

The findings of my investigations and those of both the Electrical Safety Taskforce and the Ministerial Review demonstrate that, from any perspective, Queensland's electrical safety system at the commencement of the WEP was unacceptable and required urgent attention.

6.17.2 2002-03

There was one electrical fatality in Queensland in the 2002-03 reporting year. The *Electrical Safety Act* was passed during this period.

6.17.3 2003-04

There were two electrical fatalities in Queensland during the 2003-04 reporting year. Both of these involved appliances.

During the same period, New South Wales had 11 electrical fatalities. Western Australia had three electrical fatalities and each of the remaining States³²⁶ and Territories had one electrical fatality each.

As a percentage of fatalities per million of population, Queensland had the second lowest rate in Australia³²⁷.

6.17.4 2004-05

There were seven fatal electrocutions in Queensland in this period³²⁸. Three of these incidents involved electrical workers. Two involved members of the public (one allegedly engaged in criminal activity) and the other two incidents involved non-electrical workers.

Five of the fatalities involved fixed wiring and one involved contact with live overhead power lines³²⁹.

However, there does not appear to be any common theme in these fatalities (for example, workplace health and safety) as there was in the workplace incidents discussed in this Report.

DIR has suggested that a safety switch "would have controlled the electrical safety risk" in six of the seven fatal electrical incidents that occurred. Two of the fatalities occurred at separate residences where safety switches were not installed. I have discussed the issue of safety switches in residential premises in 7.2.2.

326 Tasmania had no electrical fatalities during this period.

327 Tasmania has been excluded from these calculations as it recorded no deaths during the period.

328 Current to 17 June 2005 – information supplied by DIR.

329 Male farm worker killed when the grain auger he was operating contacted live overhead high voltage power lines.

Chapter 7: Implementation to date and what remains to be done

7.1 Response from Commissioner for Electrical Safety

A number of issues were referred to the Commissioner for Electrical Safety, Mr Jack Camp, throughout the WEP. Those issues and the Commissioner's response³³⁰ are set out below.

7.1.1 Cases 6 and 7

In Cases 6 and 7 of the WEP, I recommended that:

The Commissioner for Electrical Safety consider the safety issues raised in Part 6 of this report with a view to recommending to the Minister that measures be prescribed to address those issues in relevant Codes of Practice under the *Electrical Safety Act 2002*.

The various safety issues raised in Part 6 of that report included:

- ensuring appropriate consultation occurs between an employer and the relevant electricity entity and clarification of their respective obligations where the employer is carrying on business in proximity to overhead power lines;
- de-energising, re-gridding or undergrounding overhead HV power lines;
- earthing of mobile cranes used in proximity to overhead power lines;
- use of a safety observer when work is being carried out in close proximity to or on overhead power lines;
- action to restrict movement of mobile cranes working under power lines; and
- use of insulated swivels on cranes.

7.1.2 Commissioner's response

7.1.2.1 Completed work

The Commissioner provided the following information regarding safety issues that have been addressed:

Various Crane Safety issues raised in WEP Cases 6 and 7

The Code of Practice entitled "Working near Exposed Live Parts" provides practical ways to meet requirements for consultation between employers and relevant supply entities when performing work around power lines as provided

³³⁰ By letter dated 8 June 2005.

for in the Electrical Safety Regulation 2002. It also uses de-energising of power lines as a first example of eliminating a hazard as part of the risk management process.

The use of a safety observer is also provided in the Electrical Safety Regulation 2002 and the Code of Practice, as are actions to restrict crane movement and the use of insulated swivels.

Compliance Audits of the Crane Industry

Under the Electrical Safety Audit Program and in conjunction with Workplace Health and Safety Queensland (WHSQ), audits of crane operations and safe approach distances to power lines were conducted in 2005. These distances are provided in the Electrical Safety Regulation 2002 and the Code of Practice entitled "Working near Exposed Live Parts".

Crane Safety Video

As part of a program to increase the awareness of crane and other equipment operators the crane industry and building industry peak bodies were consulted on the relevance and suitability of a safety video entitled "Look Up and Live, Look Down and Survive". This was released in late 2004 to key stakeholders. The video promotes a greater awareness amongst crane and related industries of methods to avoid the hazards of energised power lines, including the hazards of digging near underground power lines.

One hundred videos and fifty DVDs were provided to peak industry bodies during November and December 2004. Further releases are planned for mid 2005.

7.1.2.2 Work in progress

The Commissioner provided the following information regarding the ongoing work being undertaken:

The recommendation stated that "The Commissioner for Electrical Safety consider the issues raised in Part 6 of this report with a view to recommending to the Minister that measures be prescribed to address those issues in relevant Codes of Practice under the Electrical Safety Act 2002."

The Electrical Safety Office took a broad approach to determining potential solutions by consulting with the building peak bodies and electricity supply industries. This process agreed on a number of strategies and placed a priority to put preventative measures in place that remove the electrical hazard before work with cranes and similar equipment commenced. It also identified that an increased industry awareness to avoid hazards was required, as well as potential means of reducing the impact if contact with power lines occurs.

The strategies that were identified include:

1. Council Planning Schemes

This involves the inclusion of appropriate wording into council planning schemes that require developers and builders to consider crane and other

plant safety and overhead power lines when submitting an application for planning approval.

The Electrical Safety Office has worked directly with the Local Government Association of Queensland to encourage councils to include working in council planning schemes or related documentation. The Electrical Safety Office has sent letters to all councils to encourage them to adopt appropriate wording or supply brochures provided to them by the Electrical Safety Office to the general public. The Electrical Safety Office has received positive feedback from a number of councils on both strategies.

The Electrical Safety Office has negotiated amendments to relevant documentation with the Brisbane City and Gold Coast City Councils which both councils have agreed to make available as case studies to other councils considering amending their documentation.

It is expected that this issue will be resolved in 2005-06.

2. Application for Electricity Supply

This involves the inclusion of crane and other plant safety as a matter when developers and/or builders apply to an electricity entity for temporary supply of power before building work commences on the site.

The Electrical Safety Office has worked with Energex and Ergon to amend their existing documents relating to applications for the temporary supply of power. Energex have implemented these changes. Ergon is currently considering appropriate amendments and have been supportive of this process and its intended outcomes. Completion is expected in late 2005.

3. Connection of Cranes to an Earth Lead

The connection of a lead between a crane and the earth is potentially one way of improving the electrical safety when a crane inadvertently contacts a power line. However, this can also introduce other risks to workers nearby.

To address this issue, the Electrical Safety Office is working with a nationally based project under the governance of the Energy Networks Association to address the technical issues of electrically connecting a crane to earth by a lead. This project is known as 'Earthing of Mobile Plant in the Electricity Supply Industry'.

A consultant has been engaged to conduct the work in Victoria. A draft report is due mid 2005 for consideration by the national electricity supply industry and issues identified will also be examined for application to cranes and similar equipment that are outside of the electricity supply industry.

Timing for resolution will be dependent upon the initial findings of the consultant's report.

4. Movement Limiting Devices

This involves the inclusion of advice into a code of practice for devices that detect the proximity of electricity and limit the movement of plant.

These devices are not commercially available but are under development and currently undergoing industrial trials interstate. The Electrical Safety Office is monitoring these developments and will assess the suitability for a code of

practice once they are available.

5. Review of requirements for working near exposed live parts

In the light of industry feedback obtained from stakeholders over time, a project has been established to review the requirements for working near exposed live parts. This project will review the content of the Code of Practice entitled "Working near Exposed Live Parts" and the safe approach distance provisions in the Electrical Safety Regulation 2002 in order to simplify and clarify the readability of the requirements.

This work is expected to be completed by late 2005.

7.1.3 Case 12

In Case 12 of the WEP, I recommended that:

DIR request the Commissioner for Electrical Safety to review:

1. Whether the issues of concern expressed in the Electrical Safety Alert relating to the design and operation of EWPs and their suitability for undertaking work in proximity to overhead electric lines are still valid and, if so, what action should be taken to ensure the health and safety of electrical workers using EWPs for overhead line work.
2. The adequacy of current training programs for electrical workers in the operation of EWPs.
3. Any inconsistencies, ambiguities and duplication in the various Guidelines and Manuals discussed in this Report.
4. Whether the ES Act, the ES Reg or any of the Codes of Practice issued under the ES Act require amendment in light of the opinions I have expressed and the issues for investigation I have identified in this Report.

7.1.4 Commissioner's response

7.1.4.1 Completed work

The Commissioner provided the following information regarding safety issues that have been addressed:

Safety Alert for the Versalift Type of EWP - [Case 12]

Recommendation 10.8.1 stated that "Whether the issues of concern expressed in the Electrical Safety Alert relating to the design and operation of EWPs and their suitability for undertaking work in proximity to overhead electrical lines are still valid and, if so, what action should be taken to ensure the health and safety of electrical workers using EWPs for overhead line work."

Recommendation 10.8.2 [required me to review] "the adequacy of current training programs for electrical workers in the operation of EWPs".

Due to the complexity of recommendation 10.8, the Electrical Safety Office divided it into four stages.

Stage 1 is limited to both recommendations above as applied to the Queensland electricity supply industry.

To address stage 1, the Electrical Safety Office engaged an independent engineering consultant, Scientific and Engineering Consultants Pty Ltd to carry out investigations. The report concluded that a very sophisticated ESI³³¹ training program is in place at a Federal, State and workplace level, that the design of the Australian distributed Versalift EWP models TEL-29 EIH is adequate, and that the assertion in the Safety Alert “that ... the arrangement of the deadman switch ... is in the same direction as that necessary to raise the boom” ... is not a safety issue.

However, during the course of the investigation by Scientific and Engineering Consultants a separate issue beyond the scope of the Safety Alert was raised regarding the engine speed of the EWP. DIR investigated this issue further and determined that it has no impact on workplace health and safety, and operator standards are considered adequate.

Nevertheless, as a matter of consistency, the Electrical Safety Office will inform manufacturers and other interested stakeholders that there is a need to associate the correct engine speed with EWP design requirements.

Rural Industry awareness of safe approach distances

The Electrical Safety Office consulted extensively with rural industry stakeholders to assist them in their development of training packages for cane and cotton workers. This was done as part of activities to promote and improve compliance with electrical safety legislation in the rural community and as a priority to work with industry organisations to develop practical means for compliance.

The awareness training short courses are available to rural workers to help them comply when working around exposed live power lines.

7.1.4.2 Work in progress

The Commissioner provided the following information regarding safety issues that are in the course of being addressed:

Suitability of guidelines and legislation for EWPs - [Case 12]

As explained above, due to the complexity of recommendation 10.8, the Electrical Safety Office divided it into four stages. Stage 1 is now complete and the others stages are being progressed.

Stage 2 examines the adequacy of training for electrical workers using other types of EWPs in the Queensland electricity supply industry. Stage 3 examines inconsistencies, ambiguities, and duplication in the various guides and manuals discussed in the WEP Case 12 report. Stage 4 examines if the

331 Electrical Safety Industry.

current electrical safety legislation needs amendment.

The Electrical Safety Office is currently working with crane and EWP industry stakeholders as part of the overall consultation processes described above to progress stages 2, 3 and 4.

This work is expected to be completed in 2005-06.

7.1.5 Cases 8 to 11

The Director-General of DIR has referred to the Commissioner a number of other issues I raised in Cases 8, 9, 10 and 11, regarding fallen power lines.

My recommendation to the Director-General of DIR in Part 8 was that:

DIR should undertake relevant independent research into the various types of splice joins used by electricity supply entities with a view to determining whether any of those joins are unsuitable to bear the static and dynamic loadings likely to be encountered in the geographic region in which any such entity operates.

My recommendations in Parts 9, 10 and 11 were that:

DIR should:

- undertake relevant independent research into the vegetation management policies and practices of the electricity supply entities and determine whether these are appropriate;
- undertake independent research into the regulatory approaches of other State and (relevant) international jurisdictions to LV fault protection; and
- consult widely with relevant academic and industry bodies on any existing, new or emerging technology that would enable the risks presented by fallen LV power lines to be removed or minimised.

7.1.6 Commissioner's response

7.1.6.1 Completed work

The Commissioner provided the following information regarding safety issues that have been addressed:

Research Splice Joins - Fallen Power Lines [Cases 8-11]

Recommendation 1 stated that "DIR commission relevant independent engineering research into the various types of splice joins used by electricity supply entities with a view to determining the suitability of splice join specifications for sub-tropical dynamic and static loading requirements."

A suitably qualified and independent consultant was appointed and investigated this recommendation. The investigation confirmed that splice join

technology has largely been replaced by a different type of filling for a number of years. Splice joins are no longer installed on new works, except in a small number of situations where there is no substitute technology available.

The investigation also found that there is insufficient evidence to suggest that splice joins are defective or otherwise unsuitable when correctly installed. It also established that there is no reason to believe that the Australian Standard or the purchasing specifications used by Energex or Ergon Energy for these products are inadequate.

Further, the report noted that for situations where there is no substitute technology available and splice joins must be used, there are precautions that need to be taken for storage and when fitting these devices to overhead power lines to achieve their designed safety requirements.

A copy of the report was issued to both Energex and Ergon with a covering letter seeking advice of actions they propose. Responses were received which confirmed that the precautions would be followed, and that splice joins are being progressively removed during upgrades of the network. The Electrical Safety Office will audit those responses as part of its Electrical Safety Audit Program to ensure compliance.

Research Vegetation Management of Electricity Entities - Fallen Power Lines [Cases 8-11]

Recommendation 5 stated that “DIR research and monitor industry best practice in vegetation management and ensure this information is used to inform the network operator Safety Management Systems which will be implemented as required under the new Electrical Safety Act 2002”.

The Electrical Safety Office engaged a suitably qualified independent consultant to conduct a best practice study into the co-existence of electrical networks and vegetation.

The report investigated the existing statutory requirements, policies and systems of the regulatory authorities and electricity distribution entities in Queensland, NSW, Victoria, SA and ACT. It also considered systems from web based research of overseas utilities and other industries.

The investigation also benefited greatly by integrating it with a business process audit by the Electrical Safety Office of the vegetation management systems of Ergon Energy.

The report recommends that vegetation management systems must include key factors such as asset management, strategic sourcing, business process re-engineering, performance management, and project management.

A copy of the report was issued to both Energex and Ergon Energy in mid January 2005 seeking advice of actions in response to the report. Responses were received that confirmed that the report would be used to improve their vegetation management systems.

Again, for the purposes of ensuring compliance, the Electrical Safety Office has included vegetation management audits of Energex and Ergon Energy in its Electrical Safety Audit Program.

7.1.6.2 Work in progress

The Commissioner provided the following information regarding safety issues that are in the course of being addressed:

Monitoring of Emerging Technologies - Fallen Power Lines [Cases 8-11]

Recommendation 10 stated that “DIR continue to monitor existing, new and emerging technologies in the area of low voltage protection systems, consult with industry bodies, regulators from other jurisdictions and international networks to assist in informing the process”.

This recommendation was approached by incorporating it into the work of The Energy Networks Association. This is a national body that reviews technical practices for electricity entities across Australia.

This process has produced a draft “National Low Voltage Electricity Network Electrical Protection Guideline” which was first published in December 2003. That document was produced collaboratively with electricity entities and safety regulators of which the Electrical Safety Office was an active participant.

The objective of the guideline is to establish a standard across the country at least equal to international best practice in an environment such as the Australian one. The guideline also explicitly recognises the dynamic nature of the technologies involved, envisages that amendments will be required both in the light of those developments and of experience.

This draft is currently undergoing further review, and should be finalised in 2005.

7.1.7 Additional comments by Commissioner

The Commissioner for Electrical Safety has advised that the following work is ongoing:

Promotion of “Look Up and Live” message

Two key priorities in the Electrical Safety Office Business Plan are:

- Promote heightened electrical safety awareness throughout the community and an increased understanding of the importance of acting on that knowledge (e.g. Key messages that underpin the ESO Communication Plan).
- Foster a culture of electrical safety throughout the community by working with industry organisations and people to develop practical means by which they can comply with electrical safety law and thus promote safety.

As part of meeting these priorities, the inclusion of specific information relating to crane and other plant safety near overhead power lines in training material has been provided for owner builders.

The Electrical Safety Office has expanded these priorities to include training material for a range of workers considered likely to be at risk of coming into contact with overhead power lines. It has consulted with a number of stakeholders who provide this training and have negotiated amendments to the training to include relevant information related to this matter. It is anticipated that amendments to training materials will be implemented by the end of 2005.

The Electrical Safety Office, in conjunction with the Strategic Communications Unit of DIR, developed and is in the process of implementing, a comprehensive education campaign. Work to date includes advertising in relevant industry journals, providing information to a range of key stakeholders who have provided this information to their members, and the provision of information on the Electrical Safety Office website.

Regular Consultation with Crane Industry Representatives

In conjunction with Workplace Health and Safety Queensland (WHSQ), the Electrical Safety Office regularly meets with representatives of two crane industry groups. These are the "Tower Crane" and "Mobile Crane" groups to discuss crane safety in general, as well as electrical safety.

7.2 Safety switches

A number of incidents in the WEP raised the use of safety switches³³². Safety switches have been recognised as a major factor in the reduction of fatal electrocutions in both residences and workplaces.

The June 2004 DIR Issues Paper called "Safer Electrical Equipment" stated³³³:

Safety switches, also known as Residual Current Devices or Ground Fault Circuit Interrupters, are capable of detecting very small leakages of current to earth and function by disconnecting the supply of electricity. They can protect a person from electric shock resulting from various incidents including faults in electrical appliances, circuit wiring or misuse of electrical equipment. Safety switches do not remove the need for safe practice in the use of electrical equipment but do provide continuing protection, unlike maintenance regimes which detect and repair fault only at particular times. Safety switches can mean the difference between life and death when a fault does occur.

7.2.1 Workplaces

Regulation of the use of safety switches differs³³⁴ depending upon the type of work being performed. The installation of safety switches is not mandatory in many cases.

The current position is that workplaces where there is an inherently high electrical risk (for example, construction, assembly, fabrication, maintenance

332 There are three basic types of safety switch, each with its own special features and application – standard safety switch, power outlet safety switch and portable safety switch.

333 Page 8.

334 Electrical Safety Regulation 2002 – Part 5, Division 4, Sections 77-81.

and manufacturing) must have a safety switch installed on the switch board or use a portable safety switch. Premises where office work or other work is carried out can either have a safety switch installed or have all electrical equipment tested and tagged.

A draft Code of Practice called “Electrical Safety In Workplaces - How to ensure safety and meet your obligations” has recently been prepared and is presently the subject of consultation.

It includes information on the use of safety switches.

7.2.2 Residential

Safety switches have been compulsory³³⁵ in new homes in Queensland since 1992.

Since September 2002 a purchaser of residential property is required to install a safety switch within three months of settlement³³⁶.

Otherwise, it is not compulsory to install a safety switch in a home constructed prior to 1992 until there is a change of ownership.

The Electric Safety Board strategic plan for 2003-2005 states³³⁷ that “from 1991/92 to December 2000, an average of four domestic fatalities per year could have been prevented if a safety switch had been fitted to protect power circuits”.

One of the principal approaches of DIR has been to use an advertising campaign to raise awareness of the benefits of safety switches and to advocate higher levels of voluntary installation. A safety switch costs approximately \$200 fully installed³³⁸.

The question that needs to be asked is whether this approach has produced an adequate uptake of residential safety switch installation throughout the community.

Recent electrical fatality statistics supplied by DIR suggest that a safety switch “would have controlled the electrical safety risk” in six of the seven fatal electrical incidents that occurred in Queensland in the 2004-05 reporting year. Two of the fatalities occurred at separate residences where safety switches were not installed.

This issue, namely the adequacy of the voluntary take-up approach to safety switch installation for residential premises, was raised in the June 2004 DIR Issues Paper.

335 Electrical Safety Regulation 2002 – Part 5, Division 4, Sections 77-81.

336 Historically, it has been suggested that 50% of residential property in Queensland is transferred approximately every 7 years.

337 Page 8.

338 According to the ESO website.

I understand that DIR will shortly be in a position to review, and form a view on, whether or not the voluntary approach has been a success from an electrical safety perspective. I also understand that DIR intends to:

- review its strategies for encouraging owners of residential premises to install safety switches; and
- reconsider the case for amending the Regulation to require owners of residential premises to install safety switches over a nominated phase in period.

I will continue to monitor developments as they arise.

Chapter 8: Government Owned Corporations and Local Government Owned Corporations

8.1 Application of Ombudsman Act 2001

Section 184 of the *Government Owned Corporations Act 1993* (GOC Act) provides that:

The *Ombudsman Act 2001* does not apply to a company GOC.

Section 728(1)(a) of the *Local Government Act 1993* (LG Act) provides that:

The *Ombudsman Act 2001* does not apply to a corporatised corporation prescribed under a regulation.

Accordingly, I am unable to investigate, form opinions or make recommendations about the administrative actions of company GOCs and LGOCs.

8.1.1 Government Owned Corporations

A number of cases in the WEP concerned incidents which involved infrastructure controlled or operated by Energex.

Energex³³⁹ is a government owned corporation (GOC) under s.6 of the GOC Act.

There are a number of other company GOCs involved in the generation, transmission, distribution and retail fields of the Queensland energy sector, namely:

- Tarong Energy Corporation Ltd
- CS Energy Ltd
- Stanwell Corporation Ltd
- Powerlink Queensland
- Ergon Energy Corporation Ltd and Ergon Energy Pty Ltd
- Energex Retail Pty Ltd.

8.1.2 Local Government Owned Corporations

There is one corporatised Local Government Owned Corporation, namely Wide Bay Water, but it has not been prescribed under a regulation so as to exclude it from the application of the *Ombudsman Act*.

³³⁹ Energex became a statutory GOC prescribed by regulation on 1 January 1995. It then became a company GOC pursuant to s.7(3) of the GOC Act on 1 July 1997 when it was incorporated or registered under the Corporations Law.

8.2 Part 4 of the Ombudsman Act 2001 – powers and procedures for conducting investigations

Section 24 of the *Ombudsman Act* provides that the Ombudsman may conduct an investigation either:

- informally; or
- by exercising powers under Part 4.

Part 4 of the *Ombudsman Act* sets out the Ombudsman's powers for conducting "formal" investigations. The relevant sections that provide the Ombudsman with coercive powers are ss.28 and 29(1). Those sections require persons who have received a formal notice from the Ombudsman to give an oral or written statement of information relevant to an investigation or produce documents containing information reasonably required for an investigation, and, if required, to attend before the Ombudsman to answer questions or provide documents relevant to an investigation.

Part 4 or "formal" powers would generally only be used where a matter raises a serious allegation of maladministration and for example where:

- an agency claims legal professional privilege; or
- an agency is unwilling to provide information other than in response to an investigation requirement; or
- there has been actual or suspected non-cooperation on the part of an agency or individual in response to a reasonable informal request for information or preliminary inquiry³⁴⁰.

Section 30 introduces the concept of an "investigation requirement". Non-compliance with an investigation requirement can lead to prosecution under s.30 of the Act and other judicial sanction. It provides:

30 Compliance with investigation requirement

- (1) A person who receives an investigation requirement must comply with the requirement, unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

- (2) An excuse is a reasonable excuse for subsection (1) if—
- (a) within the time for compliance with the investigation requirement, the person gives the ombudsman a notice of the excuse in enough detail to allow the ombudsman to form an opinion on whether the excuse is reasonable; and

³⁴⁰ Section 22 of the *Ombudsman Act* allows the Ombudsman to make "reasonably necessary inquiries to decide whether a complaint should be investigated".

- (b) the ombudsman advises the person that, in the ombudsman's opinion, the excuse is reasonable.
- (3) Subsection (2) does not limit what is a reasonable excuse.

8.3 Level playing field

GOCs and LGOCs are intended to operate as corporate bodies on a commercial basis in a competitive environment.

Section 16 of the GOC Act provides:

“Corporatisation” is a structural reform process for nominated government entities that—

- (a) changes the conditions and (where required) the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment; and
- (b) ...
- (c) ...

The National Competition Policy³⁴¹ aims to ensure that private and public bodies are able to compete for business on a level playing field.

There are arguments both for and against the exclusion of GOCs and LGOCs from the Ombudsman's jurisdiction.

8.3.1 Argument for exclusion

The principal argument supporting the exclusion of GOCs and LGOCs from the operation of the *Ombudsman Act* relates to the creation of a “level playing field” for these corporatised entities with their private sector competitors. In other words, the argument is that GOCs and LGOCs should not be subject to the additional administrative and financial burdens that would be imposed if administrative decisions and actions of company GOCs could be the subject of complaint, investigation and review under the *Ombudsman Act*.

I do not express any opinion on this issue which is a matter for the Parliament to determine. My concern is with the terms of the provisions excluding GOCs and LGOCs from my jurisdiction.

³⁴¹ In accordance with the National Competition Policy principles, GOCs are expected to operate on the basis that they do not experience significant advantages or disadvantages by virtue of their government ownership.

8.3.2 Need for refinement of the exclusion

In my opinion, the exclusion of GOCs and LGOCs from the Ombudsman's jurisdiction would be more appropriately achieved by excluding them from the definition of "agency" in the *Ombudsman Act*.

One of the principal functions of the Ombudsman is to investigate administrative actions of agencies, as defined – that is State government departments, public authorities and local governments. In my view, s.184 of the GOC Act, by removing company GOCs from the application of the *Ombudsman Act*, has produced some unintended and unjustifiable consequences that are not in the public interest.

As illustrated in the example below, the broad exclusion may allow company GOCs to refuse to cooperate with Ombudsman investigations into the administrative actions of agencies that clearly are subject to the *Ombudsman Act*, by declining to provide relevant information in the GOC's sole possession.

Section 184 may also allow company GOCs to claim that they are exempt from the operation of the coercive powers given to the Ombudsman by Parliament to compel the production of information relevant to an investigation from any citizen or private sector corporation.

This would place company GOCs in a unique position. It is unlikely that Parliament was aware that s.184 would create this anomaly³⁴².

8.4 WEP example

There was one clear example in the WEP that neatly illustrates the jurisdictional problem confronted by my Office when investigating complaints involving infrastructure controlled or operated by a company GOC.

8.4.1 Cases 6 and 7

Cases 6 and 7³⁴³ concerned the investigation of an incident involving a crane that became energised after making contact with live overhead power lines at a construction site. AB, the crane operator, and KC, a labourer, were fatally electrocuted at the site within minutes of each other.

Section 80(2) of the Workplace Health and Safety (Miscellaneous) Regulation 1995 required the employer at the construction site to:

- (i) consult with Energex; and
- (ii) ensure the safety precautions required by Energex were complied with.

³⁴² The same argument applies to LGOCs and s.728(1)(a) of the Local Government Act 1993.

³⁴³ See summary at 4.6.1 of this Report.

for manslaughter prior to the introduction of the offence that preceded the current section 328A of the *Criminal Code*.

Further, penalties awarded so far for offences under the *Workplace Health and Safety Act 1995* have been considered inappropriate for cases where industrial negligence and breaches of legislation result in death or serious injury. To date, the highest penalty imposed by the courts where there has been a fatality has been \$40,000.00.

The Issues Paper expressed³⁵² the case in favour of the creation of a new offence when it stated:

Arguments for manslaughter again relate to deterrence and prevention principles. Hopkins (1995) argues that if individuals in society who cause death in a culpable manner can be charged with manslaughter why not companies in the context of workplace death. He goes on to say that a corporate manslaughter conviction carries more stigma and could capture more public interest than a conviction for failure to maintain a safe workplace. While these arguments are legitimate the realities of gaining a successful conviction within the present legal system is extremely problematic and highly unlikely.

In contrast to general obligation offences under the *Workplace Health and Safety Act 1995*, successful prosecution for a crime such as manslaughter requires proof of guilty mind on the part of the defendant or mens rea. This is most problematic in relation to manslaughter charges as they pertain to a corporation. In order to gain a conviction the prosecution must prove a high degree of negligence. Negligence however is a state of mind and since a corporation does not have a state of mind it is almost impossible to describe a corporation's behaviour as negligent (Hopkins 1995).

To address this problem the courts have held that a corporation will only be criminally liable for an offence if an officer of the corporation, senior enough to be a directing mind of the corporation, is negligent. This principle, commonly known as the 'Tesco Principle' has been criticised as unworkable in larger corporations as it fails to reflect the diffused nature of decision-making in medium and large organisations (Johnstone 1999).

These difficulties become apparent when examining the Victorian experience. Since 1990 Victoria has maintained a policy of prosecuting individuals and corporations for manslaughter in cases of reckless or criminally negligent workplace deaths. Despite the existence of the provision since 1990 there has been only one successful prosecution. In *R v Denbo Pty Ltd* a company was found negligent and fined \$120,000 for causing the death of one of its employees. Although the company pleaded guilty within one month of the trial the company went into liquidation and was therefore unable to meet the fine. In other cases the judiciary have attributed the negligence to personal failures of individuals and not company negligence (Creighton & Rozen, 1997). The solution to this problem may lie in the adoption of an entirely new corporate liability law that establishes new methods for determining corporation mens rea.

352 Pages 17 – 18 of Issues Paper.

