other enforcement options under this Act.

Application to Defence

3.114. Section 5 of the NT Electricity Act provides:

> (1) This Act binds the Crown.
>
> (2) Nothing in this Act renders the Crown in any of its capacities liable to be prosecuted for an offence.
>
> …
>
> (4) For the purposes of this section, a reference to the Crown extends:
>
> (a) not only to the Crown in right of this Territory but also (so far as the legislative power of the Territory permits) to the Crown in any other capacity; and
>
> (b) to an instrumentality of the Crown, and to an officer or employee of the Crown and any contractor or other person who carries out functions on behalf of the Crown.

3.115. In our view, ss 5(1) and 5(4)(a) together indicate that the legislation extends to the Crown in right of the Commonwealth, its officers, employees and contractors carrying out functions on its behalf. Section 5(2) confirms the strong presumption that the Commonwealth would not be exposed to criminal liability in respect of contraventions under the NT Electricity Act.

3.116. With respect to Territory laws, s 109 of the Constitution does not apply. Nevertheless, it is well established that similar principles apply in relation to a Territory law, so that a Territory law that is repugnant to a Commonwealth law will be overridden by the Commonwealth law to the extent of the repugnancy. The test for repugnancy closely resembles that which applies in relation to inconsistency for the purposes of s 109.[58]

3.117. We are not aware of any Commonwealth law to which the NT Electricity Act would be repugnant. For the same reasons we gave in the NSW advice, we also do not think the Commonwealth would be able to assert its implied constitutional immunity from the NT Electricity Act generally (though it may be possible to make arguments to this effect in particular circumstances).

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58 *Northern Territory v GPAO* (1999) 196 CLR 553 at [40]-[61], [219]-[223].

3.118. In summary, we think the Commonwealth should proceed on the basis that it is bound to comply with the NT Electricity Act.

Liability of individuals

3.119. In our view, the effect of s 5(4)(b) of the NT Electricity Act is that neither of the following could be prosecuted for an offence under the Act:

- officers or employees of the Commonwealth,
- contractors or other persons carrying out functions on behalf of the Commonwealth.

3.120. In other words, in the same way that the Commonwealth could not be prosecuted for an offence under the NT Electricity Act, neither could individual officers or employees in Defence, or contractors carrying our functions on behalf of Defence.

3.121. This does not change the fact that it would be prudent for all members in Defence to comply with the applicable law, and within their roles to encourage compliance by others.

Australian Capital Territory

3.122. Different principles govern the application of laws of the Australian Capital Territory to the Commonwealth than those which apply in relation to State and Northern Territory laws.

3.123. Section 12 of the *Australian Capital Territory (Self-Government) Act 1988* (the ACT Self-Government Act) provides, for enactments of the ACT Legislative Assembly:

> Except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth.

3.124. Regulation 3B of the *Australian Capital Territory (Self-Government) Regulations 1989* (ACT Self-Government Regulations) provides that the enactments set out in the schedule to the regulations bind the Crown if the enactment:

> (a) is expressed, in whole or part, to bind the Crown or to apply to any act, matter or thing affecting the Crown or the Commonwealth; or
>
> (b) provides that any act, matter or thing done under the enactment binds the Crown…

3.125. The schedule to the regulations lists a limited number of enactments. Of potential particular interest here is the *Electricity and Water Ordinance 1988*, which became the *Electricity and Water Act 1988* (ACT) (ACT Electricity Act) under s 34(4) of the ACT Self-Government Act. The ACT Electricity Act has since been repealed by the *Utilities Act 2000* (ACT) (ACT Utilities Act). However, under s 10A of the *Acts Interpretation Act 1901* (Cth AI Act) (read with s 13(1) of the *Legislative Instruments Act 2003*), a reference to Territory legislation that has been repealed and re-enacted

or re-made, with or without modifications, is to be construed as a reference to the re-enacted or re-made law.

3.126. As indicated above, the ACT Electricity Act was repealed by the ACT Utilities Act. Generally we would need to compare the Acts to see if the current Act is a re-enactment or re-making of the repealed Act to determine if s 10A of the Cth AI Act applies. However, it is not necessary to do so here. Even if the ACT Utilities Act could be described as a re-enactment or remaking of the ACT Electricity Act, the requirements of reg 3B of the ACT Self-Government Regulations have not been met for it to bind the Commonwealth. The ACT Utilities Act is not expressed to bind the Crown in right of the Commonwealth, it does not provide that it applies to an act, matter or thing affecting the Commonwealth, nor does it provide that an act, matter or thing done under it binds the Crown.

3.127. It follows, in our view, that the ACT Utilities Act does not bind the Commonwealth. For completeness, we note that the ACT also has laws dealing specifically with electrical safety (e.g. *Electrical Safety Act 1971* (ACT)). However, as none of these (nor their predecessors) has been included in the schedule to the ACT Self-Government Regulations, they will not bind the Commonwealth and we have not considered them further.

Liability of individuals

3.128. Under s 27 of the ACT Self-Government Act and s 121(4) of the *Legislation Act 2001* (ACT), the immunity of the Commonwealth from certain laws of the ACT extends to:

- Commonwealth officers and employees, ad
- contractors or anyone else who exercises a function on behalf of the Commonwealth.

3.129. This does not change the fact that it would be prudent for all persons in Defence to comply with relevant laws, and within their roles to encourage compliance by others.

3.130. We were assisted in the preparation of this advice by Steven Gardiner (Law Clerk), Natascha Sommer (Law Graduate) and Zoe Maxwell (Law Graduate).